Cathy Williams

From: Gretchen Lohmann [GLohmann@NCTA.com]
Sent: Tuesday, May 04, 2010 4:27 PM
To: nicholas_a._fraser@omb.eop.gov; Cathy Williams; PRA
Subject: NCTA Comments
Attachments: NCTA PRA Comments in Program Access.pdf

Good afternoon:

Attached are NCTA's comments in the Notice of Public Information Collections Being Reviewed by the Federal Communications Commission - OMB Control Number 3060-0888.

Please contact us if you have any questions.

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

Notice of Public Information Collections Being Reviewed by the Federal Communications Commission	)))	OMB Control Number 3060-0888

Attention: Cathy Williams

PAPERWORK REDUCTION ACT COMMENTS OF THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

The National Cable & Telecommunications Association ("NCTA") files these comments in response to the Federal Communications Commission's Notice ("PRA Notice" or the "Notice"),[1] pursuant to the Paperwork Reduction Act of 1995 ("PRA"), inviting comment on the new information collection requirements adopted as part of the Commission's newly expanded program access rules. *Report and Order*, MB Docket No. 07-192 (released January 20, 2010). As required by the PRA, the Commission has requested comment on, among other things, the accuracy of the agency's estimate of the burden of the proposed collection of information.[2] As described below, the PRA Notice fails to properly reflect newly created burdens imposed by the *Report and Order*. Accordingly, the Commission should correct its information collection notice to comply with the Paperwork Reduction Act and thereafter provide for a new round of public comment before the rules are permitted to become effective.

DISCUSSION

The *Report and Order* for the first time expands the program access rules to reach entities *never previously covered* by the program access requirements –terrestrially-delivered

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1 43 Fed. Reg. 10263 (Mar. 5, 2010).

2 44 U.S.C. § 3506.

programming providers that are owned or controlled by a cable operator – and subjects their actions to potential complaints. The PRA Notice suggests that the paperwork burdens imposed by the *Report and Order* fall primarily on entities that may now file complaints to seek access to terrestrially-delivered programming. However, the *Report and Order* imposes equal or greater burdens on potential defendants in such complaints that the PRA Notice fails to consider:

- The Report and Order increases the paperwork burdens associated with complaints regarding access to terrestrially-delivered programming networks, yet the PRA Notice fails to accurately describe the breadth and extent of such additional information collection burdens. The *Report and Order* itself anticipates that the new rules will engender additional discovery requests that likely will be directed primarily at defendants.[3] It directs all litigants – both complainants and defendants – to compile and prepare regression analyses, consumer surveys, and other empirical studies regarding the competitive impact of the programming at issue in the complaint.
- It establishes a presumption in favor of a finding of significant hindrance or harm to complainants where a defendant has withheld a terrestrially-delivered regional sports network ("RSN"), thereby introducing significant additional paperwork burdens by placing upon the defendant the heavy burden of demonstrating that its actions have *not* caused significant hindrance or harm to the complainant.
- The *Report and Order* increases paperwork burdens by expanding the scope of program access rules to cover terrestrially-delivered programming networks, subjecting them to the burdens of answering and defending complaints.

The PRA Notice either fails to consider or to accurately describe the information collection impact of these new rules.

First, the PRA Notice fails to accurately describe the breadth and extent of the additional information collection burdens associated with applying Section 628(b) of the program access rules to terrestrially-delivered programming services. The *Report and Order* does not just create additional paperwork burdens (which are mentioned in the Notice) associated with preparing a

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[3] *See Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, 25 FCC Rcd 746, ¶ 56 (2010) ("*Report and Order*").

complaint and the answer pursuant to the new claims. Rather, the newly-authorized complaints "involving terrestrially-delivered programming, unlike complaints involving satellite-delivered programming, entail an *additional* factual inquiry regarding whether the unfair act has the purpose or effect set forth in Section 628(b)."[4] A determination of whether or not an alleged unfair practice involving terrestrially-delivered programming has the "purpose or effect of significantly hindering or preventing the MVPD" from providing satellite cable programming to consumers is a fact-intensive inquiry requiring an assessment of the competitive impact of the programming at issue on the relevant markets.[5] Thus, the *Report and Order* expressly endorses submission of regression analyses, consumer surveys, and other statistically reliable empirical data by both complainants and defendants.[6] The PRA Notice, however, makes no mention at all of the need to compile these complex economic studies and statistical analyses and does not appear to have taken into account the person-hours associated with their preparation and submission.[7]

The PRA Notice also fails to identify the increased paperwork burdens associated with preparing and responding to new categories of discovery requests aimed at eliciting facts relevant to the competitive impact of the programming at issue on the complaining MVPD's ability to provide satellite cable programming to consumers. These new burdens also fall disproportionately on defendants, since the Commission itself believes that "a defendant cable

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4 *Id.* ¶ 49 (emphasis supplied).

