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

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

COMMENTS ON SECOND FURTHER NOTICE OF PROPOSED RULEMAKING OF THE ALLIANCE FOR COMMUNICATIONS DEMOCRACY

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The Alliance for Communications Democracy ("ACD") submits these comments in response to the Commission's Second Notice of Proposed Rulemaking ("*Second FNPRM*") in the above-captioned dockets.[1] ACD is a national membership organization of nonprofit public, educational, and governmental access ("PEG") organizations that supports efforts to protect the rights of the public to communicate via cable television and promotes the availability of the widest possible diversity of information sources and services to the public.[2] The organizations represented by ACD have helped thousands of members of the public, educational institutions, and local governments make use of PEG channels that have been established in their communities pursuant to franchise agreements and federal law, 47 U.S.C. § 531.

I. INTRODUCTION

ACD's comments focus on the portions of the *Second FNPRM* that seek comment on whether the Cable Act's leased access provisions or the Commission's leased access rules can "continue to withstand First Amendment scrutiny in light of the market changes discussed in this order." *Second FNPRM*, ¶ 47; *see also id.*, ¶¶ 39, 40. Similar so-called "First Amendment concerns," *id.*, ¶ 47, have been raised regarding the Cable Act's[3] PEG provision.[4]

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[1] *Lease Commercial Access*; *Modernization of Media Regulation Initiative*, MB Docket Nos. 07-42 & 17-105, Report and Order and Second Notice of Proposed Rulemaking, FCC 19-52 (2019).

[2] ACD's voting members are: Alliance for Community Media ("ACM") West; Capital Community TV (Salem, Oregon); Community Media Center Marin (San Rafael, California); CreaTV San Jose (San Jose, California); MetroEast Community Media (Gresham, Oregon); Chicago Access Corporation (Chicago, Illinois); ACM Northeast, and Public Media Network (Kalamazoo, Michigan). ACD's nonvoting members are Access Humboldt, and Vermont Access Network.

[3] The "Cable Act" refers to the Cable Communications Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992 and the Telecommunications Act of 1996.

[4] *See* Amicus Curiae Brief of NCTA – The Internet & Television Association in Support of Neither Party at 1, *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019) (No. 17-1702), http://www.supremecourt.gov/DocketPDF/17/17-1702/74830/20181211150721690_17-1702%20ac%20NCTA.pdf ("But behind this [question presented in this case] is the more fundamental issue of whether the requirement imposed on NCTA's members to set aside public access channels in the first place violates *their* First Amendment rights by compelling them to retransmit content over which they lack all control and that they may not want to distribute.")

The claimed basis for the *Second FNPRM* First Amendment issue is clear: changes in the video marketplace over the past decades, particularly the development of "online platforms that creators can use to distribute their content for free," have supposedly "reduced the importance of leased access."[5] Again, similar claims, while misplaced, have been levied against the Cable Act's PEG provisions. But even if this premise were true—which it is not—only Congress can eliminate portions of the statute. However unnecessary, or even unconstitutional, the Commission may think the Cable Act's leased access provisions are in 2019, or however unwise it thinks they may be as a policy matter, it does not have the authority to rewrite the Cable Act. Nor does it have the authority to constitutionally trump acts of Congress. Invocation of the First Amendment does not change these basic facts.

In any event, the market changes discussed in the *Second FNPRM* have little, if any, bearing on the validity of the Cable Act's leased access and PEG provisions under the First Amendment. The market changes described in the *Second FNPRM* are exaggerated in critical ways, and they are not relevant to the actual First Amendment analysis of the leased access provisions. These changes in the video marketplace have not eliminated the important governmental interest in diverse sources of video programming (nor, in the case of PEG, have they eliminated the additional governmental interest in localism). And they have not increased the burden on cable operators' First Amendment free expression.

[5] *Second FNPRM*, ¶ 2.

