other signatories in writing, explaining the reasons for the proposed termination and the particulars of the asserted improper implementation. Such party also shall afford the other signatories a reasonable period of time of no less than thirty (30) days to consult and remedy the problems resulting in improper implementation. Upon receipt of such notice, the parties shall consult with each other and notify and consult with other entities that either are involved in such implementation or would be substantially affected by termination of this Agreement, and seek alternatives to termination. Should the consultation fail to produce within the original remedy period or any extension a reasonable alternative to termination, a resolution of the stated problems, or convincing evidence of substantial implementation of this Agreement in accordance with its terms, this Programmatic Agreement shall be terminated thirty days after notice of termination is served on all parties and published in the **Federal Register**.

C. In the event that the Programmatic Agreement is terminated, the FCC shall advise its licensees and tower owner and management companies of the termination and of the need to comply with any applicable Section 106 requirements on a case-by-case basis for collocation activities.

XIII. Annual Meeting of the Signatories

The signatories to this Nationwide Collocation Programmatic Agreement will meet annually on or about the anniversary of the effective date of the NPA to discuss the effectiveness of this Agreement and the NPA, including any issues related to improper implementation, and to discuss any potential amendments that would improve the effectiveness of this Agreement.

XIV. Duration of the Programmatic Agreement

This Programmatic Agreement for collocation shall remain in force unless the Programmatic Agreement is terminated or superseded by a comprehensive Programmatic Agreement for wireless communications antennas.

Execution of this Nationwide Programmatic Agreement by the FCC, NCSHPO and the Council, and implementation of its terms, constitutes evidence that the FCC has afforded the Council an opportunity to comment on the collocation as described herein of antennas covered under the FCC's rules, and that the FCC has taken into account the effects of these collocations on historic properties in accordance with Section 106 of the National Historic Preservation Act and its implementing regulations, 36 CFR part 800.

Federal Communications Commission

______

Date: ______

National Conference of State Historic Preservation Officers

______

Date: ______

Advisory Council on Historic Preservation

______

Date: ______

[FR Doc. 2020–16542 Filed 8–19–20; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[MB Docket Nos. 07–42 and 17–105; FCC 20–95; FRS 16954]

Leased Commercial Access; Modernization of Media Regulation Initiative

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Commission adopts a tier-based leased access rate calculation as part of its Modernization of Media Regulation Initiative. The Commission finds that a simplified tier-specific rate calculation best reflects regulatory changes that have occurred in the last 20 years and will more accurately approximate the value of a particular channel, while alleviating burdens on cable operators. The Commission also finds that, although changes in the marketplace cast substantial doubt on the constitutionality of mandatory leased access, leased access requirements are contained in a specific statutory mandate from Congress, so the Commission does not eliminate its leased access rules.

DATES: Effective September 21, 2020.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, contact Diana Sokolow, *Diana.Sokolow@fcc.gov,* of the Policy Division, Media Bureau, (202) 418–2120.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Second Report and Order, FCC 20–95, adopted on July 16, 2020 and released on July 17, 2020. This document will be available via ECFS at *http://fjallfoss.fcc.gov/ecfs/.* Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat. Alternative formats are available for people with disabilities (Braille, large print, electronic files, audio format), by sending an email to *fcc504@fcc.gov* or calling the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Synopsis

1. In this Second Report and Order, we adopt a tier-based leased access rate calculation as part of the Commission's Modernization of Media Regulation Initiative. The leased access rules, which implement statutory leased access requirements, direct cable operators to set aside channel capacity for commercial use by unaffiliated video programmers. In 2019, we proposed to modify the leased access rate formula so that rates would be calculated based on information specific to the tier on which the programming is carried. Today, we adopt this proposal, finding that a simplified tier-specific rate calculation best reflects regulatory changes that have occurred in the last 20 years [1] and will more accurately approximate the value of a particular channel, while alleviating burdens on cable operators. We also find that, although changes in the marketplace cast substantial doubt on the constitutionality of mandatory leased access, leased access requirements are contained in a specific statutory mandate from Congress, so we do not eliminate our leased access rules.

2. Congress established commercial leased access as part of the Cable Communications Policy Act of 1984 (1984 Act). According to the 1984 Act, codified at section 612 of the Communications Act of 1934, as amended (the Act), cable operators are required to set aside capacity for use by unaffiliated programmers. Under these statutory provisions, the amount of channel capacity reserved for leased access programming depends on the cable system's total activated channel capacity. Cable operators with more activated channels are required to set aside a greater number of leased access channels than those cable operators with fewer activated channels. Congress created commercial leased access to ''promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems.''

