

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC**

Notice of Public Information Collection)	
Requirement Submitted to OMB for Review)	OMB Control No. 3060-0214
and Approval)	OMB Control No. 3060-0174

**COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS
ON FCC PUBLIC INFORMATION COLLECTION SUBMISSION**

Jane E. Mago
Jerianne Timmerman
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, NW
Washington, DC 20036
(202) 429-5430

David H. Solomon
J. Wade Lindsay
WILKINSON BARKER KNAUER, LLP
2300 N Street, NW
Washington, DC 20037
(202) 783-4141

June 11, 2012

Table of Contents

I.	INTRODUCTION AND SUMMARY	1
II.	THE COMMISSION’S ESTIMATE OF THE ADMINISTRATIVE BURDENS OF COMPLYING WITH THE ONLINE POLITICAL FILE REQUIREMENT IS RIFE WITH OMISSIONS	6
A.	The Commission Fails to Account for All the Burdens of Complying with the Online Political File Requirement.....	7
B.	The Commission Fails to Address the Unnecessary Duplications Created by Its Online Political File Requirements	9
III.	THE COMMISSION UNDERESTIMATES THE BURDEN OF COMPLYING WITH ITS ONLINE PUBLIC FILE REQUIREMENTS OVERALL	11
A.	The Commission Underestimates the Burdens Associated with the Online Political File Requirements.....	11
B.	The Commission Underestimates the Burdens Associated with the Online Public File Requirements	14
IV.	OMB SHOULD INSTRUCT THE COMMISSION TO UTILIZE A PILOT PROGRAM.....	16
V.	CONCLUSION.....	18

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC**

Notice of Public Information Collection)	OMB Control No. 3060-0214
Requirement Submitted to OMB for Review)	OMB Control No. 3060-0174
and Approval)	

**COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS
ON FCC PUBLIC INFORMATION COLLECTION SUBMISSION**

The National Association of Broadcasters (“NAB”),¹ by its attorneys, hereby submits these comments in response to the above-captioned notice of the Federal Communications Commission’s (“Commission” or “FCC”) Public Information Collection Requirement submission to the Office of Management and Budget (“OMB”).² As detailed below, the Commission’s submission does not satisfy the rigorous standards of the Paperwork Reduction Act³ (“PRA”) and OMB should disapprove the information collection. At a minimum, OMB should instruct the FCC to establish a working group or other similar “pilot program” to test the new online public file requirements in order to develop a “specific, objectively supported estimate of burden,” as required by the PRA.⁴

I. INTRODUCTION AND SUMMARY

The Commission’s submission relates to amended FCC rules 73.1943, 73.3526, 73.3527, and 73.1212, 47 C.F.R. §§ 73.1943, 73.3526, 73.3527, and 73.1212. The amendments to section

¹ NAB is a nonprofit trade association that advocates on behalf of local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

² See Information Collections Being Submitted for Review and Approval to the Office of Management and Budget, *Notice and Request for Comments*, 77 Fed. Reg. 27772 (May 11, 2012).

³ See 44 U.S.C. §§ 3501, *et seq.*

⁴ 5 C.F.R. § 1320.8(a)(4) and (6).

73.1943 alter the existing requirement that commercial and non-commercial broadcast stations maintain for public inspection a file containing materials related to “all requests for broadcast time made by or on behalf of candidates for public office . . .” by requiring commercial and non-commercial television stations to post such material in a new online public file hosted by the FCC.⁵ The amendments to sections 73.3526 and 73.3527 of the Commission’s rules require commercial and non-commercial television stations to post certain other materials, but not all materials, that are contained in the stations’ public inspection files to the FCC’s online public file.⁶

The new rules relating to television stations’ political file materials are of particular concern to NAB and its members. Maintaining the political file is particularly burdensome for commercial television stations. As a general matter, broadcasters must include in their political files communications regarding the purchase of time for political messages.⁷ Adding to the burden of maintaining political files, broadcast stations must place the political records specified by statute and FCC rules in their files “as soon as possible,”⁸ which has been interpreted to mean “immediately, under normal circumstances.”⁹

More specifically, broadcast stations must include in the political file information showing: (1) how they disposed of requests for time; and (2) where an agreement to sell time is reached, the amount of time purchased, the length of each purchased spot, the schedule for the

⁵ *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations; Extension of the Filing Requirement for Children’s Television Programming Report (FCC Form 398)*, MM Docket Nos. 00-168 and 00-44, Second Report and Order, FCC 12-44, ¶ 57 (rel. Apr. 27, 2012) (“Order”).

