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

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

SECOND REPORT AND ORDER

Adopted: July 16, 2020 **Released: July 17, 2020**

By the Commission: Chairman Pai and Commissioner O'Rielly issuing separate statements; Commissioner Carr approving in part, concurring in part and issuing a statement; Commissioner Rosenworcel concurring; Commissioner Starks concurring and issuing a statement.

I. INTRODUCTION

1. In this Second Report and Order, we adopt a tier-based leased access rate calculation as part of the Commission's Modernization of Media Regulation Initiative.[1] The leased access rules, which implement statutory leased access requirements, direct cable operators to set aside channel capacity for commercial use by unaffiliated video programmers.[2] In 2019, we proposed to modify the leased access rate formula so that rates would be calculated based on information specific to the tier on which the programming is carried.[3] Today, we adopt this proposal, finding that a simplified tier-specific rate calculation best reflects regulatory changes that have occurred in the last 20 years[4] and will more accurately approximate the value of a particular channel, while alleviating burdens on cable operators. We also find that, although changes in the marketplace cast substantial doubt on the constitutionality of mandatory leased access, leased access requirements are contained in a specific statutory mandate from Congress, so we do not eliminate our leased access rules.

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

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

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

[4] Specifically, the current rate formula was adopted consistent with the "tier neutrality" principle, but the Commission has since ceased regulation of cable programming service tier (CPST) rates as of 1999, and that principle no longer applies. *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Leased Commercial Access*, CS Docket No. 96-60, Second Report and Order and Second Order on Reconsideration of the First Report and Order, 12 FCC Rcd 5267, 5291, para. 46 (1997) (*1997 Leased Access Order*) ("In addition, we note that our rate regulation rules generally are based on the principle of tier neutrality, which requires cable operators to charge the same per channel rate regardless of the programming costs incurred on a particular tier.") (footnote omitted); Telecommunications Act of 1996, Pub. L. No. 104-104, § 301(b)(1), 110 Stat. 115 (1996) (codified as 47 U.S.C. § 543(c)(4) (providing for sunset of upper tier rate regulation after March 31, 1999)).

II. BACKGROUND

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

3. Congress further authorized the Commission to adopt maximum reasonable rates for commercial leased access as part of the Cable Television Consumer Protection and Competition Act of 1992,[9] and also provided that the price, terms, and conditions for leased access must be "sufficient to assure that such use will not adversely affect the operation, financial condition, or market development of the cable system."[10] The Commission accordingly adopted leased access rate regulations in 1993, and subsequently modified its leased access regulations in 1996 and 1997.[11] The Commission's implementing rules, which the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) upheld in 1998,[12] include a formula for calculating maximum rates that cable operators could charge leased access programmers.[13] Specifically, to permit cable operators to recover their costs and earn a profit, the Commission adopted a maximum reasonable rate formula for full-time leased access channels based on the "average implicit fee" that other programmers pay for carriage.[14] Currently, for a full-time channel on

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

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

[7] *See id*.

[8] *Id*. § 532(a).

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

[10] 47 U.S.C. § 532(c)(1).

[11] *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5948-49, para. 512 *et seq.* (1993) (*1993 Rate Regulation Order*); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Order on Reconsideration of the First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 16933 (1996); *1997 Leased Access Order*; 47 U.S.C. § 532(c)(4)(A)(i).

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

[13] *See* 47 CFR § 76.970(d)-(h).

[14] *1997 Leased Access Order*, 12 FCC Rcd at 5283, paras. 32-33. To illustrate, "if subscribers pay an average of $0.50 per channel for a particular tier, and the average programming or license fee on the tier is $0.10, then, on average, programmers on the tier are implicitly 'paying' the operator $0.40 for carriage." *Id*. at 5283-84, para. 33

(continued….)

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

4. In the *2019 Leased Access Order*, we updated the leased access rules based on our determination that the video marketplace had changed significantly since the Commission initially adopted its leased access rules.[19] We explained that the marketplace has become far more competitive than it was when leased access was first mandated in 1984, at which time consumers had access only to a single pay television service and cable had monopoly power.[20] In particular, we focused on the increased availability of media platforms, including online platforms that programmers can utilize at very low cost to distribute their video programming, as well as the low demand for commercial leased access.[21] To further the Commission's media modernization efforts, we vacated the *2008 Leased Access Order* and adopted updates and improvements to the existing leased access rules.[22] A *Second Further Notice of Proposed Rulemaking* (*Second FNPRM*) proposed a tier-specific leased access rate formula and sought comment on whether existing leased access requirements can withstand First Amendment scrutiny in light of video programming market changes.[23]

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("From the operator's standpoint, the average implicit fee represents the average value of a channel after programming acquisition costs are paid.").

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

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

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

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

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

[20] *See id*. at 4938, para. 10.