3. Congress further authorized the Commission to adopt maximum reasonable rates for commercial leased access as part of the Cable Television Consumer Protection and Competition Act of 1992, and also provided that the price, terms, and conditions for leased access must be ''sufficient to assure that such use will not adversely affect the operation, financial condition, or market

[1] Specifically, the current rate formula was adopted consistent with the ''tier neutrality'' principle, but the Commission has since ceased regulation of cable programming service tier (CPST) rates as of 1999, and that principle no longer applies.

development of the cable system.'' The Commission accordingly adopted leased access rate regulations in 1993, and subsequently modified its leased access regulations in 1996 and 1997. The Commission's implementing rules, which the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) upheld in 1998, include a formula for calculating maximum rates that cable operators could charge leased access programmers. Specifically, to permit cable operators to recover their costs and earn a profit, the Commission adopted a maximum reasonable rate formula for full-time leased access channels based on the ''average implicit fee'' that other programmers pay for carriage. Currently, for a full-time channel on a tier with a subscriber penetration over 50 percent, our rules require that an operator calculate the average implicit fee for all eligible tiers rather than just the individual tier where the channel will be placed. Although the Commission revised its commercial leased access rate rules in its *2008 Leased Access Order,* those rules never went into effect. Thus, the leased access rate rules adopted in the *1993 Rate Regulation Order,* as subsequently amended, remain in effect.

4. In the *2019 Leased Access Order,* we updated the leased access rules based on our determination that the video marketplace had changed significantly since the Commission initially adopted its leased access rules. We explained that the marketplace has become far more competitive than it was when leased access was first mandated in 1984, at which time consumers had access only to a single pay television service and cable had monopoly power. In particular, we focused on the increased availability of media platforms, including online platforms that programmers can utilize at very low cost to distribute their video programming, as well as the low demand for commercial leased access. To further the Commission's media modernization efforts, we vacated the *2008 Leased Access Order* and adopted updates and improvements to the existing leased access rules. A *Second Further Notice of Proposed Rulemaking* (*Second FNPRM*) proposed a tier-specific leased access rate formula and sought comment on whether existing leased access requirements can withstand First Amendment scrutiny in light of video programming market changes.

5. The *Second FNPRM* elicited seven comments and six replies, none of which opposed the proposed tier-specific rate formula. Commenters largely reiterated arguments that the marketplace has changed in ways that lessen the governmental interest in leased access regulations. For example, Americans for Prosperity (AFP) explains that ''great advances in technology allow households to readily access innumerable content from varied sources, as well as from internet-delivered video programming services and over-the-air broadcasters.'' Similarly, the Free State Foundation (Free State) explains that ''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.'' Regarding the First Amendment, the record reflects a lack of consensus regarding what level of scrutiny should apply and whether the leased access rules remain constitutional.

6. *Tier-Based Fee Calculation.* We adopt our unopposed proposal to implement a simplified tier-specific leased access fee calculation. This rule change will ease burdens on cable operators while also fulfilling our statutory obligation to establish rules for determining maximum reasonable leased access rates. We believe the modifications are warranted given the significant changes to the overall rate regulation regime that have occurred since our current leased access rate rules were adopted.[2] The ''average implicit fee'' will continue to reflect the maximum rate per month that a cable operator may charge a leased access programmer for a full-time channel. Consistent with our proposal in the *Second FNPRM,* we revise our rules to provide that the average implicit fee will be calculated by first determining the total amount the operator receives in subscriber revenue per month for the programming on the tier on which the leased access channel will be placed. Next, the operator will subtract the total amount it pays in programming costs per month for that tier. Finally, the operator will divide that figure by the number of channels on that tier. The result of these calculations will be the maximum per channel rate that a cable operator can charge a leased access programmer for full-time carriage.

7. When the Commission adopted the average implicit fee calculation, it envisioned a simple scheme based on existing and easily verifiable data. Although the weighting scheme was intended to be a simple way to average the leased access rate across tiers, in practice it has proven to be confusing and time-consuming. The weighting scheme incorporated the concept of tier neutrality, which is a vestige of CPST rate regulation, which no longer exists.[3] By now basing the average implicit fee solely on the programming revenue and costs for the tier on which a leased access programmer is offered carriage, we eliminate the need for a complicated weighting scheme that considers subscriber revenue and programming costs across all tiers with subscriber penetration over 50 percent. The rate formula will now be a tier-specific calculation, thus representing a more accurate assessment of the channel's value on that particular tier. This is the same rate calculation method that previously has been in place for channels placed on tiers with less than 50 percent subscriber penetration.[4] The revised rate formula should result in cable operators using revenue and cost estimates that more closely reflect the value of the channel sought by the leased access applicant, and thus better serve the goals of the statute. Rates are likely to decrease if leased access programmers request channel capacity on less profitable tiers, whereas rates are likely to rise if programmers request channel capacity on more profitable tiers.

