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

The American Cable Association ("ACA") hereby submits these comments in response to the Federal Communications Commission's ("Commission") Further Notice of Proposed Rulemaking on Leased Commercial Access ("FNPRM").[1] ACA represents over 700 small and mid-sized cable operators who are currently subject to the Commission's onerous leased access rules, and who would benefit from the reforms suggested in the FNPRM, as well as several additional reforms presented herein.

The commercial leased access framework requires cable operators to set aside between 10 and 15 percent of their activated channels for commercial use by unaffiliated programmers[2] and places restrictions on the fees that cable operators may

[1] *Lease Commercial Access; Modernization of Media Regulation Initiative,* Further Notice of Proposed Rulemaking, FCC 18-80, MB Docket Nos. 07-42; 17-105 (rel. Jun. 8, 2018) ("FNPRM").

[2] 47 U.S.C. § 532(b).

charge for the lease of such channel capacity.[3] When the leased access framework was first established in 1984, Congress believed that it was necessary "assure that the widest possible diversity of information sources are made available to the public from cable systems[,]"[4] because independent programmers who wished to distribute video content "free of the editorial control of the cable operator"[5] had no other outlet for doing so. Today, however, the market for video programming is extremely competitive, and both content producers and audiences have access to a variety of distribution platforms, including traditional MVPDs, over-the-air broadcast stations, online video distributors, and user-generated online content platforms, such as YouTube and Periscope.[6] With the rise of online video distribution, demand for leased access capacity, which was never particularly high to begin with, has slowed to a trickle. Unfortunately, while the value of leased access to programmers and the public at large has declined over the past decades, the significant burdens on cable operators associated with responding to leased access requests have remained relatively static.

[3] 47 C.F.R. § 76.970(d).

[4] *Cable Communications Policy Act of 1984,* Pub. L. No. 98-549, 98 Stat. 2779 (1984), 47 U.S.C. § 521 et seq. (1984). The statute was amended by the *Cable Television Consumer Protection and Competition Act of 1992*, Pub. L. No. 102-385, 106 Stat. 1460 (1992), 47 U.S.C. § 521, *et seq.* (1992).

[5] *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation Leased Commercial Access*, Order on Reconsideration of the First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 16933, ¶ 2 (1996) ("1996 Leased Access Order").

[6] Online content platforms have been particularly successful in democratizing the distribution of video programming, as they allow content producers to reach a global audience with little or no distribution cost. To put this success in perspective, individuals all over the world produce and upload more video content every thirty days than major U.S. television networks have created over the past 30 years. Mary Lister, *37 Staggering Video Marketing Statistics for* 2018, The Wordstream Blog (Jul. 25, 2018), https://www.wordstream.com/blog/ws/2017/03/08/video-marketing-statistics.

The requirement to set aside channels for leased access was imposed by Congress, but Commission rules have made compliance with the mandate more burdensome than necessary. The FNPRM proposes to reduce some of the burdens on cable operators by permitting them to respond only to "bona fide" requests for information,[7] by providing additional time to respond to information requests,[8] and by permitting them to require lessees to pay a "nominal" application fee or deposit.[9] ACA supports these proposals,[10] but believes that further reforms, as discussed herein, are needed to provide meaningful relief from the most burdensome component of the leased access rules – the requirement to provide a detailed response to a request for information – and to allow for the recovery of administrative costs associated with completing a leased access agreement.

Under the current rules, a cable system must respond to a request for information about leased access by providing four pieces of information: 1) how much of the operator's leased access set-aside capacity is available; 2) a complete schedule of the operator's full-time and part-time leased access rates; 3) rates associated with technical and studio costs; and 4) if requested, a sample leased access contract.[11] Providing a complete response is burdensome, in part because leased access requests

[7] FNPRM, ¶¶ 16-18.

[8] FNPRM, ¶¶ 19-20.

[9] FNPRM, ¶¶ 21-22. In adopting the proposal to permit cable operators to require an application fee or deposit, the Commission should make clear that such fees or deposits can be forfeited if a potential lessee fails to complete an agreement within a reasonable time.