II. COMMENTS

A. Market changes are irrelevant to determining the appropriate level of scrutiny, which is intermediate scrutiny.

Supreme Court precedent provides that strict scrutiny applies "to regulations that suppress, disadvantage, or impose differential burdens upon speech *because of its content*." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) ("*Turner*") (emphasis added) (citing *Simon & Schuster v. Member of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991); *Simon & Schuster*, 502 U.S. at 125-26 (Kennedy, J., concurring in judgment); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). "In contrast, regulations that are *unrelated to the content of speech* are subject to an intermediate level of scrutiny." *Turner*, 512 U.S. at 642 (emphasis added) (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). Thus, a determination of the appropriate level of scrutiny must focus on whether a statute or regulation is content-neutral or content-based, and that remains the case under current First Amendment jurisprudence. *See Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017) (assuming that challenged "statute is content neutral and thus subject to intermediate scrutiny"); *McCullen v. Coakley*, 573 U.S. 464, 485 (2014) (conclud[ing] that the Act is neither content nor viewpoint based and therefore need not be analyzed under strict scrutiny").

As the *Second FNPRM* recognizes (¶ 39), the D.C. Circuit has held that leased access provisions of the Cable Act are subject to intermediate scrutiny. *Time Warner Entm't Co., L.P. v. FCC*, 93 F.3d 957, 969 (D.C. Cir. 1996). In doing so, it relied on its determination that "[t]he provisions are not content-based. They do not favor or disfavor speech on the basis of ideas contained in the speech or the views expressed. . . . The Supreme Court has determined that regulations along these lines are content-neutral." *Id.* (citing *Turner*, 512 U.S. at 642-43, 661-64). Whatever changes there have been in the video marketplace since that decision, it cannot be

argued that those changes have transformed the leased access provisions of the Cable Act from content-neutral to content-based. The same is true for the Cable Act's PEG provisions. Accordingly, those changes are irrelevant to determining the appropriate level of scrutiny, and intermediate scrutiny still applies.

B. The changes discussed in the Second FNPRM *and in the record are irrelevant to whether the Cable Act's leased access provisions continue to survive intermediate scrutiny.*

The *Second FNPRM* seeks comment (¶ 47) on whether "the statutory leased access requirements or the Commission's other leased-access rules continue to withstand First Amendment scrutiny in light of the market changes discussed in this order." Under intermediate scrutiny, a content-neutral provision survives 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." *Turner* at 662 (citing *U.S. v. O'Brien*, 391 U.S. 367, 377 (1968)). It is not enough that these changes be generally characterized as "dramatic." *Second FNPRM*, ¶ 40. To the extent changes in the marketplace have relevance to the issue of First Amendment scrutiny, they must be specifically linked to this analysis.

The government interests behind the leased access and PEG provisions of the Cable Act are unrelated to the suppression of free expression, and there can be no serious argument that changes in the marketplace affect whether these interests are related to the suppression of free expression. Moreover, the marketplace changes discussed in the *Second FNPRM* are both overstated and unrelated to (1) the governmental interests furthered by the leased access provisions, and (2) the degree to which the leased access provisions burden any First Amendment freedoms.

1. Leased access furthers diversity, and market changes have not rendered this a non-important or insubstantial government interest.

As the D.C. Circuit has explained, "'Leased access' was originally aimed at bringing about 'the widest possible diversity of information sources' for cable subscribers." *Time Warner Entm't Co., L.P. v. FCC*, 93 F.3d 957, 968 (D.C. Cir. 1996) (citing 47 U.S.C. § 532(a)). The PEG provisions of the Cable Act advance additional important governmental interests. PEG programming furthers the Cable Act's goal of "assur[ing] that cable systems are responsive to the needs and interests of the local community." 47 U.S.C. § 521(2). It also serves the Cable Act's goal of "assur[ing] that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public," 47 U.S.C. § 521(4), which is "consistent with the First Amendment's goal of a robust marketplace of ideas." *Time Warner Cable of N.Y.C. v. City of New York*, 943 F. Supp. 1357, 1368 (S.D.N.Y. 1996) ("*Time Warner Cable*"), *aff'd sub nom. Time Warner Cable of N.Y.C. v. Bloomberg L.P.*, 118 F.3d 917 (2d Cir. 1997). "Assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment." *Turner* at 663. PEG channel requirements help ensure that access to electronic media is not monopolized by "the licensees or owners of those media" as has traditionally happened. *Time Warner Cable* at 1369 (citing H.R. Rep. No. 98-934, at 30 (1984), *reprinted in* 1984 U.S.C.A.A.N. 4655, 4667).

These interests are distinct from the interest behind the Cable Act's broadcast station must-carry provisions addressed in *Turner*. There, the Court summarized Congress's interest as addressing:

> [T]hat the physical characteristics of cable transmission, compounded by the increasing concentration of economic power in the cable industry, are endangering the ability of over-the-air

> broadcast television stations to compete for a viewing audience and thus for necessary operating revenues. Congress determined that regulation of the market for video programming was necessary to correct this competitive imbalance.