8. We find that a tier-specific implicit fee calculation will mitigate unnecessary burdens on cable operators by simplifying the leased access fee calculation while also fulfilling our statutory obligation to establish rules for determining maximum reasonable leased access rates. Although a few cable commenters suggest that the Commission could permit marketplace negotiations to establish the maximum reasonable rates, they also support the tier-specific implicit fee calculation that NCTA initially proposed. Considering our statutory obligation to ''establish rules for determining maximum reasonable [leased access] rates,'' we do not think Congress intended for us to rely on the marketplace to establish maximum reasonable leased access rates, even if doing so might be ''less intrusive'' on cable operators. We agree with NCTA that ''[t]ier-specific rates are

[2] As noted above, the Commission ceased regulation of CPST rates as of 1999, and thus the ''tier neutrality'' principle pursuant to which the current rate formula was adopted no longer applies.

[3] Tier neutrality requires cable operators to charge the same per channel rate regardless of the programming costs incurred on a specific tier, and that principle has no longer applied since the Commission ceased regulation of CPST rates in 1999.

[4] A mathematical representation of the revised leased access rate calculation is as follows, where T = Elected Tier, C = Channels, R = Total Tier Monthly Subscriber Revenue, K = Total Tier Monthly Programming Costs, and A = Maximum Full-time Rate Per Month: $A = (R_T - K_T)\ (1 / C_T)$.

the fairest approximation of the maximum reasonable rate,'' given that such rates will be based on the actual programming revenue and costs associated with the tier on which the leased access programmer will be carried. We note that no commenter disagrees. In addition, we expect that the tier-specific calculation will be much simpler than the current weighting scheme because it is focused solely on a specific tier, and not all tiers with subscriber penetration over 50 percent.

9. At this time, we decline to adopt any other changes to the leased access rate formula. ACA Connects is the only party that makes additional proposals in response to the *Second FNPRM,* asserting that ''additional steps should be taken to reduce administrative burdens, particularly for smaller entities.'' As explained further in the Final Regulatory Flexibility Analysis, we note that simplifying the rate formula to be based on the specific tier will benefit small cable operators, as well as other cable operators. Accordingly, no additional relief for small cable operators is necessary at this time. More specifically, ACA Connects proposes that the Commission establish a universal per channel minimum leased access rate that is presumptively reasonable or modify the rate formula to make sure that the least profitable cable operators are not forced to offer leased access at extremely low rates or even for free, thus diverting capacity that would be better used for broadband. Despite these arguments, the record does not contain any evidence to demonstrate the frequency with which the leased access rate might be extremely low or even free. With regard to a universal rate, we find that the average implicit fee is a more accurate representation of the actual value of the channel to the operator because it is based on the operator's own data.[5] Indeed, the leased access rate calculation merely reflects each cable operator's existing market conditions, it does not dictate them. Nevertheless, we note that our rules provide for waivers in unusual cases. Consistent with our current approach, we will consider the need for special relief on an individual basis in instances where significant hardship has ''adversely affect[ed] the operation, financial condition, or market development of the cable system.''[6]

10. ACA Connects also requests that the Commission ease administrative burdens by permitting cable operators to use a single set of data to respond to leased access requests for a set period of time, such as three years, rather than having to obtain data and recalculate the formula for each request. We find that using a single data set for three years would be less likely to result in calculations that accurately represent the current value of carriage. Accordingly, we do not adopt this proposal. We do, however, take the opportunity to codify the determination set forth in the *1993 Rate Regulation Order* that the average implicit fee shall be calculated annually based on contracts in effect in the previous calendar year. The Commission has previously stated that under its rules, cable operators are required to calculate the maximum rates annually based on the contracts in effect in the previous calendar year, rather than at the time of each request. Thus, in response to the request from ACA Connects, we find it is in the public interest to codify in our rules[7] the Commission's longstanding determination on this issue that the average implicit fee shall be calculated annually based on contracts in effect in the previous calendar year.[8]

11. *The First Amendment.* We agree with commenters that the constitutional foundation for the leased access regime is in substantial doubt; nonetheless, leased access rules are required pursuant to a specific statutory mandate from Congress. For example, section 612(b) of the Act specifically states that a ''cable operator shall designate channel capacity for commercial use by persons unaffiliated with the operator in accordance with the following requirements. . . .'' The Commission has long recognized that decisions about the constitutionality of Congressional enactments are generally outside the purview of administrative agencies. As a result, we decline to eliminate our leased access requirements and leave it to the courts to address the current constitutional status of the leased access statute, particularly given that the D.C. Circuit has previously upheld the constitutionality of the leased access statute, albeit under different marketplace conditions.