⁶ *Id.*

⁷ *See* 47 U.S.C. § 315(e)(1)(B); 47 C.F.R. § 73.1943(a).

⁸ *Id.* § 315(e)(3); 47 C.F.R. § 73.1943(c).

⁹ *Codification of the Commission’s Political Programming Policies*, 7 FCC Rcd 678, 698 (1991).

purchased spots, the class of time for each spot involved in the purchase, and the amount the station charged for the time.¹⁰ In addition, if spots are purchased on behalf of a candidate or an authorized campaign committee, broadcast stations must also include in the political file the name of the candidate, the identity of the committee purchasing the time (including the name, address, and contact telephone number), and the treasurer of that committee.¹¹ If spots are purchased for issue ads, the broadcast stations must include in the political file the name of any candidates referred to in the spots, the office they are seeking or the election addressed in the spot, or the issue the spots concern.¹² Broadcast stations must also place in their political file a “list of the chief executive officers or members of the executive committee or of the board of directors of the corporation, committee, association or other unincorporated group, or other entity” sponsoring the issue ads.¹³ Further, for issue ads communicating “a message relating to any political matter of national importance,” broadcasters must disclose the rates charged.¹⁴

Under the Commission’s new rules, television stations will be required to upload “as soon as possible” to the FCC’s online public file all the materials described above that they currently copy and place in their local political files.¹⁵ In addition, television stations will be responsible for maintaining backup copies of their political file materials either by downloading a mirror copy of the online file or by maintaining their own electronic or paper backup files.¹⁶

¹⁰ 47 C.F.R. § 73.1943(a).

¹¹ 47 U.S.C. § 315(e)(2).

¹² *Id.*

¹³ 47 C.F.R. § 73.1212(e).

¹⁴ 47 U.S.C. § 315(e)(1)(B).

¹⁵ *See Order*, Appendix A (adding 47 C.F.R. § 73.1943(d) with a cross reference to 47 C.F.R. § 73.1943(c)).

¹⁶ *Id.* ¶ 96.

In comments submitted to the FCC, NAB demonstrated that the Commission's plans to create a centralized online public file, and particularly the online political file, present serious implementation challenges that, unless carefully managed, can increase substantially the public inspection file burdens for television broadcast stations.¹⁷ Indeed, NAB and numerous individual television broadcasters provided the Commission with compelling evidence demonstrating that the burden associated just with placing political files online will be significant and much higher than the Commission estimates.¹⁸

The FCC's submission to OMB inadequately addresses the detailed information provided by NAB and many television broadcasters. As a consequence, the FCC has failed to account completely for the burdens of complying with the new information collections. Specifically, the FCC fails to account for the fact that the online political file requirement actually requires television stations to maintain two political files, the file on the FCC's website and a backup file at the station itself. The FCC also fails even to admit, much less reduce or eliminate, the

¹⁷ *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations; Extension of the Filing Requirement for Children's Television Programming Report (FCC Form 398)*, MM Docket Nos. 00-168 and 00-44, Comments of the National Association of Broadcasters on Proposed Information Collection Requirements at 3-7 (filed Jan. 23, 2012) ("NAB PRA Comments").

