

**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

**COMMENTS OF
THE FREE STATE FOUNDATION***

I. Introduction and Summary

These comments are filed in response to the Commission's request for comments in its rulemaking proposing to modify its formula for cable leased access rates and questioning the constitutionality under the First Amendment of the agency's leased access rules.¹ The comments focus on the constitutional infirmity of leased access regulation in light of today's competitive video marketplace and established First Amendment free speech jurisprudence. In short, the leased access rules can no longer be justified under the present market conditions consistent with constitutional free speech protections. Therefore, the Commission should refrain from enforcing them.²

Cable operators' channel lineup selections, tier placements, and other video programming decisions are editorial activities and forms of constitutionally protected

* These comments express the views of Randolph J. May, President of the Free State Foundation and Seth L. Cooper, Senior Fellow and Director of Policy Studies. The views expressed do not necessarily represent the views of others associated with the Free State Foundation. The Free State Foundation is an independent, nonpartisan free market-oriented think tank.

¹ Report and Order and Second Further Notice of Proposed Rulemaking, MB Docket 07-42, FCC 19-52, released June 7, 2019.

² While it is our position that enforcement of the leased access rules is unconstitutional, we recognize that if others disagree, or the Commission ultimately disagrees, there are ways to minimize the burdens they impose on cable operators that might lessen the constitutional infirmity of the rules. The focus of these comments is on the unconstitutionality of enforcement of the rules as they stand under current market conditions and First Amendment jurisprudence. It is possible we may address in the future potential ways to lessen the constitutional infirmity.

speech. But under the Commission's rules, cable operators lose editorial control over any video programming on the channel capacity they are required to lease for video programming not of their choosing. Moreover, rate controls on leased channel capacity also undermine cable operators' editorial rights by restricting what they can charge for content they may not want to carry.

As explained more fully in the body of these comments, the Supreme Court's First Amendment jurisprudence holds that government cannot tell speakers what they must say. Nevertheless, legacy cable regulation, including leased access regulation, historically has been upheld because of perceived "bottlenecks" in the distribution of video programming. In the late 1980s and early 1990s, most consumers had little choice for pay-TV services other than their local cable operator. But since then, 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.

Today, most consumers can choose between a cable provider and two direct broadcast satellite (DBS) providers. Many consumers also have access to a former "telco" video services provider, such as Verizon FiOS. At the end of 2017, cable operators served 51.8 million or 55.2% of multi-channel video programming distributor (MVPD) subscribers, DBS served nearly 33.5%, and a "telco MVPD" serviced 11.3%. Recent reports indicate that MVPD subscriptions have declined every year from 2013 to the present. Meanwhile, in 2018 antenna use for over-the-air broadcast TV increased to its highest level since 2005, as 31% of U.S. households had an antenna on at least one TV.

Furthermore, and perhaps most significantly, the video landscape has also been reshaped by the emergence of online video distributor (OVD) services, especially Netflix, Amazon Prime Video, HBO Now, and Hulu, with additional streaming services, such as Disney Plus, on the way. 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.

Based on late 80s and early 90s perceptions about cable "bottlenecks," legacy cable regulatory restrictions on video service providers' free speech were subjected to intermediate level scrutiny by the Supreme Court and lower courts. It is not surprising that, in recent years, lower federal courts have challenged, or at least questioned, the legacy bottleneck rationale for free speech restrictions imposed on cable services.

Since the factual underpinning for the old rationale that was used to support legacy cable regulation no longer holds up, strict scrutiny is the correct legal standard by which cable leased access regulation should be evaluated. Strict scrutiny requires that a statute or agency rule further a compelling government interest that is narrowly tailored to accomplish that interest. Today, there is no compelling government interest in regulating or limiting the editorial discretion of cable operators to program their services as they wish. Given the video market's competitiveness and the low demand for leased channel capacity, there is no evidence that leased access regulation advances any supposed compelling government interest in a narrowly tailored manner as the First Amendment requires.

Accordingly, in light of the Court's relevant First Amendment decisions and the dynamic changes to the video services marketplace over more than two decades, the Commission accurately has perceived the constitutional problem posed by continued leased access regulation. The Commission's leased access rules can no longer survive scrutiny under First Amendment free speech jurisprudence and the agency should refrain from enforcing them.

II. Today's Video Market Is Characterized by Competing Distribution Platforms and Consumer Choice

Section 612 of the Communications Act requires cable operators to make available a portion of their channel capacity for leasing by unaffiliated video programmers. The Commission is responsible for establishing maximum rates as well as terms and conditions for cable operators' leasing of channel capacity. Leased access requirements date back to the Cable Act of 1984. The underlying premise of legacy cable regulation, including leased access, was that cable operators possessed bottleneck or monopoly power over video programming distribution. Leased access mandates were intended to promote a multiplicity of video distribution outlets to consumers.