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

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

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

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

III. DISCUSSION

A. Tier-Based Fee Calculation

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

7. When the Commission adopted the average implicit fee calculation, it envisioned a simple scheme based on existing and easily verifiable data. Although the weighting scheme was intended to be a simple way to average the leased access rate across tiers, in practice it has proven to be confusing and time-consuming.[29] The weighting scheme incorporated the concept of tier neutrality, which is a vestige of CPST rate regulation, which no longer exists.[30] By now basing the average implicit fee solely on the programming revenue and costs for the tier on which a leased access programmer is offered carriage, we eliminate the need for a complicated weighting scheme that considers subscriber revenue and

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

[25] AFP Comments at 2.

[26] Free State Comments at 2.

[27] As noted above, the Commission ceased regulation of CPST rates as of 1999, and thus the "tier neutrality" principle pursuant to which the current rate formula was adopted no longer applies. *See supra* n.4.

[28] 47 CFR § 76.970(e).

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

[30] *1997 Leased Access Order*, 12 FCC Rcd at 5290-91, para. 46. Tier neutrality requires cable operators to charge the same per channel rate regardless of the programming costs incurred on a specific tier, and that principle has no longer applied since the Commission ceased regulation of CPST rates in 1999. *See supra* n.4.

programming costs across all tiers with subscriber penetration over 50 percent.[31] The rate formula will now be a tier-specific calculation, thus representing a more accurate assessment of the channel's value on that particular tier. This is the same rate calculation method that previously has been in place for channels placed on tiers with less than 50 percent subscriber penetration.[32] Appendix C contains a mathematical representation of the revised leased access rate calculation. The revised rate formula should result in cable operators using revenue and cost estimates that more closely reflect the value of the channel sought by the leased access applicant, and thus better serve the goals of the statute.[33] Rates are likely to decrease if leased access programmers request channel capacity on less profitable tiers, whereas rates are likely to rise if programmers request channel capacity on more profitable tiers.

8. We find that a tier-specific implicit fee calculation will mitigate unnecessary burdens on cable operators by simplifying the leased access fee calculation while also fulfilling our statutory obligation to establish rules for determining maximum reasonable leased access rates.[34] Although a few cable commenters suggest that the Commission could permit marketplace negotiations to establish the maximum reasonable rates, they also support the tier-specific implicit fee calculation that NCTA initially proposed.[35] Considering our statutory obligation to "establish rules for determining maximum reasonable [leased access] rates,"[36] we do not think Congress intended for us to rely on the marketplace to establish maximum reasonable leased access rates, even if doing so might be "less intrusive"[37] on cable operators.[38] We agree with NCTA that "[t]ier-specific rates are the fairest approximation of the maximum reasonable rate," given that such rates will be based on the actual programming revenue and costs associated with the tier on which the leased access programmer will be carried.[39] We note that no commenter disagrees. In

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

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

[33] 47 U.S.C. § 532(a) ("The purpose of this section is to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems *in a manner consistent with growth and development of cable systems*.") (emphasis added). *See also id*. § 532(c)(1) ("[T]he cable operator shall establish, consistent with the purpose of this section and with the rules prescribed by the Commission … the price, terms and conditions of such use *which are at least sufficient to assure that such use will not adversely affect the operation, financial condition, or market development of the cable system*.") (emphasis added).

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

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

[36] 47 U.S.C. § 532(c)(4)(B).

[37] Comcast Reply at 8.

[38] *See* S.Rep. 102-92 at 31-32, 1992 USCCAN 1133, 1164-65 (explaining that "[t]o permit the operator to establish the leased access rate … makes little sense," the FCC is required to establish maximum reasonable rates for access to leased access channels, and "[b]y involving the FCC before leases are negotiated, programmers will know the parameters of an agreement, increasing certainty and the use of these channels").

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

addition, we expect that the tier-specific calculation will be much simpler than the current weighting scheme because it is focused solely on a specific tier, and not all tiers with subscriber penetration over 50 percent.[40]

9. At this time, we decline to adopt any other changes to the leased access rate formula.[41] ACA Connects is the only party that makes additional proposals in response to the *Second FNPRM*, asserting that "additional steps should be taken to reduce administrative burdens, particularly for smaller entities."[42] As explained further in Appendix B, we note that simplifying the rate formula to be based on the specific tier will benefit small cable operators, as well as other cable operators.[43] Accordingly, no additional relief for small cable operators is necessary at this time. More specifically, ACA Connects proposes that the Commission establish a universal per channel minimum leased access rate that is presumptively reasonable or modify the rate formula to make sure that the least profitable cable operators are not forced to offer leased access at extremely low rates or even for free, thus diverting capacity that would be better used for broadband.[44] Despite these arguments, the record does not contain any evidence to demonstrate the frequency with which the leased access rate might be extremely low or even free. With regard to a universal rate, we find that the average implicit fee is a more accurate representation of the actual value of the channel to the operator because it is based on the operator's own data.[45] Indeed, the leased access rate calculation merely reflects each cable operator's existing market conditions, it does not dictate them. Nevertheless, we note that our rules provide for waivers in unusual cases.[46] Consistent with our current approach, we will consider the need for special relief on an individual basis in instances where significant hardship has "adversely affect[ed] the operation, financial condition, or market development of the cable system."[47]

10. ACA Connects also requests that the Commission ease administrative burdens by permitting cable operators to use a single set of data to respond to leased access requests for a set period of time, such as three years, rather than having to obtain data and recalculate the formula for each request.[48] We find that using a single data set for three years would be less likely to result in calculations

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

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

[42] ACA Connects – America's Communications Association (ACA Connects) Comments at 2.