5 *See id.*

6 *Id.* ¶ 56:

> In order to provide some guidance to potential litigants, . . . we provide the following illustrative examples of evidence that they might consider providing. A litigant might rely on an appropriately crafted regression analysis that estimates what the complainant's market share in the MVPD market would be if it had access to the programming and how that compares to its actual market share. A litigant might also rely on statistically reliable survey data indicating the likelihood that customers would choose not to subscribe to or switch to an MVPD that did not carry the withheld programming.

7 *See generally* PRA Notice, 43 Fed. Reg. 10263.

operator or cable-affiliated programmer is likely to have the best information about the competitive significance of its [programming] (*e.g.*, value of subscribers and local demand for the" programming, and anticipates that the "discovery process [will] enable[] parties to obtain additional evidence needed to satisfy their burdens."[8] The new burdens associated with an expanded category of fact-intensive program access claims subject to discovery can easily run into hundreds of additional hours of paperwork for both the complainant and the defendant. Such discovery would almost certainly need to be conducted under a protective order,[9] creating an additional paperwork burden. Yet the interplay of the new claims with discovery is not mentioned at all in the Notice.

Second, the PRA Notice fails to adequately assess the paperwork burdens associated with the vicarious liability regime created in the *Report and Order*. The *Report and Order* is designed to subject the program access rules' unfair practices provision to withholding of cable-affiliated terrestrial cable programming from competing MVPDs. But the express statutory language of Section 628(b) of the Communications Act, establishing the parties subject to the rules, only restricts unfair practices by cable operators, satellite cable programming vendors, or satellite broadcast programming vendors.[10] The *Report and Order* seeks to bring the newly-authorized complaints within the scope of this provision by subjecting cable operators and their affiliated satellite programming vendors to complaints for terrestrial programming if they own or control or are under common control with a terrestrial cable programming vendor.[11]

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8 *Report and Order* ¶ 56.

9 *See* 47 C.F.R. § 76.1003(k).

10 47 U.S.C. § 548(b).

11 *Report and Order* ¶ 57.

The PRA Notice acknowledges that this additional element of proof creates a paperwork burden for complainants, but fails to adequately explain the paperwork burden of this requirement on defendant cable operators and satellite cable programming vendors. In effect, cable operators and satellite cable programming vendors may be required to answer for the conduct of a terrestrial programming affiliate in which they hold only a small ownership interest and over which they may not wield day-to-day control. Indeed, the Commission states expressly in the *Report and Order* in cases where a cable operator or a cable-affiliated satellite cable programming vendor "does not have *de jure* control of a terrestrial programmer, we do not foreclose complaints alleging that" a cable operator or cable-affiliated satellite cable programming vendor "has nonetheless influenced the programmer to engage in discrimination."[12]

Thus, the *Report and Order* apparently could permit complainants to make general assertions about a cable operator's or cable-affiliated satellite cable programmer's control over an affiliated terrestrial programmer in the complaint, and then seek to elicit via discovery, facts relevant to the issue of whether the named defendants actually control the programming at issue. Yet none of the paperwork burdens potentially associated with this new vicarious liability regime are mentioned in the Notice.

Third, where complaints are lodged against cable-owned or -operated RSNs, the *Report and Order* provides that complainants may "invoke a rebuttable presumption" that Section 628(b) had been violated in order to relieve "litigants and the Commission staff" from "undertak[ing] repetitive examinations of our RSN precedent and the relevant historical

[12] *Id.* ¶ 57 n.227.

evidence."[13] Instead, the burden of proof effectively shifts to the defendants to overcome the presumption "by establishing that the unfair act does not have the purpose or effect of significantly hindering or preventing the MVPD from providing satellite cable programming or satellite broadcast programming."[14]

The PRA Notice identifies Section 76.1001(b)(2), which authorizes the filing of complaints to seek redress for alleged unfair practices involving terrestrial cable programming, as requiring OMB approval,[15] but that rule does not reflect the rebuttable presumption that effectively shifts the burden of proof to the defendant.[16] To the contrary, the PRA Notice simply provides that "*a complainant shall have the burden of proof* that the defendant's alleged conduct has the purpose or effect of hindering significantly or preventing the complainant from providing satellite cable programming or satellite broadcast programming to subscribers or consumers; an answer to such a complaint shall set forth the defendant's reasons to support a finding that the complainant has not carried this burden."[17] The PRA Notice summary, like the Commission's rule, does not reflect the burden-shifting presumption adopted in the *Report and Order*.[18]

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[13] *Id.* ¶ 52.

[14] *Id.*

[15] The two other rule sections for which the FCC is seeking OMB approval are Section 76.1003(c)(3), which requires a program access complaint to show that the complainant competes with the defendant cable operator, and Section 76.1003(l), which permits a complainant seeking renewal of an existing programming contract to request a temporary standstill of the price, terms and conditions of the existing contract pending resolution of the complaint.