[10] The first two of these proposals would essentially expand the relief that is currently provided for systems with fewer than 1,000 subscribers to all cable systems. *See* 47 C.F.R. § 76.970(i)(2).

[11] 47 C.F.R. § 76.970(i)(1).

are so few and far between[12] that cable company employees are unlikely to have some or all of the necessary information readily at hand. While from the outside it may seem like gathering this information should be a simple matter, it is not. For example, the statute requires cable operators to make a percentage of their activated channels available for leased access, but a cable systems' channel capacity is not static. It changes as cable operators add and drop channels, and repurpose system bandwidth from video to broadband services. While a cable employee may know (or may be able to find out with reasonable effort) how much leased access programming is carried, he or she would not know exactly how much capacity is "available" in relation to the overall set aside required by the statute without running the numbers.

By far the most burdensome element of the Commission's rules related to responding to information requests is the requirement to provide a complete schedule of the operator's full-time and part-time leased access rates. The formula for calculating the "average implicit fee" for a particular channel is extremely complex, and the data points needed to complete these calculations are numerous and constantly in flux,[13] so a cable operator must recalculate the fee to respond to every single leased access

[12] Many ACA members report that they often go years without receiving a single leased access inquiry.

[13] To determine the maximum rate permitted for leased access based on the Commission's formula, a cable operator must calculate the "total implicit fee" based on the total subscriber revenue and programming costs per month for the basic tier and all tiers with over 50% penetration. The operator must then multiply the number of subscribers by the number of channels on the basic tier and each tier with over 50% penetration to determine the number of "subscriber-channels" per tier, then divide the number of subscriber-channels per tier by the number of subscriber-channels on basic and all tiers with over 50% penetration to find the "subscriber-percentage." The subscriber-percentage for a particular tier must then be multiplied by the total implicit fee, which is then divided by the number of channels on that tier to determine the "average implicit fee" for a full-time channel on that particular tier. 47 C.F.R. § 76.970(e).

request. A cable operator may spend a thousand dollars or more in man-hours[14] and consulting fees to complete the calculation process each time.

The remaining requirements are also burdensome, because in many cases cable operators do not have standardized rates for technical assistance or studio time. Leased access requests are very rare, and programmers have diverse technical needs, so it is burdensome to produce generalized information "necessary for users to present their material on the air."[15] Similarly, a cable operator may not generaly offer studio services to the public and it is onerous to immediately offer rate information to a potential lessee.[16] Additionally, because cable operators receive requests so infrequently (or in some cases, never at all), many may not have a sample contract on hand, or if they do, it may be out of date, so to comply with the rule an operato may need to incur legal fees in order to draft a new contract from scratch or to review and update an old one.

In most cases, requests for information about leased access go no further, but on the rare ocassion that an inquiry is later followed by an actual request for programming time, there are additional costs involved with processing the application, negotiating terms, and making arrangements for the delivery of programming to the cable headend. Negotiating a leased access agreement can be time consuming, and for small operators often requires the assistance of outside counsel. The time and effort is often magnified

[14] In a larger company, the process may involve input from multiple business units. In a smaller company, even the president or CEO may be directly involved.

[15] 47 C.F.R. § 76.971(c). Moreover, the information provided may not be useful if a cable operator does not know what kind of technical support is specifically needed by the programming.

[16] Without knowing what studio services are needed by the programmer, the information provided by the cable operator may not be informative.

by novice programmers who are not familiar with the cable programming market or the leased access rules. Further, while arranging for the delivery of programming may be fairly simple in some cases, in others it can involved a substantial back and forth as the parties work to resolve various practical matters.[17]

The Commission's formula for determining a maximum allowable leased access rate is intended to allow cable operators to receive a "reasonable profit"[18] based on the value of the channel capacity used by the programmer. Unfortunately, the formula does not take into account the administrative costs described above,[19] which in most cases vastly outweigh the revenue operators are permitted to collect. While the very small profit permitted by the formula may be sufficient to recover administrative costs when channels are leased full time, most leased access requests are for part-time programming, often for a 30 minute or one hour program that airs once, or on a weekly

[17] One ACA member reported that they worked with a potential lessee for months to find a cost-effective method to deliver a linear programming stream. The parties were ultimately unsuccessful, and the deal was never finalized.