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

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

[45] The fact that the Commission previously adopted an interim safe harbor percentage to be used in the unrelated context of calculating universal service contributions does not alter our analysis. *See id.* at 3, n.5; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Memorandum Opinion and Order, 13 FCC Rcd 21252, 21257, para. 11 (1998). Universal service is an entirely separate regulatory regime with unrelated factual considerations.

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

[47] *See* 47 U.S.C. § 532(c)(1).

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

that accurately represent the current value of carriage. Accordingly, we do not adopt this proposal. We do, however, take the opportunity to codify the determination set forth in the *1993 Rate Regulation Order* that the average implicit fee shall be calculated annually based on contracts in effect in the previous calendar year.[49] The Commission has previously stated that under its rules, cable operators are required to calculate the maximum rates annually based on the contracts in effect in the previous calendar year, rather than at the time of each request.[50] Thus, in response to the request from ACA Connects, we find it is in the public interest to codify in our rules[51] the Commission's longstanding determination on this issue that the average implicit fee shall be calculated annually based on contracts in effect in the previous calendar year.[52]

B. The First Amendment

11. We agree with commenters that the constitutional foundation for the leased access regime is in substantial doubt; nonetheless, leased access rules are required pursuant to a specific statutory mandate from Congress.[53] For example, section 612(b) of the Act specifically states that a "cable operator shall designate channel capacity for commercial use by persons unaffiliated with the operator in accordance with the following requirements. . . ."[54] The Commission has long recognized that decisions about the constitutionality of Congressional enactments are generally outside the purview of administrative agencies.[55] As a result, we decline to eliminate our leased access requirements and leave it to the courts to address the current constitutional status of the leased access statute, particularly given that the D.C. Circuit has previously upheld the constitutionality of the leased access statute, albeit under different marketplace conditions.

12. The *Second FNPRM* sought comment on application of the First Amendment to the Commission's rules and statutory provisions concerning full-time leased access, including in particular whether the leased access rules can continue to withstand First Amendment scrutiny in light of

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

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

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

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

[53] 47 U.S.C. § 532.

[54] *Id*. § 532(b)(1).

[55] *See, e.g.*, *Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, CC Docket No. 96-152, Second Report and Order, 12 FCC Rcd 3824, 3834, para. 24 (1997). *See also Elgin v. Dep't of Treasury*, 567 U.S. 1, 16 (2012) ("This Court has also stated that 'adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies.'") (quoting *Thunder Basin Coal Co. v. Reich,* 510 U.S. 200, 215 (1994)); *id*. at 17 ("We need not, and do not, decide whether the MSPB's view of its power is correct, or whether the oft-stated principle that agencies cannot declare a statute unconstitutional is truly a matter of jurisdiction.").

marketplace changes.[56] Commenters disagree as to whether strict scrutiny or intermediate scrutiny should apply, and they also disagree as to whether the leased access rules would pass muster under the applicable level of scrutiny.[57] Strict scrutiny applies to content-based speech restrictions and requires that a statute be narrowly tailored to serve a compelling governmental interest.[58] When the D.C. Circuit previously upheld the constitutionality of the leased access statute, it determined that the statute is content-neutral and thus subject to intermediate scrutiny, which it passes if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[59]

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[56] *2019 Leased Access Order and Second FNPRM*, 34 FCC Rcd at 4955, para. 47. *See also Communications Marketplace Report*, GN Docket No. 18-231 *et al.*, Report, 33 FCC Rcd 12558, 12597, para. 51, 12600, paras. 57-59 (2019) (describing the competitiveness of the video marketplace); *2018 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,* MB Docket No. 18-349, Notice of Proposed Rulemaking, 33 FCC Rcd 12111, 12112, para. 2 (2018) ("the media marketplace has seen dramatic changes since the Commission began conducting its periodic media ownership reviews in the late 1990s"); *Comcast Cable Commc'ns, LLC v. FCC*, 717 F.3d 982, 994 (D.C. Cir. 2013) (Kavanaugh, J., concurring) ("In today's highly competitive market, . . . [no] video programming distributor possesses market power in the national video programming distribution market"); *United States v. AT&T Inc.*, 310 F.Supp.3d 161, 164 (D.D.C. 2018) (noting the "'tectonic changes' brought on by the proliferation of high-speed internet access).