[16] In fact, unlike the rebuttable presumption the Commission adopted in its rules governing effective competition petitions, *see* 47 C.F.R. §76.906, the rebuttable presumption adopted in the *Report and Order* is not codified in any of the Commission's rules.

[17] 43 Fed. Reg. at 10264.

[18] *Id.* at 10263-4 ("A complainant shall have the burden of proof that the defendant's alleged conduct has the purpose or effect of hindering significantly or preventing the complainant from providing satellite broadcast programming to subscribers or consumers; an answer to such a complaint shall set forth the defendant's reasons to support a finding that the complainant has not carried this burden.").

Neither reflects the newly-imposed burden that the Commission's decision will place on cable operators and RSNs to rebut the presumption that their conduct was unlawful.[19]

Even if the Commission had taken the changes discussed above into account in compiling estimates of the paperwork burdens in the PRA Notice, they could not be completed within the burden hours estimated by the Commission.[20] The PRA Notice estimates that the total paperwork burden after inclusion of the significant changes arising from the *Report and Order* will involve a total of 640 respondents, requiring a total annual burden of 20,960 hours[21] – up from the estimated 600 total annual respondents generating a total annual paperwork burden of 19,200 hours under the existing rules.[22] This means that the Commission is estimating that the significant additional paperwork burdens described above will increase the paperwork burden for the average respondent by less than one hour per year -- from an average of 32 hours per year to an average of 32.75 hours per year. Such a relatively slight estimated increase in paperwork burdens cannot be reconciled with the Commission's own acknowledgement of the fact-intensive nature of the new claims authorized in the *Report and Order*. The PRA requires that the estimate

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19 *Report and Order* ¶ 56 (footnote omitted).

20 The PRA Notice estimates a response time of 4.1 to 61.4 hours for each of the different types of information collections listed. While the information presented in the Notice makes it difficult to ascertain the basis for this range of estimates, cable operators conservatively estimate that the burden of presenting evidence to rebut the presumption will likely exceed 250-300 hours just to perform a regression analysis. This estimate is largely based on the assumption that the data necessary to perform the regression analysis is readily available; however, some data, including competitors' economic and marketing data, would only be available from the complainant and other competitors and gaining access to such data likely would significantly increase the burden of performing a regression analysis.

21 PRA Notice, 43 Fed. Reg. at 10,263.

22 *See* Office of Management and Budget, Information Collection Review, http://www.reginfo.gov/public/do/PRAMain.

be corrected to provide a "specific, objectively supported estimate of burden" before the OMB can approve the new rules.[23]

Lastly, the PRA Notice fails to acknowledge the additional information collection burdens associated with expanding the program access rules to cover terrestrially-delivered programming services. The basic program access complaint rules[24] in place prior to this *Report and Order* imposed information collection requirements. The program access rules, when adopted, were acknowledged by the Commission to impose such requirements,[25] were submitted to OMB for clearance,[26] and received OMB control number 3060-0888, which appears in the Code of Federal Regulations at 47 C.F.R. § 0.408.

If the rules imposed an information collection burden when covering only satellite-delivered services, they necessarily have increased information collection burdens when also covering terrestrial services. An agency may not change the coverage of a rule that has received OMB clearance without further OMB approval. *Cottage Health Systems v. Sebelius*, 631 F. Supp. 2d 80, 100 (D.D.C. 2009).

Accordingly, OMB control number 3060-0888 cannot cover complaints and the associated information collection requirements relating to the distribution of terrestrial services. Unless there is a "valid" control number there can be no obligation to comply with the rules.[27]

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[23] *See* 44 U.S.C. § 3506(c)(1)(A); *see also id.* § 3506(c)(2)(A) (providing for review by "members of the public and affected agencies concerning each proposed collection of information" to evaluate the "accuracy of the agency's estimate of the burden of the proposed collection of information.").

[24] 47 C.F.R. § 76.1003.

[25] *First Report and Order*, 8 FCC Rcd 3359, 3429 (1993).

[26] 58 Fed. Reg. 29581 (May 21, 1993).

[27] The PRA states "(a) Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information that is subject to this chapter if – (1) the collection of information does not display a valid control number assigned by the Director [of the OMB] in accordance with this chapter...." 44 U.S.C. § 3512.

Failure to resolve this apparent oversight will result in ongoing confusion and controversy regarding rule compliance.

In short, there are significantly greater information collection burdens associated with the new rules created in the *Report and Order* that are not recognized in the PRA Notice. Given the lack of an accurate and complete description of all the additional paperwork burdens imposed by the new rules, the Commission has not satisfied its obligations under the PRA.

Respectfully submitted,

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