At one time, consumers' primary option for a video subscription service may have been their local analog cable operator. However, since the mid-80s and early 90s, the landscape has been completely transformed by new technologies and other marketplace developments. Today's video services marketplace features competitive platforms for video programmers to distribute programming content and consumers have a wide variety of diverse viewing choices.

According to data cited in the Commission's Communications Marketplace Report, at the end of 2017, "most consumers have access to three competing MVPDs

(two DBS MVPDs and a cable MVPD)."³ And "some consumers also have access to a competing telephone company MVPD, for a total of four MVPDs." Indeed, out of approximately 94 million MVPD subscriptions, an estimated 10.6 million, or 11.3% of such subscriptions were to "telco MVPD" services such as Verizon FiOS and AT&T U-verse. Cable served 51.8 million or 55.2% of MVPD subscribers, and DBS served nearly 31.5 million or 33.5% of subscribers.

Moreover, multichannel video programming distributors (MVPDs) lost 3.6 million video subscribers in 2017,⁴ continuing a trend of annual losses that began in 2013.⁵ Press reports indicate significant further losses of MVPD subscribers in 2018 and early 2019.⁶ Over-the-air TV is experiencing a rapid rise. According to the FCC's Report: "In 2018, 16.6 million TV households (13.9%) relied exclusively on over-the-air broadcast signals, up from 15.7 million TV households (13.2%) in 2017," and up from 13.3 million (11%) in 2016.⁷ And survey results released by the Consumer Technology Association found that in 2018 antenna use increased to its highest level since 2005, as 31% U.S. households had an antenna on at least one TV, and antenna adoption among 25-to 34-year olds was 45%.⁸

³ Communications Marketplace Report, GN Docket No. 18-231, *et al.*, Report (released December 26, 2018), at ¶ 51.

⁴ Communications Marketplace Report, at ¶ 51.

⁵ Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 15-158, *Seventeenth Report*, (rel May 6, 2016), at ¶ 73 ("In 2013 and 2014, the total number of subscribers to MVPD video services actually fell").

⁶ *See, e.g.*, Leichtman Research Group, Press Release: "Major Pay-TV Providers Lost About 975,000 Subscribers in 3Q 2018" (November 13, 2018), at: <https://www.leichtmanresearch.com/major-pay-tv-providers-lost-about-975000-subscribers-in-3q-2018/>; Robert Briel, "US Pay-TV providers lost 1,325,000 subscribers in 1Q 2019," *Broadband TV News* (May 16, 2019), at: <https://www.broadbandtvnews.com/2019/05/16/us-pay-tv-providers-lost-1325000-subscribers-in-1q-2019/>.

⁷ Communications Marketplace Report, at ¶ 109.

⁸ *See* Jared Newman, "Young TV viewers turn to antennae to escape cable's insane prices," *Fast Company* (April 30, 2019), at: <https://www.fastcompany.com/90342475/young-tv-viewers-turn-to-antennas-to-escape-cables-insane-prices>.

Importantly, online video distributor (OVD) services now provide consumers with additional choices and pose a powerful competitive challenge to traditional MVPDs. While MVPD subscriptions have declined, OVD subscriptions have dramatically increased. According to industry reports, in early 2019, Netflix had over 60 million U.S. subscribers to its streaming video service.⁹ Meanwhile, Amazon Prime Video had over 101 million and Hulu had about 28 million.¹⁰ Additionally, millions of Americans subscribe to niche streaming video services. And traditional MVPDs now offer "Virtual MVPD" or "vMVPD" services – that is, multi-channel video programming delivered to subscribers via broadband connections. One research outlet projected vMVPD subscribership to reach 77 million by 2023, up from 21 million at the end of 2017.¹¹

These sweeping changes in the market, enabled by new video delivery technologies and new video service entrants offering a diverse array of programming, have upended the basis for cabled leased access regulation. And as the Commission's proposed rulemaking points out, "demand for commercial leased access has remained low and most leased access inquiries do not result in carriage."¹² So, as a policy matter, continued enforcement of leased access burdens is completely unjustifiable.

⁹ See Todd Spangler, "Netflix Posts Record Subscriber Gain in Q1, Issues Weaker Q2 Growth Forecast," *Variety.com* (April 16, 2019), at <https://variety.com/2019/digital/news/netflix-q1-2019-earnings-1203190870/>.