[57] Some commenters contend that leased access no longer passes muster under intermediate scrutiny. *See, e.g.*, AFP Comments at 2-3 (also arguing that heightened First Amendment scrutiny may apply). Other commenters argue that leased access may continue to pass muster under intermediate scrutiny. *See, e.g.*, Alliance for Communications Democracy (ACD) Comments at 3-6; National Association of Broadcasters (NAB) Reply at 1; Letter from Rick Kaplan, General Counsel and Executive Vice President, Legal and Regulatory Affairs, National Association of Broadcasters, to Marlene H. Dortch, Secretary, FCC, at 2-3 (June 3, 2020) (NAB June 3, 2020 *Ex Parte*) (asserting that the level of First Amendment scrutiny should be based on whether the rule is content-based or content neutral, and not on any marketplace changes); Letter from Jerianne Timmerman, Senior Vice President and Deputy General Counsel, Legal and Regulatory Affairs, NAB, to Marlene H. Dortch, Secretary, FCC, at 1 (June 25, 2020) (NAB June 25, 2020 *Ex Parte*) (same). Still other commenters maintain that strict scrutiny should apply, and leased access would not pass muster under it. *See, e.g.*, Free State Comments at 3, 9; International Center for Law & Economics (ICLE) Comments at 11-17 (but arguing that the leased access rules would survive First Amendment scrutiny if intermediate scrutiny applies); NCTA Comments at 14-20 (arguing that leased access would fail even if intermediate scrutiny applies); Charter Reply at 5 (same); Comcast Reply at 3-6 (same). NAB also states that the Commission "should avoid reaching constitutional questions unnecessarily." *See* Letter from Erin L. Dozier, Senior Vice President and Deputy General Counsel, Legal and Regulatory Affairs, National Association of Broadcasters, to Marlene H. Dortch, Secretary, FCC, at 1 (May 28, 2020) (NAB May 28, 2020 *Ex Parte*). *See also* NAB June 3, 2020 *Ex Parte* at 1-2; Letter from John R. Feore, Cooley LLP, Counsel to ION Media Networks, Inc., and Colby M. May, Colby M. May, Esq., P.C., Counsel to Trinity Broadcasting Network, to Marlene H. Dortch, Secretary, FCC, at 1-2 (June 11, 2020) (ION/Trinity June 11, 2020 *Ex Parte*); Letter from William Weber, Vice President, Government Affairs and Associate General Counsel, and Talia Rosen, Assistant General Counsel, Public Broadcasting Service, and Lonna Thompson, Executive Vice President, Chief Operating Officer, and General Counsel, America's Public Television Stations, to Marlene H. Dortch, Secretary, FCC, at 1 (June 11, 2020) (APTS/PBS June 11, 2020 *Ex Parte*).

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

[59] *See Turner Broad Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994) (citing *U.S. v. O'Brien*, 391 U.S. 367, 377 (1968)); *Time Warner Entm't Co., L.P. v. FCC*, 93 F.3d 957 (D.C. Circ. 1996) (upholding the leased access statute). NCTA contends that the D.C. Circuit's rationale in *Time Warner* has since been disavowed by the Supreme Court. Letter from Rick Chessen, Chief Legal Officer, Senior Vice President, Legal & Regulatory Affairs, NCTA, to Marlene H. Dortch, Secretary, FCC, at 2, n.8 (July 2, 2020) (citing *Reed v. Town of Gilbert*, 576 U.S. 155, 169 (2015) and *National Institute of Family & Life Advocates v. Becerra*, 138 S.Ct. 2361, 2371 (2018). NAB disagrees with this argument. Letter from Rick Kaplan, General Counsel and Executive Vice President, Legal and Regulatory Affairs, NAB, to Marlene H. Dortch, Secretary, FCC, at 1-2 (July 9, 2020) (NAB July 9, 2020) (asserting that "the two

(continued….)

13. We agree with numerous commenters who argue that marketplace changes – such as increased Internet usage and availability,[60] and competition from other multichannel video programming distributors (MVPDs) as well as online video distributors[61] – appear to have eroded the original justification for the leased access rules: to safeguard competition and diversity in the face of cable operators' monopoly power.[62] Free State explains that, whereas in the late 1980s and early 1990s consumers generally "had little choice for pay-TV services other than their local cable operator," today "choice among competing providers offering a diverse array of content is now prevalent" thanks to the availability of direct broadcast satellite (DBS) providers, telephone companies providing video services, and the availability of online video providers.[63] Commenters highlight the fact that MVPD subscribership losses are related to increased subscribership to online streaming services.[64] For example, NCTA explains that the Internet now "supports a broad array of platforms through which program networks and other content providers may distribute their content to viewers," including both streaming services and on-demand platforms.[65]

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

(Continued from previous page)
Supreme Court decisions cited by NCTA in its comments, and now in its recent *ex parte*, do not support NCTA's claims that the leased access rules are content-based and thus subject to strict scrutiny," and that under applicable precedent the leased access rules are not content-based) (footnote omitted). *See also* Letter from Rick Chessen, Chief Legal Officer, Senior Vice President, Legal & Regulatory Affairs, NCTA, to Marlene H. Dortch, Secretary, FCC, at 1-3 (July 10, 2020) (responding to NAB's July 9 filing and reiterating its position that "the constitutional foundation for the leased access regime is in substantial doubt").

