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THE FREE STATE FOUNDATION

A Free Market Think Tank for Maryland.....Because Ideas Matter

Media Advisory

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FSF SAYS THE FCC'S CABLE LEASED ACCESS REGULATIONS VIOLATE THE FIRST AMENDMENT

Free State Foundation President Randolph May and Senior Fellow and Director of Policy Studies Seth Cooper submitted comments today to the Federal Communications Commission 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. The comments urge the Commission to conclude that the leased access rules can no longer be justified consistent with free speech protections and that, therefore, the Commission should refrain from enforcing them.

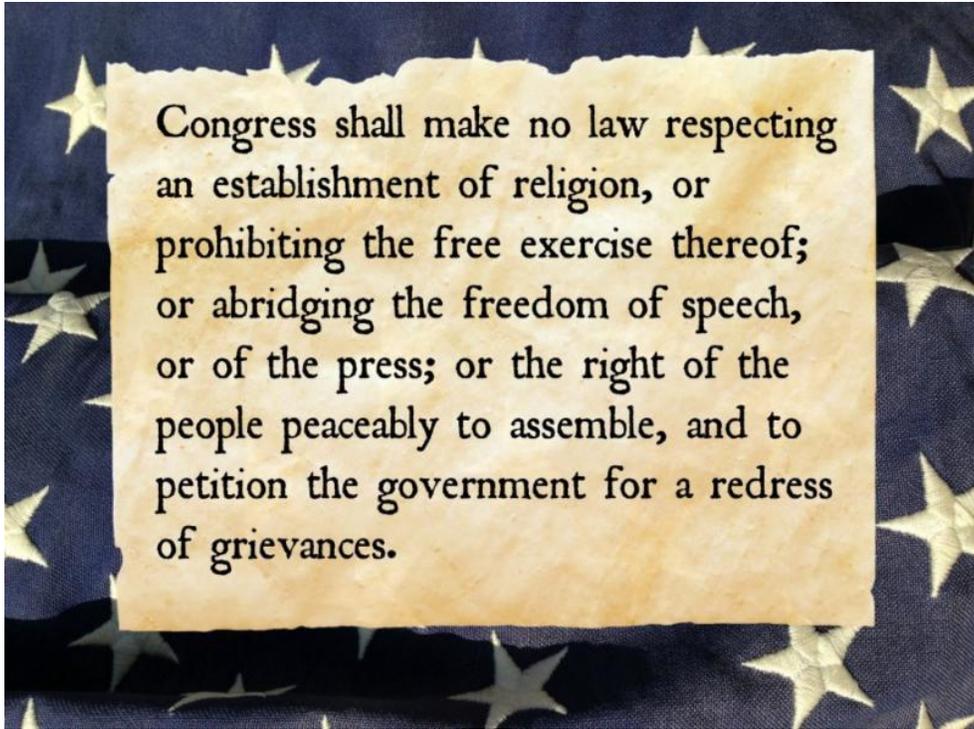
The complete set of Free State Foundation comments, with footnotes, is [here](#).

Immediately below is the "Introduction and Summary" to the comments, without the footnotes.

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. 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.

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



Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

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.

A PDF of the complete FSF comments, with footnotes, is [here](#).

In case you missed it...please see:

- **[A Free Market Approach Should Be Used to Reallocate C-Band Spectrum](#)**, by Free State Foundation President Randolph May and Visiting Fellow Gregory Vogt
 - **[Delegation, Deference, and the FCC](#)**, by Free State Foundation President Randolph May
 - **[The DOJ Needs to Reconsider Market Definition for Advertising Markets](#)**, by Theodore Bolema, Member of the Free State Foundation's Board of Academic Advisors
 - **[First Amendment First Principles](#)**, by Free State Foundation President Randolph May
 - **[FCC Gives First Amendment Its Due in Cable Leased Access Proposal](#)**, by Free State Foundation Senior Fellow and Director of Policy Studies Seth Cooper
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The Free State Foundation's newest book, [A Reader on Net Neutrality and Restoring Internet Freedom](#), by Randolph May and Seth Cooper, is available from Amazon [here](#) in paperback for \$9.95 or for your Kindle [here](#) for \$2.99. And it is available [here](#) from Apple and other booksellers in various e-book formats for \$2.99 or less. Read more about the book [here](#).

A Reader on Net Neutrality and Restoring Internet Freedom



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