Turner at 632-33. Thus, the sole governmental interest at issue in *Turner* was federal economic structural regulation of the cable industry justified by concerns over market power arising from cable operators' bottleneck control over video programming distribution.

The *Second FNPRM* fails to recognize the different governmental issues behind these different Cable Act provisions. As a result, it focuses on market changes that may have been relevant under the Court's analysis of the broadcast must-carry provisions at issue in *Turner*, but are not relevant to the leased access provisions.

The *Second FNPRM* identifies (¶ 39) "cable operators' monopoly power" as the potentially outdated justification behind leased access.[6] But whereas monopoly power or bottleneck control was directly relevant to Congress's interest in addressing "competitive imbalance"[7] in the Cable Act's broadcast station must-carry provisions, that is not the case for Congress's interest in diverse sources of information in the leased access provisions (or its additional interest in advancing localism through the Cable Act's PEG provisions). Even if cable television service has become a less dominant source of video programming, it does not follow that there is no longer a legitimate government interest in diverse video programming. Indeed, not only is the *Second FNPRM*'s characterization of changes in the media landscape greatly

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[6] *See also id.*, ¶ 10 ("When leased access was first mandated in 1984, consumers had access only to a single pay television service, and Congress and the courts recognized cable's monopoly power in this regard.") (citations omitted).

[7] *Turner* at 633.

exaggerated, but alternative sources of video programming have not lessened concerns about the lack of diversity in video programming.[8]

a) Cable television remains a uniquely important source of video programming and information.

The *Second FNPRM*'s claims about the changes in today's medial landscape with respect to the importance of cable television are significantly overstated. Traditional cable remains the dominant way in which Americans access television. The Nielsen Total Audience Report for the third quarter of 2018 notes that the average time per adult eighteen and over spent watching live and time-shifted television per day was four hours and thirteen minutes, compared to just one hour and eleven minutes of all other video sources. The Nielson Co., *The Nielson Total Audience Report: Q3 2018* at 4 (2019), https://www.nielsen.com/us/en/insights/report/2019/q3-2018-total-audience-report/ ("Nielsen Report").[9] The six largest cable companies have more total video subscribers than the top satellite TV providers, top telephone companies, and top internet-delivered pay-TV providers combined. Leichtman Research Group, Inc., *Major Pay-TV Providers Lost About 975,000 Subscribers in 3Q 2018* (Nov. 13, 2018), https://www.leichtmanresearch.com/major-pay-tv-providers-lost-about-975000-subscribers-in-3q-2018/. Less than 3.8 percent of television households access cable content through a virtual multichannel video programming distributor ("MVPD"). Nielson Report at 15. And only 7.0 percent of households access such content exclusively through a broadband internet connection. *Id.*

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[8] This is equally true, if not more so, for the governmental interest in localism, which is relevant to PEG requirements.

[9] The other sources are: (1) "Video Focused App/Web on a Tablet" (six minutes); (2) "Video Focused App/Web on a Smartphone" (eleven minutes); (3) "Video on a Computer" (seven minutes); and (4) "TV-Connected Devices (*DVD, Game Console, Internet Connected Device*)" (forty-seven minutes). *Id.*

The *Second FNPRM*'s emphasis on online video platforms ignores the millions of Americans who lack access to broadband internet or do not use the internet because of the cost of doing so or other reasons. According to the Commission's 2019 Broadband Deployment Report, 21.3 million Americans still lack "a connection of at least 25 Mbps/3 Mbps (the Commission's current benchmark)." *In the Matter of Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, GN Docket No. 18-238, 2019 Broadband Deployment Report, ¶ 2, FCC 19-44 (2019).[10] This lack of access is more pronounced in rural areas and Tribal lands, where the percentages of people lacking access to fixed broadband is 26.4 percent and 32.1 percent, respectively. *Id.*, ¶ 33 (Figure 1). The data in 2019 report also "show that generally Americans in areas where these services [fixed terrestrial 25 Mbps/3 Mbps] are deployed typically live in census block groups with a lower percentage of households living in poverty, and with higher average populations, population densities, per capita incomes, and median household incomes than Americans living in areas without coverage by these services." *Id.*, ¶ 40.