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

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

[62] *See 2019 Leased Access Order and Second FNPRM*, 34 FCC Rcd at 4952-53, paras. 39-40.

[63] Free State Comments at 2-3.

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

[65] NCTA Comments at 6.

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

[67] *See* Free Press Comments at 5.; NAB July 9, 2020 *Ex Parte* at 3.

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

[69] NCTA Comments at 9.

hand, NAB maintains that the changes in the video marketplace have actually reduced the burdens of leased access on cable operators, for example, because their channel capacity has increased.[70]

15. We agree with those commenters that maintain that it is not the role of the Commission to adjudicate in the first instance the constitutionality of leased access requirements that have been mandated by Congress.[71] We have no need to opine on the appropriate level of constitutional scrutiny for a First Amendment analysis as is debated in the record or to decide whether leased access requirements survive any particular level of scrutiny. Finally, although the constitutionality of the leased access regime is in doubt, we express no opinion whatsoever as to the constitutionality of other carriage-related obligations placed on cable operators under the Act.[72] We are mindful that each carriage-related provision presents unique circumstances, and that those other provisions are not at issue in the instant proceeding.

IV. PROCEDURAL MATTERS

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

17. *Paperwork Reduction Act.* This Second Report and Order does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA).[74] In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002.[75]

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[70] NAB Reply at 2, 6-8; NAB June 3, 2020 *Ex Parte* at 3-6; NAB June 25, 2020 *Ex Parte* at 1-2. *See also* National Association of Telecommunications Officers and Advisors and the Alliance for Community Media (NATOA/ACM) Reply at 2. We need not make a conclusive determination on this issue given our finding that the question of the constitutionality of leased access is a matter generally outside the purview of the Commission. *See supra* para. 11

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

[72] *See* NAB May 28, 2020 *Ex Parte* at 2 (contending that "should the Commission determine that the leased access requirements present First Amendment issues, it should also make clear that the same issues are not implicated by all carriage-related regimes," and "not all marketplace or technological developments militate toward a finding of unconstitutionality"); NAB June 3, 2020 *Ex Parte* at 7 ("[E]ven if the FCC believes that the opportunity for individual non-broadcast video content providers to distribute their programming via the internet has weakened the justifications for the leased access provisions, that finding is not applicable to requirements for MVPD carriage of local commercial and noncommercial broadcast television signals."); *id.* at 7-11 (asserting that the congressional purpose behind non-leased access carriage requirements remains valid today); ION/Trinity June 11, 2020 *Ex Parte* at 3 ("Should the Commission nonetheless determine to address the changed circumstances/First Amendment arguments, any order should make absolutely clear that the Commission is not prejudging how those arguments would be received in proceedings addressing any other Commission rules."); APTS/PBS June 11, 2020 *Ex Parte* at 1 ("[I]f the Commission does extend the scope of the proceeding to reach any constitutional First Amendment determinations, it should make explicit that the decision only applies to the narrow commercial leased access rules at issue in the docket, and does not extend in any way to other, broader, regulatory matters, including without limitation MVPD carriage of noncommercial broadcast stations…. [I]t is essential that the Commission recognize that changes to the marketplace do not change any of the underlying governmental interests in ensuring access to noncommercial educational public television stations."); NAB June 25, 2020 *Ex Parte* at 2.

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

[74] Public Law 104-13.

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

18. *Congressional Review Act.* The Commission has determined, and the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, concurs that this rule is "non-major" under the Congressional Review Act, 5 U.S.C. § 804(2). The Commission will send a copy of this Second Report and Order to Congress and the Government Accountability Office pursuant to 5 U.S.C. § 801(a)(1)(A).

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

V. ORDERING CLAUSES

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

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

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

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

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Final Rules

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

PART 76 – MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

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

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

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

§ 76.970 Commercial leased access rates.

* * * * *

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

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

* * * * *

APPENDIX B

Final Regulatory Flexibility Analysis

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

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

2. In the Second Report and Order, we adopt a tier-based leased access rate calculation as part of the Commission's Modernization of Media Regulation Initiative.[4] The leased access rules, which implement statutory leased access requirements, direct cable operators to set aside channel capacity for commercial use by unaffiliated video programmers.[5] In 2019, we proposed to modify the leased access rate formula so that rates would be calculated based on information specific to the tier on which the programming is carried.[6] Today, we adopt this proposal, finding that a simplified tier-specific rate calculation best reflects regulatory changes that have occurred in the last 20 years[7] and will more accurately approximate the value of a particular channel, while alleviating burdens on cable operators. We also find that, although changes in the marketplace cast substantial doubt on the constitutionality of mandatory leased access, leased access requirements are contained in a specific statutory mandate from Congress, so we do not eliminate our leased access rules.

B. Legal Basis

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

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

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

[3] *See* 5 U.S.C. § 604.

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

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

[6] *See 2019 Leased Access Order and Second FNPRM*.