12. The *Second FNPRM* sought comment on application of the First Amendment to the Commission's rules and statutory provisions concerning full-time leased access, including in particular whether the leased access rules can continue to withstand First Amendment scrutiny in light of marketplace changes. Commenters disagree as to whether strict scrutiny or intermediate scrutiny should apply, and they also disagree as to whether the leased access rules would pass muster under the applicable level of scrutiny.[9] Strict scrutiny applies to content-based speech restrictions and requires that a statute be narrowly tailored to serve a compelling governmental interest. When the D.C. Circuit previously upheld the constitutionality of the leased access statute, it determined that the statute is content-neutral and thus subject to intermediate scrutiny, which it passes 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.''[10]

13. We agree with numerous commenters who argue that marketplace changes—such as increased internet usage and availability, and competition from other multichannel video programming distributors (MVPDs) as well as online video distributors—appear to have eroded the original justification for the leased access rules: To safeguard competition and diversity in the face of cable operators' monopoly power. Free State explains that, whereas in the late 1980s and early 1990s consumers generally ''had little choice for pay-TV services other than their local cable operator,'' today ''choice among competing providers offering a diverse array of content is now prevalent'' thanks to the availability of direct broadcast satellite (DBS) providers, telephone companies providing video services, and the availability of online video providers. Commenters highlight the fact that

[5] The fact that the Commission previously adopted an interim safe harbor percentage to be used in the unrelated context of calculating universal service contributions does not alter our analysis. Universal service is an entirely separate regulatory regime with unrelated factual considerations.

[6] *See* 47 U.S.C. 532(c)(1).

[7] Because this revision conforms our rules to the language set forth in the *1993 Rate Regulation Order,* we find this change to be editorial and non-substantive. As such, we find good cause to conclude that notice and comment are unnecessary for this revision.

[8] We assume, in response to ACA Connects, that the annual calculation is performed in conjunction with an actual request.

[9] Some commenters contend that leased access no longer passes muster under intermediate scrutiny. Other commenters argue that leased access may continue to pass muster under intermediate scrutiny. Still other commenters maintain that strict scrutiny should apply, and leased access would not pass muster under it. NAB also states that the Commission ''should avoid reaching constitutional questions unnecessarily.''

[10] NCTA contends that the D.C. Circuit's rationale in *Time Warner* v. *FCC* has since been disavowed by the Supreme Court. NAB disagrees with this argument.

MVPD subscribership losses are related to increased subscribership to online streaming services. For example, NCTA explains that the internet now ''supports a broad array of platforms through which program networks and other content providers may distribute their content to viewers,'' including both streaming services and on-demand platforms.

14. Commenters assert that as a result of video marketplace changes, leased access is no longer needed to promote diversity or competition in the marketplace. These marketplace changes may alter the evaluation of the relevant governmental interest, regardless of whether strict scrutiny or intermediate scrutiny applies. Although some commenters maintain that ''cable operators do indeed still occupy a dominant position in the pay-TV marketplace,'' the record also indicates that the utility of cable leased access as a means of promoting diversity or competition in the marketplace has changed. With respect to the burden placed on cable operators by leased access requirements, NCTA argues that leased access continues to place burdens on cable operators ''by interfering with their speech; consuming capacity and resources that could be used for other purposes, content, and services that are much more highly valued by consumers; and placing cable operators at a competitive disadvantage.'' On the other hand, NAB maintains that the changes in the video marketplace have actually reduced the burdens of leased access on cable operators, for example, because their channel capacity has increased.[11]

15. We agree with those commenters that maintain that it is not the role of the Commission to adjudicate in the first instance the constitutionality of leased access requirements that have been mandated by Congress.[12] We have no need to opine on the appropriate level of constitutional scrutiny for a First Amendment analysis as is debated in the record or to decide whether leased access requirements survive any particular level of scrutiny. Finally, although the constitutionality of the leased access regime is in doubt, we express no opinion whatsoever as to the constitutionality of other carriage-related obligations placed on cable operators under the Act. We are mindful that each carriage-related provision presents unique circumstances, and that those other provisions are not at issue in the instant proceeding.