¹⁸ *See generally Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations; Extension of the Filing Requirement for Children's Television Programming Report (FCC Form 398)*, MM Docket Nos. 00-168 and 00-44, Comments of the National Association of Broadcasters at 6-22 (filed Dec. 22, 2011) ("NAB Comments"); Reply Comments of the National Association of Broadcasters at 7-14 (filed Jan. 17, 2012); Comments of Four Commercial and NCE Television Licensees at 4 (filed Dec. 22, 2011); Joint Comments of Broadcasting Licenses, L.P., *et al.* at 3-7 (filed Dec. 22, 2011); Comments of the Joint Broadcasters at 6-15 (filed Dec. 22, 2011); Joint Comments of the North Carolina Association of Broadcasters, *et al.* at 8-10 (filed Dec. 22, 2011) ("NCAB, OAB, and VAB Joint Comments"); Joint Reply Comments of the North Carolina Association of Broadcasters, *et al.* at 4-8 (filed Jan. 17, 2012) ("NCAB, OAB, and VAC Joint Reply Comments"); Reply Comments of CBS Corporation, ABC Television Stations, Fox Television Stations, Inc., NBC Owned Television Stations and Telemundo Stations, and Univision Television Group, Inc. at 6-12 (filed Jan. 17, 2012); Reply Comments of the Joint Television Parties at 3-16 (filed Jan. 17, 2012).

duplications between its online political file and the information already available on the Federal Election Commission's ("FEC") website.

The inadequacy of the Commission's burden estimates is demonstrated further by the fact that its *Supporting Statement* provides an overall burden estimate for all "commercial broadcast stations," presenting a combined estimate of the burden for: (1) television stations, which are subject to the new online political file rule; and (2) commercial radio stations and Class A Television stations, which are required only to maintain a paper political file.¹⁹ Moreover, the Commission's new estimate is essentially identical to its 2011 estimate for the burden of complying with the earlier version of the political file rule, which required all broadcast stations to maintain paper political files.²⁰ In short, the Commission's *Supporting Statement* does not represent the kind of rigorous evaluation of the burdens associated with the new *online* political file rule required by the PRA.

Because of these flaws, the FCC's estimate of the compliance burdens associated with the online public file rules plainly understates the burdens of complying with the new information collection requirements. Indeed, data provided to NAB by 36 individual television stations serving a variety of markets across the country suggest that the Commission's estimate of the burden of complying with the online political file requirements is grossly understated, as is the Commission's estimate of the general maintenance burden of the online public file.

¹⁹ See OMB Control No. 3060-0214, *Supporting Statement*, p. 18 (May 2012) (available at http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201205-3060-005 (last viewed June 11, 2012) (the "*Supporting Statement*"). It appears that, for purposes of estimating the burden associated with the political file, the Commission calculated the number of "commercial broadcast stations" by adding the number of commercial radio stations, commercial TV stations, and Class A Television stations (11,317 + 1,367 + 473 = 13,157). *Id.* at 16-18.

²⁰ See OMB Control No. 3060-0214, *Supporting Statement*, pp. 19-20 (Aug. 2011) (available at http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201108-3060-008 (last viewed June 11, 2012)) (the "*2011 Supporting Statement*").

For all these reasons, OMB should disapprove the information collections represented by revised sections 73.1943, 73.3526, 73.3527, and 73.1212 of the Commission's rules. At a minimum, OMB should instruct the FCC to establish a pilot program to test the new online public file requirements before implementation. A pilot or similar program appears particularly necessary in light of the FCC's own statement that implementation of its new rules requires "rigorous testing," including user education and testing before stations are required to upload their online public files.²¹

II. THE COMMISSION'S ESTIMATE OF THE ADMINISTRATIVE BURDENS OF COMPLYING WITH THE ONLINE POLITICAL FILE REQUIREMENT IS RIFE WITH OMISSIONS

The PRA requires the Commission to certify to OMB that any new information collections, among other things, are "necessary for the proper performance of the functions of the agency, including that the information has practical utility," "reduce[] to the extent practicable and appropriate the burden," and are not "unnecessarily duplicative of information otherwise reasonably accessible to the agency."²² Where an information collection does not meet these standards, OMB will "instruct the agency to make a substantive or material change to" or disapprove such information collection within 60 days of receiving the agency's submission.²³

To that end, OMB has counseled agencies that an information collection will not be approved unless it is clearly justified and "[t]he burden on the public [is] completely accounted for and minimized to the extent practicable. . . ."²⁴ Prior to submitting an information collection

²¹ *Supporting Statement* at 15.

²² 44 U.S.C. §§ 3506(c)(3)(A), (B), (C).

²³ 5 C.F.R. § 1320.12(d).