[7] Specifically, the current rate formula was adopted consistent with the "tier neutrality" principle, but the Commission has since ceased regulation of cable programming service tier (CPST) rates as of 1999, and that principle no longer applies. *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Leased Commercial Access*, CS Docket No. 96-60, Second Report and Order and Second Order on Reconsideration of the First Report and Order, 12 FCC Rcd 5267, 5291, para. 46 (1997) (*1997 Leased Access Order*) ("In addition, we note that our rate regulation rules generally are based on the principle of tier neutrality, which requires cable operators to charge the same per channel rate regardless of the programming costs incurred on a particular tier.") (footnote omitted); Telecommunications Act of 1996, Pub. L. No. 104-104, § 301(b)(1), 110 Stat. 115 (1996) (codified as 47 U.S.C. § 543(c)(4) (providing for sunset of upper tier rate regulation after March 31, 1999)).

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

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

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

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

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

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

[8] 5 U.S.C. § 603(b)(3).

[9] *Id.* § 601(6).

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

[11] 15 U.S.C. § 632.

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

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

[14] *Id.*

[15] 47 CFR § 76.901(e).

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

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

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

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

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

[18] 47 CFR § 76.901(c).

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

[20] *Id*.

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

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

[23] 47 CFR § 76.901(f).

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

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

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

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

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

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

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

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

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

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

[31] 13 CFR § 121.201, NAICS Code 512110.

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

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

[34] 13 CFR § 121.201, NAICS Code 512120.

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

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

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

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

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

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

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

[36] *Id*.

[37] 5 U.S.C. § 603(c)(1)-(4).

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

[39] *See* Second Report and Order at Section III.A.

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

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

15. None.

H. Report to Congress

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

[40] *See* 5 U.S.C. § 801(a)(1)(A).

[41] *See id*. § 604(b).

APPENDIX C

Mathematical Representation of Leased Access Rate Formula

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

Variables

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

Revised Tier-Specific Formula

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

STATEMENT OF
CHAIRMAN AJIT PAI

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

If there was ever a poster child for the benefits for our Modernization of Media Regulation Initiative, it would be our leased access rules. Through this initiative, we've ended a more-than-ten-year state of legal limbo that resulted from the FCC's *2008 Leased Access Order*, which long ago was stayed by the United States Court of Appeals for the Sixth Circuit and disapproved by the Office of Management and Budget under the Paperwork Reduction Act. We've modernized many of our leased access rules to reflect the vast changes that have occurred in the video marketplace since these rules were first adopted decades ago.

And today, we revise our leased access rate formula to reflect the regulatory framework that is in place today instead of, I kid you not, a broader rate regulation regime that the Commission got rid of way back in 1999. That's right; our leased access rate formula has relied on the principle of "tier neutrality," but the Commission abandoned that principle when it ceased regulating cable programming service tier rates 21 years ago. Moreover, our current rate formula is both unnecessarily complex and doesn't reflect the actual value of a leased access channel. As a result, it's not surprising that no commenter opposes the simplified, tier-specific rate formula that we adopt today. This new formula better reflects the value of a leased access channel, will reduce unnecessary burdens on cable operators, and is consistent with our overall regulatory approach. In short, this modernization effort is simply good governance.

In this proceeding, we also teed up the question of whether cable leased access requirements remain constitutional in light of recent changes in the video marketplace. Given the proliferation of video outlets, particularly online streaming platforms, I have serious doubts that leased access mandates placed on cable operators continue to be consistent with the First Amendment. Whether one applies strict scrutiny or intermediate scrutiny, there is a strong argument that leased access requirements place unjustified burdens on speech. I hope that the courts will address this issue in due course.

My sincere thanks go to the Commission staff who worked on this item: from the Media Bureau, Steven Broeckaert, Michelle Carey, Katie Costello, Maria Mullarkey, Nancy Murphy, Holly Saurer, and Diana Sokolow; from the Office of Economics and Analytics, Eugene Kiselev and Andy Wise; from the Office of Communications Business Opportunities, Belford Lawson; and from the Office of General Counsel, Susan Aaron. With this Second Report and Order done, I hope that you all enjoy some well-deserved time off, viewing whatever you please on the numerous video platforms available to you.

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.*

The importance of today's strong affirmation that the video marketplace has changed substantially since the inception of the leased access mandate cannot be overstated. Even in the last year since adoption of the FNPRM, the seismic shift in consumer behavior toward alternative services and away from traditional multichannel video programming distributors (MVPDs) has continued unabated, due in part to more alternative services coming online and also, of course, the global pandemic causing many consumers to adjust their viewing habits. There's no doubt, as confirmed by the record in this proceeding, that over-the-top video and virtual MVPDs compete directly with traditional MVPDs and have upended the market with regard to leased access, as it was contemplated in the 1992 Cable Act.