¹⁰ Dan Risinger, "Amazon Prime Has More Than 100 Million U.S. Subscribers," *Fortune.com* (January 17, 2019), at: <https://fortune.com/2019/01/17/amazon-prime-subscribers/>; Megan Graham, "Hulu reaches 28 million subscribers and announces new Marvel shows and ad formats," *CNBC.com* (May 1, 2019), at: <https://www.cnb.com/2019/05/01/hulu-announces-28-million-subscribers-new-marvel-shows.html?&qsearchterm=hulu>.

¹¹ See Carl Weinschenk, "Report: U.S. vMVPD Subscribers to Grow to 28M by 2023, 77M Globally," *Telecompetitor* (May 1, 2018), at: <https://www.telecompetitor.com/report-u-s-vmvpd-subscribers-to-grow-to-28m-by-2023-77m-globally/>.

¹² Leased Commercial Access; Modernization of Media Regulation Initiative; MB Docket Nos. 07-42 and 17-105, Report and Order and Second Notice of Proposed Rulemaking (Notice)(released June 7, 2019), at ¶ 10.

III. Cable Leased Access Regulation Does Not Withstand Constitutional Scrutiny

Consistent with the long-standing positions espoused by Free State Foundation scholars,¹³ the Commission's proposed rulemaking is fully justified in calling the constitutional foundation of its leased access rules into question.¹⁴ Cable operators routinely engage in editorial speech, including when they determine what channels they will carry, assign numbers to particular channels, determine channel ordering, and place channels on specialty tiers. Additionally, cable operators choose the specific content of the video programming they carry, either by owning the channels or by making content conditions a part of their carriage agreements with independent programmers. This editorial discretion exercised by cable operators and other providers of video services is protected from government restrictions under the First Amendment.

The Supreme Court's First Amendment free speech jurisprudence holds that content-based restrictions are presumptively unconstitutional and that government is

¹³ See, e.g., Randolph J. May, "First Amendment First Principles," *FSF Blog* (June 22, 2019), at: <https://freestatefoundation.blogspot.com/2019/06/first-amendment-first-principles.html>; Randolph J. May, "First Principles: Restoring the First Amendment to Its Rightful Place," *FSF Blog* (January 6, 2014), at: <https://freestatefoundation.blogspot.com/2014/01/first-principles-restoring-first.html>; Randolph J. May and Seth L. Cooper, "The Case for Program Carriage Reform," *Perspectives from FSF Scholars*, Vol. 8, No. 16 (June 10, 2013), at: http://www.freestatefoundation.org/images/The_Case_for_Program_Carriage_Reform_06.07.13.pdf; Seth L. Cooper, "FCC Over-Regulation of Video Services Undermines Free Speech," *Perspectives from FSF Scholars*, Vol. 7, No. 17 (July 17, 2012), at: http://www.freestatefoundation.org/images/FCC_Over-Regulation_of_Video_Services_Undermines_Free_Speech_071612.pdf; Randolph J. May and Seth L. Cooper, "Accelerate New Video Breakthroughs by Rolling Back Old Regulations," *Perspectives from FSF Scholars*, Vol. 7, No. 12 (June 18, 2012), at: http://www.freestatefoundation.org/images/Accelerate_New_Video_Breakthroughs_061812.pdf; Seth L. Cooper, "The First Amendment for the Digital Age: A Case for Treating Modern Technologies Equally," *Perspectives from FSF Scholars*, Vol. 7, No. 6 (February 27, 2012), at: http://www.freestatefoundation.org/images/The_First_Amendment_for_the_Digital_Age_022712.pdf; Seth L. Cooper, "Must-Carry: FCC Regulation's Mismatch With Market Reality," *FSF Blog* (April 20, 2010), at: <https://freestatefoundation.blogspot.com/2010/04/must-carry-fcc-regulations-mismatch.html>. See also Randolph J. May, Seth L. Cooper, et al., "Response to Questions in the Sixth White Paper 'Video Policy,'" before the Committee on Energy and Commerce, U.S. House of Representatives (January 23, 2015) (reprinted in Randolph J. May and Seth L. Cooper, #CommActUpdate: A Communications Law Fit for the Digital Age (2017)); Randolph J. May, "Charting a New Constitutional Jurisprudence for the Digital Age," 3 *Charleston Law Review*, 373 (2009) (reprinted in Randolph J. May (Ed.), *New Directions in Communications Policy* (2009)).

