

**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 Cable subscribers no longer represent the majority of television households—only 40 percent of television households subscribe to cable today compared with 60 percent in the early 1990s.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

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).