I have repeatedly called for updating the Commission's market definition, along with that of the Department of Justice, and it is welcome news to see such widespread agreement on this point. Nonetheless, for certain negative commenters, who agree that the market has changed substantially in the intervening years, the upheaval of the modern market still does not warrant a revision of the rules or eliminating them outright on First Amendment grounds. I, for one, however, do not see the point in rearranging the deck chairs simply for a better view of the iceberg. If we are going to proceed with addressing leased access, we have an obligation to embrace reality and our solemn oaths to defend the U.S. Constitution.

While there may be clear statutory limits in how far the Commission's authority extends with regard to answering the constitutional question, I had hoped for a more significant overhaul in this Order. That said, when leased access eventually does see its day in court, the item as adopted will certainly help to bolster the case in favor of striking these regulations down. I thank the Chairman for accepting my requested edits to strengthen certain language to emphasize our analysis of the current market and the Commission's determination that the market has changed significantly over the last three decades. As I noted, the record also bears this out, and my belief is that a reasonable court ought to determine this to be a strong argument in favor of finding a lack of sufficient interest to underpin the leased access requirements, which would in turn lead to their demise.

I approve.

STATEMENT OF
COMMISSIONER BRENDAN CARR,
APPROVING IN PART AND CONCURRING IN PART

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 requirements impinge on free speech.[1] They do so in several ways, including 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 and later amended the statutory leased access requirements. Back then, cable providers accounted for 98 percent of the pay-TV market. So Congress enacted these laws to disrupt the "bottleneck monopoly" that cable providers used to possess over the distribution of video content.

Flash forward to today, and the market for distributing video content is drastically different. The monopoly conditions that courts relied on to uphold leased access and its intrusion on free speech are gone. That's why, at the outset of this proceeding, I urged my colleagues to seek comment on the First Amendment implications of the leased access regime. I am glad that we did, because, as the Order now finds, marketplace changes have in fact "eroded the original justification for the leased access rules: to safeguard competition and diversity in the face of cable operators' monopoly power" in the video distribution market.

Indeed, when Congress passed the leased access regime, consumers basically had just three options for video content: over-the-air television, video cassettes, or cable. There was no Internet (not as we know it today). There were no DBS providers. And telcos were legally prohibited from offering video programming.

The pay-TV market looks nothing like it did back then. Where cable providers once accounted for 98 percent of the market, the facts have flipped: over 99 percent of U.S. households now have access to at least three pay-TV options. In fact, two of the top-four largest pay-TV providers are satellite companies that did not even exist when Congress passed the 1992 Cable Act—and only four of the top-ten largest providers are cable companies. Cable subscribers no longer represent the majority of television households—only 40 percent of television households subscribe to cable today compared with 60 percent in the early 1990s. And vertical integration between cable operators and programmers has also declined significantly, falling from 52 percent in 1994 to just 9 percent in 2017.

Add to that a little thing called the Internet. The dramatic rise of online platforms and the proliferation of broadband services over the last decade fundamentally transformed the way content is delivered to consumers. Online providers such as Sling and Hulu provide linear programming alternatives. Disney Plus, Netflix, and Amazon Prime—among countless others—provide access to large

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[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).

video libraries and original content alike. Programmers can also reach consumers directly through apps, and platforms like YouTube and Vimeo enable virtually anyone to distribute programming to billions of potential viewers at little to no cost. YouTube's content statistics, alone, are staggering: 1.9 billion users per month; 720,000 hours of content uploaded by users per day; 1 billion hours of content watched per day, with over 250 million hours watched on television screens; and over 5,000 channels with over a million subscribers. Or take Netflix—which did not begin its streaming services until 15 years after the 1992 Cable Act was passed—it now has more U.S. subscribers than the top-three pay-TV services (cable and satellite) combined.

The cable box itself is no longer the dominate platform for video distribution. Content can now be viewed on mobile phones, tablets, computers, Smart TVs, and streaming devices, as either a supplement to or replacement for traditional cable packages. Indeed, roughly 80 percent of adults in the U.S. now carry an Internet-capable smartphone and many treat it as an appendage to their body.

But while the media marketplace has changed dramatically over the last 20-30 years, one thing has remained constant—there is very little demand for leased access. The D.C. Circuit in *Time Warner* noted that the leased access requirements enacted in 1984 "did not accomplish much," and the regime that emerged from the 1992 Cable Act has steadfastly carried on that tradition. In fact, many cable operators report that years will go by without even a request for carriage. With or without rate regulation, meaningful demand for leased access channels has simply failed to materialize. So while the Supreme Court has found that "promoting the widespread dissemination of information from a multiplicity of sources" and "promoting fair competition in the market for television programming" are important governmental objectives for First Amendment purposes, we have more than three decades of proof that the leased access rules fail to advance those interests, drawing the constitutional concerns into even sharper focus.[3] Only a government program could exist for so long while accomplishing so little.

Despite the ineffectiveness of the leased access regime, it continues to impose significant First Amendment burdens and other real-world costs. And this is a point that the D.C. Circuit in *Time Warner* apparently failed to appreciate, perhaps because the case arose in the context of a facial challenge to the statute. In that decision, the D.C. Circuit suggested that cable operators would be insulated from any significant burden on their First Amendment rights because very few entities would actually invoke the leased access regime.