Apart from the issue of access, sweeping assertions about how the internet has changed everything overlook that many more Americans continue to view video programming via cable television than over the internet, and that far more Americans rely on traditional television, not the internet, for news. Recent research shows that "[a]mong the roughly half of U.S. adults who prefer to watch their news, the vast majority—75%—prefer the television as a mode for watching; 20% of watchers prefer the web." Amy Mitchell, Pew Research Ctr., *Americans Still Prefer Watching to Reading the News—And Mostly Still Through Television* (Dec. 3, 2018),

[10] The Commission also maintained its conclusion that mobile broadband is not a full substitute for fixed broadband services. *Id.*, ¶11.

http://www.journalism.org/2018/12/03/americans-still-prefer-watching-to-reading-the-news-and-mostly-still-through-television/.

Moreover, many Americans do not use the internet and thus do not benefit from the online sources of video content emphasized by industry commenters and in the *Second FNPRM*. The Pew Research Center estimates that 10 percent of U.S. adults do not use the internet, and that jumps to about one third for both Americans 65 and older and Americans with less than a high school level of education. Monica Anderson, et al., Pew Research Ctr., *10% of Americans Don't Use the Internet. Who Are They?* (Apr. 22, 2019), https://www.pewresearch.org/fact-tank/2019/04/22/some-americans-dont-use-the-internet-who-are-they/. "[B]lacks and Hispanics are more likely than whites to report that they never go online," *id.*, and there are significant racial disparities in terms of having a broadband connection at home. Andrew Perrin, Pew Research Ctr., *Smartphones Help Blacks, Hispanics Bridge Some—But Not All—Digital Gaps with Whites* (Aug. 31, 2017), http://www.pewresearch.org/fact-tank/2017/08/31/smartphones-help-blacks-hispanics-bridge-some-but-not-all-digital-gaps-with-whites/ (78 percent of whites report having a broadband connection at home, compared to 65 percent black respondents and 58 percent of Hispanic respondents). In contrast, cable television service is both more widely available and viewed than online video. The Commission's most recent report on the Status of Competition in the Market for Delivery of Video Programming "assume[s] that cable MVPDs are available to *over 99 percent* of housing units." *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 16-247, Eighteenth Report, 32 FCC Rcd 568, 575, ¶ 20 (2017) (emphasis added).[11]

[11] The report explains that previous data showed that cable MVPDs provide video service to 99.7 percent of housing units, but data on estimates for the number of housing units passed is no longer tracked. *Id.*, ¶ 20 n.33.

In short, the unique importance of cable television as a means of reaching large audiences cannot be ignored and the characterization of the media landscape suggested in the *Second FNPRM* grossly overstates online and other non-cable sources of video programming as a substitute to reach such audiences.

b) The *Second FNPRM* proceeds from the flawed assumption that more sources of video programming obviate any interest in diverse sources of video programming.

That there are *more* sources of video programming does not automatically mean that there are more *diverse* sources of video programming, let alone sufficiently dramatic changes that would eliminate Congress's interest in encouraging diversity in sources of information. The Commission states that it agrees with NCTA—The Internet & Television Association ("NCTA") that "'consumers now have a competitive choice of multiple delivery systems offering more programming options of more diverse types from more diverse sources than was imaginable a quarter century ago.'"[12] The record does not support this claim.

The cited NCTA comments do not include any analysis of whether video programming has actually become any more diverse; it simply assumes that if there are more channels and sources of video programming, then any and all concerns about diverse programming have been eliminated.[13] In reality, the extent to which alternative sources of video programming has furthered diversity in video programming is uncertain at best.

In terms of original programming produced by streaming services such as Netflix, Hulu, and Amazon (as opposed to user-created programming on sites such as YouTube), it is not at all

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[12] *Second FNPRM*, ¶ 10 (quoting NCTA Comments at 3-4 (July 30, 2018) ("NCTA Comments")).

