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June 7, 2010

VIA EMAIL

Nicholas A. Fraser
The Office of Management and Budget
725 17th Street, N.W.
Washington, D.C. 20503

Re: OMB Control Number: 3060-0888

Dear Mr. Fraser:

The National Cable & Telecommunications Association ("NCTA"), by its attorneys, hereby responds to the *Notice*[1] requesting comment under the Paperwork Reduction Act ("PRA") on the revised information collection requirements imposed by the Federal Communications Commission in its new program access rules. In comments to the Commission on its initial estimate of the burden of the collection of information required by the new rules, NCTA showed that the costs of complying with the new rules would substantially exceed that estimate.[2] The initial PRA estimates, as NCTA demonstrated, failed to take into account the multiple effects of the Commission's decision to expand the scope of the program access rules to encompass for the first time contractual arrangements involving *terrestrially* delivered program networks that are owned in whole or in part by, or under common control with, a cable operator.

The Commission's Supporting Statement for the most part fails to adequately address these concerns or accurately describe the burdens of its new information collections. In a revised assessment, the Commission has modified its estimate, but it has still failed to recognize the full effects of its rule changes. It has underestimated the effects of the new burdens that it acknowledges, and it has continued to ignore some of the burdens that its rules will impose.

I. The FCC Ignored the Effect of Its Presumption Regarding Regional Sports Networks in Assessing the Likelihood of Complaints.

In its Supporting Statement, the agency now essentially concedes that it significantly underestimated the information collection burdens associated with terrestrial programming complaints:

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1 75 Fed. Reg. 25250 (May 7, 2010).

2 Paperwork Reduction Act Comments of the National Cable & Telecommunications Association, submitted May 4, 2010 ("NCTA Comments").

> [W]hile the calculations reflected in the Notice resulted in an estimate that complaint proceedings involving terrestrially delivered, cable-affiliated programming would impose an average burden over four times greater than the other filings covered by this information collection, we have now *revised* these calculations, with a new estimate that these complaint proceedings will impose an average burden of *nine times* greater – or 540 hours on average for parties initiating their own filings.[3]

In other words, it revised its initial estimate of the cost of complying with a terrestrial complaint upward by *125%*.

But the effect of that revision on the total annual burden of complying with such complaints depends, of course, on how many terrestrial programming complaints the Commission expects to receive – and the number expected by the agency is very low. The Commission's Supporting Statement explains that only a very small percentage of the "40 additional average annual respondents resulting from the new rules" are likely to be parties initiating complaints regarding terrestrial programming, while the majority will involve less burdensome standstill proceedings. Thus, it concludes that there will be 15 standstill proceedings and only *five* terrestrial complaints (each presumably involving two parties).

Wholly apart from the fact that the Commission offers no explanation for its starting point that there will be 40 additional respondents resulting from the new rules, the Commission's prediction that only a small percentage of those respondents will be parties to terrestrial complaints appears to be based in part on its belief that its Report and Order "specifically cautioned potential complainants that they are unlikely to succeed in a complaint involving a terrestrially delivered, cable-affiliated network that offers replicable programming, such as local news programming."[4] But the Commission fails to account for its newly-established rebuttable *presumption* "that an unfair act involving a terrestrially delivered, cable-affiliated regional sports networks ('RSN') has the purpose or effect set forth in Section 628(b)."[5] Even if complaints regarding local news networks are likely to be *discouraged* by the Commission's *warning* of the unlikelihood of success, it should be even more likely that complaints regarding RSNs will be *encouraged* by the Commission's *presumption* of success. Yet the Commission, in seeking to explain its expectation of only a small number of complaints overall, cites only the effects of the warning and not the effects of the presumption.

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[3] Supporting Statement at 12.

[4] *Id.*

[5] *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, 25 FCC Rcd 746, ¶ 52 (2010).

II. The Commission Ignored the Effect of Its Presumption Regarding Regional Sports Networks in Calculating the Burdens of Discovery and Compiling Evidence To Rebut the Presumption.

The Commission similarly ignores the effect of its presumption regarding RSN complaints on the extent to which parties in complaint proceedings will be required to undertake costly regression analyses and other substantial evidentiary studies. In its comments on the initial PRA *Notice*, NCTA argued that the *Notice* failed to reflect the burdens resulting from the fact that the Order "directs all litigants . . . to compile and prepare regression analyses, consumer surveys, and other empirical studies regarding the competitive impact of the programming at issue."[6] In response, the Supporting Statement contends that the Order "does *not* specify the evidence a litigant must submit."[7] It points out that the Order recognizes that "not all potential *complainants* will have the resources to perform a regression analysis or market survey" and that "these examples should be considered illustrative only."[8]

At the same time, however, the Commission concedes that in a program access complaint proceeding, "a complainant (in its complaint) and a defendant (in its answers) are required to put forth evidence to prove or rebut claims."[9] While it may be that neither the rules nor the Order specifically compel parties to provide regression analyses or any other *particular* form of evidence, the Commission's establishment of a presumption regarding the competitive impact in cases involving RSNs may *effectively* require defendants in those cases to undertake such analyses, as well as consumer surveys and other empirical studies, in order to rebut that presumption.