²⁴ OMB, Office of Information and Regulatory Affairs, "Questions and Answers When Designing Surveys for Information Collections," at 9 (Jan. 2006), *available at* http://www.whitehouse.gov/omb/infoereg/pmc_survey_guidance_2006.pdf.

for OMB approval, federal agencies therefore must assess all proposed information collections carefully by evaluating the need for the information collection, providing a “specific, objectively supported estimate of burden,” and considering whether the burden can be reduced.²⁵ Notably, OMB encourages agencies to test an information collection through a “pilot program,” where appropriate.²⁶

The Commission has failed to provide an accurate, supportable estimate of the burden of complying with the online political file requirements of section 73.1943 and the new information collection should not be approved.

A. The Commission Fails to Account for All the Burdens of Complying with the Online Political File Requirement

OMB should disapprove section 73.1943 because the Commission has not accurately accounted for or taken steps to minimize to the extent practical the burdens associated with placing stations’ political file material online. The Commission now estimates the total annual burden for commercial broadcast (including radio) stations to comply with the political file rule to be 197,355 hours at an annual cost of \$5.1 million, or 15 hours per year for each of the 13,157 relevant stations.²⁷ Notably, this estimate is identical on a per station basis to the Commission’s 2011 estimate for the burden of complying with the political file requirements as they existed before the Commission adopted the online requirements.²⁸ Specifically, the Commission last year estimated the total annual burden for commercial broadcast stations to comply with the

²⁵ 5 C.F.R. § 1320.8(a)(1), (4), and (5).

²⁶ *Id.* § 1320.8(a)(6).

²⁷ *Supporting Statement* at 18.

²⁸ *See 2011 Supporting Statement* at 19-20.

paper political file requirement to be 198,120 hours at an annual cost of \$5.1 million, or 15 hours per year for each of the 13,208 relevant stations.²⁹

This correlation between the burden estimates for the old and the new political file requirements plainly shows that the Commission has not accurately accounted for the burdens associated with the online public file requirements for television stations. The Commission provides a single burden estimate for complying with the political file requirements for all commercial broadcast stations, even though stations now have different political file requirements. Television stations now will be required to utilize the FCC’s centralized online political file (and to maintain a local backup file), while radio stations and Class A television stations are required only to maintain a local paper political file. This failure to provide separate burden estimates for complying with the online political file and the paper political file rules clearly calls into question the adequacy of the Commission’s estimate.

Indeed, it is readily apparent that the Commission has failed to account for at least some aspects of the new online political rule. The new rule actually requires television stations to maintain *two* separate political files; one online and one backup file located at the station.³⁰ Simple common sense dictates that the burden of maintaining two separate files will be greater than the burden of maintaining a single file. Yet, the Commission does not even mention the backup requirement in the “New Requirement” section of the *Supporting Statement*,³¹ much less account for this self-evident increased burden on television stations.

The accuracy of the FCC’s burden estimate is further undermined by the fact that the Commission does not yet know the full extent of what will be required to comply with the online

²⁹ *Id.*

³⁰ *Order* ¶ 96.

³¹ *Supporting Statement* at 14.

political file rule. The Commission is still developing the computer systems that stations will use to comply with the online filing obligations.³² What this means is that the Commission does not yet have a full understanding of how the online file process will work and, therefore, cannot be expected to estimate accurately or completely the burdens of complying with these requirements.

These facts alone demonstrate that the Commission has not accurately and completely accounted for the burdens associated with the online political file requirements. It is hard to credit the Commission's conclusion that the burden of complying with the political file rules remains unchanged on a per station basis, despite the entirely new obligations being imposed upon television stations. OMB should therefore disapprove the collection.

B. The Commission Fails to Address the Unnecessary Duplications Created by Its Online Political File Requirements

OMB should also disapprove section 73.1943 because the requirements are “unnecessarily duplicative of information otherwise reasonably accessible to the agency.”³³ The Commission's *Supporting Statement* asserts that “[n]o other agency imposes a similar information collection on the respondents” and that “[t]here are no similar data available.”³⁴ This is a gross misstatement.

As NAB previously pointed out to the Commission, there is significant overlap between the public file materials that stations will have to upload to the FCC's website and information already available on the FEC's website.³⁵ NAB's April 5 *Ex Parte* included a three-page chart

³² See generally Order ¶¶ 25, 61.