¹⁴ Notice, at ¶ 40.

generally prohibited from telling speakers what they must say.¹⁵ First Amendment protections against compelled speech also have been held to apply in the context of modern media communications services.¹⁶

But many of the Commission's legacy rules applicable to video service providers include access or forced sharing mandates. Indeed, Section 612 and the Commission's leased access rules involve forced sharing mandates that infringe on cable operators' free speech rights. Under the statute, cable operators lose "editorial control over any video programming" on the leased channel capacity.¹⁷ Section 612 and the Commission's rules require cable operators to carry independent video programming not of their own choosing. Rate controls are another facet of leased access regulation, and one that obviously impacts cable operators' editorial discretion in a forced access regime. Cable operators are subject to Commission-set maximum amounts that independent video programmers can be charged for leasing channel capacity.¹⁸

Legacy cable regulations, including the leased access rules, have been upheld under the intermediate scrutiny standard because of cable video programming distribution bottlenecks perceived in the early 1990s.¹⁹ Under intermediate scrutiny, speech of cable operators may be restricted so long as the regulation furthers an important government interest by means substantially related to further that interest. Leased access statutory provisions were upheld on First Amendment grounds by the D.C. Circuit in *Time Warner Entertainment v. FCC* (1996).²⁰ However, that decision predated the dramatic

¹⁵ See, e.g., *Rumsfeld v. CAIR*, 547 U.S. 47, at 61 (2006).

¹⁶ See, e.g., *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241 (1974); *Pacific Gas & Electric Company v. Public Utility Commission*, 475 U.S. 1, 9 (1975).

¹⁷ 47 U.S.C. § 532(c)(2).

¹⁸ See 47 U.S.C. § 532(4)(A)(i); 47 C.F.R. §76.970.

¹⁹ See *Turner Broadcasting System, Inc. v. FCC*, 520, U.S. 180, 197-207 (1997).

²⁰ *Time Warner Entertainment v. FCC*, 93 F.3d 957 (D.C. Cir. 1996).

transformation of the video ecosystem and the rise of competing video platforms, including online video distributor (OVD) services. In view of such developments, it is not surprising that federal courts, for several years, have challenged, or at least questioned, the legacy bottleneck rationale for imposing free speech restrictions on cable services.²¹

Additionally, the editorial speech rights of cable operators in choosing channel lineups, tier placements, and the like appear even more important today. Cable operators are pursuing strategies, including new features and service offerings, intended to attract and retain subscribers who may be tempted to rely exclusively on OVD services.

Restrictions arising from leased access regulation and other legacy cable regulation limit the freedom and ability of cable operators to make editorial judgments in pursuit of making available enhanced quality, uniquely branded, high value, and economically attractive service offerings. Rival OVDs face no similar speech-restrictive regulatory burdens.

Accordingly, strict scrutiny is the correct legal standard by which cable leased access regulation must be evaluated. Under modern Supreme Court jurisprudence, strict scrutiny requires that a statute or agency rule further a compelling government interest that is the least restrictive means of accomplishing that interest. Given that the modern

²¹ See *Comcast v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009) ("[T]he record is replete with evidence of ever increasing competition among video providers...Cable operators, therefore, no longer have the bottleneck power over programming that concerned the Congress in 1992"); *Comcast v. FCC*, 717 F.3d 982, 994 (D.C. Cir. 2013) (Kavanaugh, J., concurring). ("In today's highly competitive market, neither Comcast nor any other video programming distributor possesses market power in the national video programming distribution market"); *Fox v. FCC*, 613 F.3d 317, 326-327 (2d Cir. 2010) (recognizing dramatic changes in technology and competition but concluding it is bound by Supreme Court precedent regarding spectrum scarcity); *Time Warner Cable v. Hudson*, 667 F.3d 630 (5th Cir. 2012) (concluding that the First Amendment prohibits modern speech media from being subject to selective, discriminatory regulations and striking down certain state video franchise requirements). On other occasions, federal circuit courts have concluded that the MVPD market characterized by bottlenecks when the Cable Act of 1992 was passed is "mixed," with competition varying according to geographic region. See *Cablevision v. FCC*, 597 F.3d 1306, 1314 (D.C. Cir. 2010); *Cablevision v. FCC*, 649 F.3d 695, 712 (D.C. Cir. 2011); *Time Warner Cable v. FCC*, 729 F.3d 137 (2d. Cir. 2013).

video services market now indisputably includes a variety of competing distribution platforms offering an abundance of diverse programming choices for consumers, there is no compelling or necessary government interest to be served by restricting the editorial freedom of cable operators in non-public fora. Given the video market's competitiveness and the low demand for leased channel capacity, there is no evidence that such regulation advances a compelling government interest as the narrow tailoring prong requires.²²

In light of the Court's relevant First Amendment decisions and the dynamic changes in the video services market, the Commission accurately has perceived the constitutional problems posed by leased access regulation. The Commission's leased access rules can no longer survive scrutiny under First Amendment free speech jurisprudence and the Commission should refrain from enforcing them.

IV. Conclusion

For the foregoing reasons, the Commission should no longer enforce its cable leased access rules.

Respectfully submitted,

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²² See, e.g., *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 228 (1989).