[18] *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation Leased Commercial Access*, Second Report and Order and Second Order on Consideration of the First Report and Order, 12 FCC Rcd 5267, ¶ 19 (1997) ("1997 Leased Access Order") ("When the full set-aside capacity is not leased to unaffiliated programmers, the maximum rate would be based on the operator's reasonable and quantifiable costs (i.e., the costs of operating the cable system plus the additional costs related to leased access), including a reasonable profit."). Note, however, that the "additional costs related to leased access" do not include the administrative or transaction costs of responding to information requests. In fact, in 1997 the Commission expressly rejected a request by ACA (known at the time as the Small Cable Business Association) that small cable operators be permitted to include in their rates "an additional some of at least $1,000 as compensation for transaction costs," reasoning that the recovery that operators may gain from subscriber revenue for leased access programming will sufficiently offset any additional transaction costs." 1997 Leased Access Order, ¶ 158.

[19] *See* 1997 Leased Access Order, ¶ 15 ("The implicit fee is intended to recover only the value of the channel capacity and not any fees, stated or implied, for services other than the provision of channel capacity (e.g., billing and collection, marketing, or studio services"); *see also, id.,* ¶ 43 ("Subscriber revenue will also be offset by additional administrative costs imposed by leasing, which are not recovered through the average implicit fee formula.").

or monthly basis.[20] In such cases, the revenue earned in a single year will be a few hundred dollars at most, while the administrative costs could be in the thousands. The bottom line is that even if the formula that the Commission uses does a relatively good job of reimbursing cable operators for the implicit cost of capacity used to provide leased access,[21] it does an abysmal job of reimbursing cable operators for their total costs of providing leased access, which are primarily administrative in nature. The Commission's prior refusal to consider these external costs means that, in most cases, cable operators lose money on leased access deals. It is therefore long past time for the Commission to reevaluate its leased access framework.

While the Commission cannot do away with the extremely outdated leased access requirements altogether, it can take steps both to reduce the administrative costs imposed by the current rules and to allow for some cost recovery for those that remain. The regulatory reforms outlined in the FNPRM will provide some relief, but additional reforms are warranted.

First, the Commission can greatly reduce the administrative burdens on individual cable operators by adopting and publishing a uniform, non-discriminatory "safe harbor" per channel rate that any cable operator may elect to use in lieu of calculating an individualized rate.[22] To calculate the safe harbor, the Commission could

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[20] Although there is no statutory mandate that cable operators lease access on a part-time basis, Commission rules require cable operators to offer capacity in increments as small as 30 minutes. 47 C.F.R. § 971(a)(4).

[21] The Commission's rules also permit cable operators to charge leased access users for technical support, but they may only charge for any technical support that is not provided for free to non-leased access programmers. Operators are also permitted to recover the cost of purchasing any technical equipment necessary to accommodate leased access programming. 47 C.F.R. § 76.971(c).

[22] Operators who wish to use the establish rates based on their individualized data should, of course, still be permitted to do so.

use its own implicit rate formula with data inputs based on national averages (or a reasonable sampling of data from large cable operators).[23] The Commission could then update the safe harbor rate on a periodic basis to account for marketplace changes. In addition to helping cable operators reduce their administrative costs, adopting a safe harbor would benefit potential lessees by making minimum pricing information publicly available prior to their initial contact with a cable operator.[24]

As an additional measure to reduce administrative costs, the Commission should reexamine the information that a cable must provide in response to a request for information from a potential lessee. For example, rather than indicating the total amount of available leased access set-aside capacity, cable operators should be permitted to confirm whether there is sufficient capacity available to accommodate the programming described in the bona fide request.[25] Moreover, in lieu of providing a complete schedule of the operator's full-time and part-time leased access rates, a cable

[23] The Commission need not impose any additional data collection obligations on cable operators, as it already collects much of the data needed to calculate this figure. *See, e.g., Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992; Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, Order, DA 18-733, MM Docket No. 92-266 (rel. Jul. 25, 2018) (soliciting industry input necessary for the statutorily required report on cable industry prices). Other necessary data can be obtained from numerous commercial sources. To the extent that the Commission does not have ready access to the exact information needed to apply its formula, it could, for the purpose of determining the safe harbor rate, modify the formula to use data and information that is readily available.