³³ 44 U.S.C. § 3506(c)(3)(B).

³⁴ *Supporting Statement* at 8.

³⁵ See “Overlaps in FCC political file/FEC online information,” Attached to Letter from Jane E. Mago, Executive Vice President & General Counsel, NAB, to Marlene H. Dortch, Secretary, Federal Communications Commission, MM Docket Nos. 00-168 and 00-44 (filed Apr. 5, 2012) (copy appended hereto).

detailing the significant duplication of FCC political file and FEC online information. The overlaps include information regarding: (1) the identity of the candidate or candidate-authorized committee that authorized a spot about a federal election, candidate, or political matter of national importance;³⁶ (2) the identity of the individuals who controls the entity who buys advertising time;³⁷ (3) the stations that sold the advertising time;³⁸ (4) the identity of the candidate and the election to which an advertising spot refers;³⁹ (5) the amounts paid for advertising;⁴⁰ and (6) whether the buyer received any rebates on the amount charged for the advertising spots.⁴¹

Given the Commission's failure to address these significant overlaps between the FCC political file and FEC online information, the Commission's PRA certification is fatally flawed and the collection should be disapproved.

³⁶ Compare 47 U.S.C. § 315(e)(2)(F), and § 315(e)(2)(G), with 2 U.S.C. § 434(a)(1), § 434(b)(5)(A), § 434(b)(6)(A), § 434(b)(6)(B)(iii), (c)(2), and § 434(f)(2)(A).

³⁷ Compare 47 U.S.C. § 315(e)(2)(F), and 47 C.F.R. § 73.1212, with 2 U.S.C. § 434(a)(1), § 434(f)(2)(A), and 11 C.F.R. § 104.20(a)(2)(3).

³⁸ Compare 47 U.S.C. § 315(e), 47 C.F.R. § 73.1212, and 73.1943, with 2 U.S.C. § 434(b)(5)(A), § 434(b)(6)(A), § 434(b)(6)(B)(iii), and § 434(c)(2).

³⁹ Compare 47 U.S.C. § 315(e)(2)(E), with 2 U.S.C. § 434(f)(2)(D), and § 434(b)(6)(B)(iii).

⁴⁰ Compare 47 U.S.C. § 315(e)(2)(B), with 2 U.S.C. § 434(b)(6)(A), § 434(b)(6)(B)(iii), § 434(b)(f)(2)(C), and § 434(c)(2).

⁴¹ Compare 47 U.S.C. § 315(e)(2)(B), 47 C.F.R. § 73.1942(a)(1)(ix), and *Codification of the Commission's Political Programming Policies*, 7 FCC Rcd 4611 ¶ 89 (1992), with 2 U.S.C. § 434(b)(3)(F).

III. THE COMMISSION UNDERESTIMATES THE BURDEN OF COMPLYING WITH ITS ONLINE PUBLIC FILE REQUIREMENTS OVERALL

A. The Commission Underestimates the Burdens Associated with the Online Political File Requirements

OMB should also disapprove section 73.1943 because the rule does not reduce “to the extent practicable and appropriate the burden” on television stations.⁴² Unfortunately, the Commission presented its burden estimate in a manner making it difficult to determine precisely what the agency estimates the burden of the online political file requirements to be. As discussed above, the Commission provided an overall estimate of the burden of complying with the political file requirements for all “commercial broadcast stations,”⁴³ without providing a separate breakout of the new burden for television stations subject to the new online political file requirements. Specifically, the Commission estimated the annual compliance burden to be 197,355 hours at an annual cost of \$5.1 million, or 15 hours per year per station multiplied by 13,157 commercial broadcast stations.⁴⁴ As demonstrated below, however, information provided to NAB by 36 individual commercial television stations suggests that the FCC has dramatically underestimated the actual administrative burden imposed upon television stations by the online political file rule.

Upon receiving notice that the Commission submitted section 73.1943 to OMB for review under the PRA, NAB reached out to a number of its member commercial television stations and asked them to run an exercise to test the Commission’s estimates of the burdens of complying with the online political file requirements. Specifically, NAB asked stations to set up an account with an existing cloud-based hosting service such as DropBox to serve as a proxy for

⁴² 44 U.S.C. § 3506(c)(3)(C).