The Commission has failed to submit this presumption for OMB approval and the Supporting Statement does not adequately address this oversight. The Commission contends that its "calculation of the burden hours takes into account the need to provide *some* form of evidence regarding the competitive impact of the programming at issue."[10] But in light of the presumptions and burdens of proof that it has established for cases involving RSNs, the rules would effectively require the most costly and time consuming forms of evidence.

III. The Commission Erroneously Assumed That the Increased Discovery Burdens Associated with Its Expansion of the Scope of the Program Access Rules Did Not Require OMB Approval.

Finally, the Supporting Statement demonstrates that the FCC has significantly understated the increased costs and burdens associated with *discovery* in complaint proceedings involving terrestrially delivered programming. The Supporting Statement expressly disclaims the need for any PRA review of the additional discovery *burdens* under the new rules because it has not

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6 NCTA Comments at 2.

7 Supporting Statement at 10 (emphasis in original).

8 *Id*. (emphasis added).

9 *Id*.

10 *Id.*

adopted any new discovery *procedures* distinguishing terrestrial programming complaints from satellite programming complaints: "[D]iscovery requests in program access complaint proceedings are governed by 47 C.F.R. § 76.1003(j). The discovery requirements that are contained in this rule have already been approved by OMB [in 2008] under the Paperwork Reduction Act."[11]

But this is a *non sequitur*. The fact that the Commission previously considered, and submitted to OMB an estimate of, the burden that its discovery requirements would impose on parties in proceedings under its *then-existing* rules authorizing complaints for *satellite-delivered programming* does not relieve it of the obligation to reassess the impact of those same discovery requirements when it amends its rules in a manner that enables a whole new category of complaints – for *terrestrially-delivered programming* – to be filed. More complaints necessarily mean more discovery. Therefore, insofar as it has treated the discovery requirements imposed by its new rules as not requiring further review by OMB, its PRA *Notice* is defective and incomplete.[12]

From a precedential point of view, OMB should be particularly concerned with any circumstance where the scope of an existing rule, already cleared through the PRA process and given a number that so identifies it, has its scope and associated information collection obligations expanded outside the PRA process. The Commission here provides a list of rules with respect to which it states "The following rule sections are also covered in this information collection but do not require additional OMB approval."[13] However, as with the uncleared rules relating to discovery, other aspects of these existing rules impose new paperwork obligations resulting from the changed definitions of their coverage and should be subject to the clearance process. There is no evident reason why all of the Section 76.1000-1004 rules whose scope has been expanded and which impose information collection burdens should not be subject to the clearance process.[14]

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[11] *Id.*

[12] While denying that it had any such obligation to review and include the discovery burdens associated with its new rules, the Commission claims that "[n]onetheless, *as discussed below*, the calculation of the burden hours takes into account the potential for discovery in a complaint proceeding initiated pursuant to the new rules adopted in the R&O." *Id*. at 11 (emphasis added). There is, however, no further mention of the word "discovery" in the Supporting Statement, much less any indication or explanation of how the "potential for discovery" was taken into account.

[13] *Notice*, 75 Fed. Reg. at 25251.

[14] Other illustrations of uncleared information collection obligation rules include Section 76.1003(b), which relates to pre-filing notices and responses thereto (a notice intended to avoid the filing of formal complaints), which is identified as not subject to clearance although it previously covered disputes relating to satellite services and now covers terrestrial services as well; Section 76.1003(e), which relates to the kind of information that may have to be collected to respond to complaints (even if no such complaints are ever filed), which now applies to terrestrial services; Section 76.9, which governs the confidential treatment of information, and now for the first time applies to information relating to terrestrial services; and Section 76.1003(c) (2), which although unchanged in wording (and not submitted for clearance), incorporates new definitions of cognizable interests and associated information collection burdens relating to terrestrial services.

In sum, the Supporting Statement fails to correct the deficiencies NCTA identified with respect to the agency's compliance with the PRA. Accordingly, NCTA respectfully recommends that OMB withhold its approval of the FCC's PRA Notice.

Sincerely,

/s/ Neal M. Goldberg

Neal M. Goldberg