[13] NCTA's Comments (at 8 n.7) include its estimate of the percentage of national cable programming networks in which cable operators have ownership interests, but whatever relevance that has to leased access, this is not relevant to PEG. PEG furthers diverse sources of information from *non-commercial* public, educational, and government sources (not to mention the important governmental interest in localism).

clear that online programming is actually any more diverse than television programming. A 2016 Institute for Diversity and Empowerment at Annenberg report found that the percentage of speaking characters on streaming shows from underrepresented racial/ethnic groups (29.4%) was below the proportion in the United States population (37.9%), and that 37% of streaming shows had *no* Black or Asian speaking characters.[14] This is approximately the same as, if not worse than, broadcast and cable programming.[15] Similarly, the Huffington Post compared original scripted dramas on Netflix, Hulu, and Amazon to those on ABC, CBS, and NBC in terms of how they fared on the "DuVernay test"— whether Black and other minority characters have "fully realized lives" or only "serve as scenery in white stories"—and found that just 36% of streaming shows and 33% of network shows passed the test.[16] And while platforms for user-generated content such as YouTube are generally open to a wide-range of video programmers, they are not a substitute for the unique role the cable television continues to serve (as discussed above).[17]

These examples are not a comprehensive analysis of the universe of video programming. They demonstrate, however, that the Commission cannot simply assume that more video programming or the growth of internet-based video programming fully addresses the governmental interest in diverse sources of video programming.

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[14] Stacy L. Smith, et al., *Inclusion or Invisibility? Comprehensive Annenberg Report on Diversity in Entertainment* 7-8, Inst. for Diversity and Empowerment at Annenberg (2016), http://annenberg.usc.edu/pages/~/media/MDSCI/CARDReport%20FINAL%2022216.ashx.

[15] *Id.*

[16] Sara Bobolz and Brennan Williams, *If You Want to See Diversity Onscreen, Watch Netflix*, Huffington Post (Feb. 26, 2016), http://www.huffingtonpost.com/entry/streaming-sites-diversity_us_56c61240e4b0b40245c96783.

[17] The *Second FNPRM* responds to arguments about the non-comparability of open platforms to cable by noting that "leased access was not intended to favor certain types of programming (such as local programming) over others." *Second FNPRM*, ¶ 10 n.30. With respect to PEG, however, Congress expressly *did* intend to promote localism, so whatever relevance this statement has to leased access, it does not apply to PEG.

2. Changes in the media landscape have not caused increased burdens on cable operators from leased access or PEG requirements.

Changes in the media landscape have not increased the burden of leased access or PEG requirements on cable operators. The *Second FNPRM* recognizes that "demand for commercial leased access has remained low."[18] As the D.C. Circuit explained in *Time Warner*, this means that cable operators' First Amendment rights are not burdened to a degree that raises First Amendment concerns. In its decision, the D.C. Circuit assumed for purposes of its analysis:[19]

> [T]hat there is not now, nor will there be under new FCC regulations, any appreciable demand by unaffiliated programmers for access to cable systems because cable systems are already carrying a wide variety of programs from diverse sources and because leased access does not make economic sense in light of the costs of production.

The court then explained that "if unaffiliated programmers have not and . . . will not exploit the leased access provisions, then the provisions will have no effect on the speech of the cable operators."[20] As a result, cable operators First Amendment rights are unaffected, and thus cannot burden more speech than necessary to advance the government interests at issue.

In terms of the Cable Act's PEG provisions, Congress already included statutory mechanisms to ensure that these provisions burden no more speech than necessary to advance important governmental interests in diverse sources of information and localism. The Cable Act does not require that cable operators carry PEG channels; rather, it authorizes franchising authorities to require PEG channels be set aside as a condition of a franchising authority's granting a franchising license. 47 U.S.C. § 531. Franchising authorities "may require adequate

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[18] *Second FNPRM*, ¶ 10 (citation omitted).

[19] *Time Warner Entm't Co., L.P. v. FCC*, 93 F.3d 957, 970-71 (D.C. Cir. 1996).

[20] *Id.* at 971 (citing *Turner*, 512 U.S. at 636).

assurance that the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support," 47 U.S.C. § 541(a)(4)(B), and when acting on a cable operator's proposal under the formal franchise renewal provisions, franchising authorities are to take into account "future cable-related community needs and interests," 47 U.S.C. § 546(c)(1)(D). Changes in the media landscape may, for instance, have relevance to future cable-related community needs and interests, but they cannot provide a basis for a fundamental attack on the PEG provisions Congress included in the Cable Act.

III. CONCLUSION

For the reasons set forth above, the Commission should not take any action with respect to the First Amendment issues raised in the *Second FNPRM*, and it should reject requests from the cable industry to revisit its flawed First Amendment arguments in the context of the Cable Act's PEG provisions.

Respectfully submitted,

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