⁴³ *Supporting Statement* at 18.

⁴⁴ *Id.*

the FCC's planned, cloud-based online public file. Stations were asked to set up "dummy" candidate folders and whatever subfolders they might anticipate using to organize their political file material on this cloud-based hosting service and, once a day, every day for a week, upload all the material they would ordinarily copy and place in their political files. Using this data as a base line, NAB asked the stations to estimate the burden of maintaining political file material online.

NAB also asked stations to estimate separately the burden of maintaining backup political files. Each responding station was asked to select the backup option that it believes it would most likely use, i.e., downloading a mirror copy of the online file or maintaining its own electronic or paper backup files, and provide an estimate of the relevant time and cost burdens.

Thirty six commercial television stations responded to NAB's questionnaire. The respondents included a wide variety of stations serving many different markets, from the Chicago Nielsen Designated Market Area ("DMA"), with almost 3.5 million TV Households, to the Wheeling-Steubenville DMA, with approximately 130,000 TV Households. The responses from these television stations are telling.

The stations' responses suggest that the average burden of the online political file during non-campaign seasons will be approximately 1.1 hours *per week*, or 57.2 hours *per year*, per commercial television station. Multiplied by the 1,367 commercial television stations,⁴⁵ the result is a total annual burden of 78,192 hours at an annual cost of \$2.64 million for commercial television stations alone. That is almost half of the total annual hours and more than half of the

⁴⁵ *Id.* at 17.

total annual cost the Commission estimates for all “commercial broadcast stations.”⁴⁶ Given that the number of commercial television stations is only approximately 10 percent of the total number of all “commercial broadcast stations,” these results suggest that the FCC’s estimates are dramatically too low, even using the time periods where the burdens of maintaining political files are lowest.

The disparity is even greater when one accounts for periods of increased campaign activity. The burden skyrockets during the height of a campaign season, with the stations estimating the burden to be 8.2 hours *per week* for each of the 1,367 commercial television stations, or a *total weekly burden* of 11,209 hours at an approximate cost of \$378,000 *per week*. The FCC’s estimates clearly do not account for these periods of intense activity.

The compliance burden is further compounded by the obligation to maintain a backup of the political file materials. The stations estimated that the requirement to maintain a backup of the political file materials would add an additional 2.9 hours *per week* for each of the 1,367 commercial television stations, or a *total weekly burden* of 3,964 hours at a cost of approximately \$134,000 per week during campaign seasons.

NAB recognizes that its evaluation of the burdens imposed by the new political file requirements in part differs from the FCC’s evaluation because our test cases involved only commercial television stations and did not include other commercial broadcast stations, which are subject only to the old requirement to maintain a political file in paper. Nevertheless, the degree of the discrepancy clearly calls into question the accuracy of the FCC’s estimate. Indeed, it is difficult to see how the FCC’s estimate of the burden of the new online rules could be

⁴⁶ *Id.* at 18. NAB estimated the annual cost by multiplying the estimated number of burden hours by \$33.75, which is the average of the relevant pay rates provided by the responding commercial television stations.

accurate, given that the Commission failed to provide an estimate specific to the entities that the rules actually affect. An estimate that merely replicates the FCC's 2011 estimate of the burden of complying only with the *paper* political file rule fails to address adequately the specific burdens of complying with the new *online* rule and does not satisfy the PRA's requirements.

B. The Commission Underestimates the Burdens Associated with the Online Public File Requirements

OMB should also disapprove the online public file requirements in sections 73.3526 and 73.3527 because the rules do not reduce “to the extent practicable and appropriate the burden” on broadcast stations.⁴⁷ In this regard, the Commission asserts that the online public file will actually “reduce many of the burdens associated with maintenance of paper files, as well as station staff time dedicated to updating and supervising onsite public access to the file.”⁴⁸ This premise is flawed.