[24] The Commission has adopted a similar safe harbor in other contexts in order to minimize the administrative burdens of making complex calculations. *See, e.g., Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 21252, 21255, ¶ 6 (1998) (adopting an interim safe harbor percentage that wireless telecommunications providers could use to allocating their revenue between the interstate and intrastate jurisdictions for purposes of calculating universal service contributions); *see also In the Matter of Universal Service Contribution Methodology; Federal-State Joint Board on Universal Service*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 (2006).

[25] For instance, if a programmer is looking to lease access every Friday at 6pm, the cable operator need only respond by stating whether that time slot is available.

operator should be permitted to provide the "safe harbor" rate as ACA urges the Commission to adopt above,[26] or an *estimate* of the rate that would be charged if they do not use the safe harbor rate.[27]

The requirements to provide rates associated with technical and studio costs and to provide a sample contract upon request should be eliminated altogether, as they are unnecessary and burdensome. As explained above, some cable operators do have standardized rate information to provide. Moreover, with respect to studio rates, such information is less relevant to potential lessees than it may have been in the past, as producing content today is significantly easier and cheaper than it was when the leased access framework was enacted,[28] and very few leased access programmers rely on cable operators to provide studio resources. As such, content producers who feel that they must have a concrete estimate of their production costs prior to submitting a writtent request for leased access should have no trouble creating one, even without knowing the rates that a cable operator may charge (assuming that it is even capable of providing studio services in the first place). There is simply no reason to require cable operators to provide this information until negotations are fully underway. Additionally, it is unreasonable to expect cable operators to undertake the expense of creating a new contract or updating an existing one before they receive an actual

[26] If the Commission adopts a safe harbor rate as described above, the operator should be permitted to direct a potential lessee to where it has been published by the Commission.

[27] The operator should be permitted to provide either an estimate that is specifically tailored to the request, or an estimate of the cost to lease a single channel full-time, with an explanation that the price for part-time leases is pro-rated in accordance with the Commission's rules. Such an estimate may be derived in many ways, including the rates charged by the cable operators for previous leased access deals, or, if known, rates that have been recently charged by other cable operators.

[28] Not only are there numerous independent third party production companies available to help content creators translate their vision to the "small screen," technology has made it easy for individuals to use everyday consumer devices to film and edit their programming from the comfort of their own homes.

request for leased access. If the Commission chooses to maintain the requirement to provide a sample contract, it should clarify that providing a term sheet in lieu of a sample contract is sufficient.

By allowing cable operators more flexibility in their responses to information requests – most of which never lead to actual requests for leased access, much less completed contracts – the Commission can greatly reduce the administrative burden on these operators while still providing sufficient information for a potential programmer to determine whether he or she would like to submit a formal, written request for leased access. Any additional information a programmer may need to engage in negotiations and complete an agreement can be provided by the cable operator after the written request for leased access (and any accompanying application fee or deposit) has been received.

Finally, in addition to minimizing administrative costs and permitting cable operators to charge an application fee as proposed in the FNPRM,[29] the Commission should also permit cable operators to charge a closing fee once a leased access agreement has been finalized in order to cover administrative costs incurred from the time the operator receives a written request for leased access to the actual completion of the agreement. The closing fee set by the cable operator should be reasonable, uniform, and non-discriminatory, and can be based on the average administrative costs of processing an application and negotiating terms of an agreement.

[29] While the Commission's proposal is designed to permit cable operators to recover the costs of gathering the information necessary to respond to a bona fide request, these costs are unlikely to be covered by a "nominal" application fee, unless the Commission adopts all of ACA's proposals to reduce the amount of information that cable operators my provide.

By adopting these proposed reforms as well as those described in the FNPRM, the Commission can reduce the unnecessary administrative burdens of accomodating leased access requests without imposing unreasonable barriers on potential leased access programmers.

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