16. *Final Regulatory Flexibility Analysis.* As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) relating to the Second Report and Order. In summary, the Second Report and Order adopts a tier-based leased access rate calculation. It also finds that, although changes in the marketplace cast substantial doubt on the constitutionality of mandatory leased access, leased access requirements are contained in a specific statutory mandate from Congress, so the Commission does not eliminate its leased access rules. The action is authorized pursuant to sections 4(i), 303, and 612 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303, and 532. The types of small entities that may be affected by the action fall within the following categories: Cable Television Distribution Services, Cable Companies and Systems (Rate Regulation), Cable System Operators (Telecom Act Standard), Cable and Other Subscription Programming, Motion Picture and Video Production, and Motion Picture and Video Distribution. The projected reporting, recordkeeping, and other compliance requirements include the modification of the leased access formula so that rates will be specific to the tier on which the programming is carried. The First Amendment discussion in the Second Report and Order would not affect any reporting, recordkeeping, or other compliance requirements. The SBA did not file comments. In considering the impact on small entities, the Commission explains that the simplified, tier-based calculation for the average implicit fee will mitigate unnecessary burdens on cable operators, including small cable operators, while also fulfilling the Commission's statutory obligation to establish rules for determining maximum reasonable leased access rates. The Commission also believes the modifications are warranted given the significant changes to the overall rate regulation regime that have occurred since our current leased access rate rules were adopted. Although a few cable commenters suggest that the Commission could permit marketplace negotiations to establish the maximum reasonable rates, they also support a tier-specific implicit fee calculation. Considering the Commission's statutory obligation to establish rules for determining maximum reasonable leased access rates, we conclude that adopting a tier-specific rate calculation is the best approach. The Second Report and Order also considers alternate proposals from ACA Connects, but it concludes that ACA's proposals are unsupported by the record and would be less accurate than the adopted approach. The Second Report and Order additionally responds to a request from ACA by modifying the leased access rules to include the Commission's prior statements that the average implicit fee shall be calculated annually based on contracts in effect in the previous calendar year.

17. *Paperwork Reduction Act.* This Second Report and Order does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA). In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002.

18. *Ordering Clauses.* Accordingly, *it is ordered* that, pursuant to the authority found in sections 4(i), 303, and 612 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303, and 532, this Second Report and Order *is hereby adopted.*

19. *It is further ordered* that part 76 of the Commission's rules, 47 CFR part 76, *is amended* as set forth below, and such rule amendments shall be effective thirty (30) days after the date of publication in the **Federal Register**.

20. *It is further ordered* that, should no petitions for reconsideration or petitions for judicial review be timely filed, MB Docket No. 07–42 shall be *terminated,* and its docket *closed.*

21. *It is further ordered* that the Commission *shall send* a copy of this Second Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 76

Administrative practice and procedure, Cable television.

Federal Communications Commission.

Marlene Dortch,

Secretary.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 76 as follows:

[11] We need not make a conclusive determination on this issue given our finding that the question of the constitutionality of leased access is a matter generally outside the purview of the Commission.

[12] We thus disagree with commenters asserting that the Commission should decline to enforce the leased access rules because they would be found unconstitutional today.

PART 76—MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

■ 1. The authority citation for part 76 continues to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 338, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

■ 2. Amend § 76.970 by revising paragraphs (d) and (e) to read as follows:

§ 76.970 Commercial leased access rates.

* * * * *

(d) The maximum commercial leased access rate that a cable operator may charge for full-time channel placement on any tier is the average implicit fee for full-time channel placement on that tier.

(e) The average implicit fee identified in paragraph (d) of this section shall be calculated by first calculating the total amount the operator receives in subscriber revenue per month for the programming on the tier on which the channel will be placed, and then subtracting the total amount it pays in programming costs per month for that tier (the ''total implicit fee calculation''). Next, the total implicit fee is divided by the number of channels on that tier (the ''average implicit fee calculation''). The result, the average implicit fee, is the maximum rate per month that the operator may charge the leased access programmer for a full-time channel on that tier. The license fees for affiliated channels used in determining the average implicit fee shall reflect the prevailing company prices offered in the marketplace to third parties. If a prevailing company price does not exist, the license fee for that programming shall be priced at the programmer's cost or the fair market value, whichever is lower. The average implicit fee shall be calculated annually based on contracts in effect in the previous calendar year. The implicit fee for a contracted service may not include fees, stated or implied, for services other than the provision of channel capacity (*e.g.,* billing and collection, marketing, or studio services).

* * * * *

[FR Doc. 2020–16557 Filed 8–19–20; 8:45 am]

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