But that contention ignores several key points. For one, it ignores the economic costs that the regime imposes on cable providers even in the absence of a single request for leased access. For example, in order to accommodate this federal mandate, cable operators must maintain and update dedicated network infrastructure (such as encoders and decoders and headend equipment) and retain staff to address all aspects of leased access carriage (including specialists, technicians, and engineers). The significant costs associated with these resources must be expended whether or not the system actually carries any leased access channels or fields a single carriage request.

Cable operators must also spend time and money to respond to inquiries, calculate carriage rates, and negotiate agreements that may never result in leased access. Furthermore, the leased access regime inhibits their ability to offer consumers tailored programming tiers (or what we now call "skinny bundles")—an option that many of their competitors in the video marketplace enjoy because they are not subject to the statutory leased access regime. The asymmetrical and anticompetitive element of this federal regime adds even more weight to the First Amendment concerns.

[3] *See Turner*, 512 U.S. at 662 (identifying these goals in the context of an intermedia scrutiny review).

Ultimately, the entire and, in fact, express purpose of the leased access regime is to interfere with free speech. It requires cable operators to carry content that they would decline to carry in an ordinary, market-based negotiation. Yet the factual basis that Congress and the Courts have relied on to justify this infringement is gone. The market for video programming is no longer marked by scarcity or a cable bottleneck but by vibrant competition that benefits both consumers and programmers alike.

All of this leads to a question. How should the Commission proceed in this case? And this is where I reach a slightly different conclusion than the Order, which is why I am concurring in part in the decision today.

The Order finds that the constitutionality of the leased access regime is in "substantial doubt." It then determines that decisions about the constitutionality of Congressional enactments are generally outside of the purview of administrative agencies. And as a result, it proceeds as if the statutory requirements are constitutional and ultimately adopts a new "tier-based" rate for leased access. It's this last part where I would have taken a slightly different approach.

While we cannot remove the leased access statute from the United States Code, I don't think we should proceed in this case as if there is no serious constitutional question. Instead, we should adopt a rule that provides cable operators with maximum flexibility given the serious First Amendment concerns at issue. We could have done so here by adopting the market-based rule that commenters proposed in the record. That would have provided even more relief than the tier-based rule we adopt.

I am guided in my approach by what some might refer to in the judicial context as the doctrine of constitutional avoidance. It flows from Supreme Court cases like *Debartalo*.[4] In a nutshell, courts will construe a statute to avoid constitutional problems unless such construction is plainly contrary to the statute.

Applying that type of concept here, we should have gone further given the serious First Amendment questions surrounding the leased access regime. None of this is to say that the tier-based rate the Order adopts is irrational or not supported by the record. I think it is an eminently reasonable rule and one that improves on the rate formula that it replaces—putting the First Amendment concerns to the side. Therefore, I am voting to approve our decision to adopt the tier-based rate formula. However, had there been the votes, I would have gone further than the Order because I think a market-based rule is also a permissible way for us to implement the statute and one that would bend our decision even further away from the constitutional concerns.

With that said, I do want to express my thanks and appreciation to the Media Bureau for their hard work on the item and throughout this entire proceeding. They have performed yeoman's work and their effort will leave the leased access regime in far better shape. So thank you to them.

[4] *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Const. Trades Council*, 485 U.S. 568 (1988).

**STATEMENT OF
COMMISSIONER GEOFFREY STARKS,
CONCURRING**

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

Democracy requires that the public have access to diverse sources of information. Recognizing this imperative, Congress created the commercial leased access regime 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."[1] The rules establishing maximum reasonable leased access rates are a core part of this mission, ensuring that unaffiliated video programmers can compete on fair terms. With this action, the Commission simplifies the calculation of maximum leased access rates by adopting a tier-based formula that better reflects the value of a particular channel to the programmer seeking carriage. I agree with commenters that this modification should make compliance less burdensome, particularly for small cable operators.

Despite the robust discussion among commenters in the record about the First Amendment implications of the leased access regime, we wisely decline to pass on the constitutionality of this Congressional mandate. No doubt the marketplace has undergone significant change since the leased access requirements were last updated, with many more options available for viewing content from over-the-top providers and other online sources. But as we make clear in myriad other decisions, not everyone in America is connected to broadband, or has available options for viewing content beyond over-the-air broadcast television and perhaps one cable or satellite provider in their local market. Moreover, there remains a huge disparity in the number of media outlets owned and controlled by people of color and women, which often translates to a lack of locally relevant and diverse programming.

I therefore disagree with the majority to the extent that it suggests we have done the requisite analysis to conclude that competition has eroded the original justification for the leased access rules, in particular with regard to the need to safeguard diversity. We have done no such analysis. I believe the Commission's time is better spent focusing on efforts to expand the reach of high-speed broadband and to end disparities in media ownership rather than gratuitously seeking to eliminate statutory protections that are specifically designed to promote and preserve diverse programming sources. For this reason, I concur.

[1] 47 U.S.C. § 532(a).