As with the political file, the Commission fails to acknowledge that its online public file requirement does not simply replace one public file requirement with another, but actually requires commercial and non-commercial stations to keep two separate files, a public inspection file on the FCC's website and a public inspection file at the stations' location containing letters and emails from the public.⁴⁹

In addition, NAB has confirmed that the Commission's burden estimates for the online public file requirements are too low. As discussed above, NAB asked commercial television stations to test the FCC's estimates of the burdens of complying with the online public file requirements. In addition to estimating the burdens of complying with the online political file, these stations provided NAB with estimates of the burden associated with uploading other public

⁴⁷ 44 U.S.C. § 3506(c)(3)(C).

⁴⁸ *Supporting Statement* at 11.

⁴⁹ *Order* ¶ 62.

file materials. To test the burdens associated with the transition to an online public file, the participating stations were asked to establish additional folders on their cloud-based hosting account that correspond to each item that will be uploaded to the FCC's online public file. The stations were asked then to scan 10 percent of the material they would have to upload from the existing paper file. Using this test as a base line, the stations were asked to estimate the total time it would take to transition their existing public inspection files to the FCC's online public file. The participating stations also provided estimates of time involved in maintaining the FCC's online public file.⁵⁰ Again, the results are telling.

The FCC estimates the online public file burden for commercial television stations to be 50 hours *per year* per station for general maintenance.⁵¹ Multiplied by 1,367 commercial television stations, this figure results in an annual burden of 68,350 hours for general maintenance of the online public file. NAB's responding commercial television stations, by contrast, estimate that the general maintenance burden of complying with the online public file requirements to be approximately 126 hours *per year* per station. Multiplied by 1,367 commercial television stations, the result is a total annual burden of 172,242 hours – significantly more than FCC estimates.

Further, it appears that the FCC's calculation of the general maintenance burden includes the one-time burden associated with transferring the stations' existing paper public inspection

⁵⁰ In addition to the political file, the FCC's rules specify myriad materials that commercial and noncommercial broadcast licensees must maintain in their public inspection files. *See generally* 47 C.F.R. §§ 73.3526(e), 73.3527(e). Ongoing maintenance of the public inspection files includes adding updated information and materials periodically and removing older information and materials at various different times because different types of public file materials are required to be retained for different periods of time.

⁵¹ *Supporting Statement* at 17.

files to the FCC’s online public file.⁵² If this is the case, the discrepancy in the Commission’s estimate becomes even more pronounced. When the burden of transferring stations’ existing public inspection files to the FCC’s online public file is added to the responding stations’ estimates, the annual burden for general maintenance of the online public file in the first year jumps to 154 hours *per year* per station, or a total annual burden of 210,518 hours. In any event, the significant discrepancy between the Commission’s and the participating stations’ estimates for general maintenance of the public inspection file, at a minimum, calls into question the Commission’s assumption that the online public file will “reduce many of the burdens associated with maintenance of paper files, as well as station staff time dedicated to updating and supervising onsite public access to the file.”⁵³

IV. OMB SHOULD INSTRUCT THE COMMISSION TO UTILIZE A PILOT PROGRAM

As explained above, the FCC clearly has failed to account for all the burdens associated with the new online political and public file requirements and, as a consequence, appears to have understated these burdens dramatically. In light of these burdens and complexities, NAB and individual broadcast stations had previously provided the Commission with detailed information regarding the difficulties in complying with the agency’s online public file proposals.⁵⁴ To that end, and consistent with OMB’s guidance regarding the use of pilot programs,⁵⁵ NAB and numerous other parties also previously urged the Commission to establish with broadcasters a joint working group to make a full and realistic assessment of whether and how to develop an

⁵² See *id.* at 19 (“We have decreased the general maintenance burdens for other television stations as well, and may decrease them further after stations have completed their transition to the online public file.”).

⁵³ *Id.* at 11.

⁵⁴ See *supra* n.18.

⁵⁵ See *supra* n.4.

online public inspection file mechanism that will benefit the public while minimizing the burdens on broadcast stations.⁵⁶ In particular, NAB urged the Commission not to include political files in any online public file requirement, at least until the agency fully evaluated, through a working group, all the associated burdens and costs (including unintended costs) and the degree to which the public would actually benefit from posting political file materials online.⁵⁷

The FCC rejected NAB's proposals, asserting that a pilot program is not necessary and "could unduly delay" its implementation of the online public file.⁵⁸ Despite its haste to implement an online public file, the FCC concedes that implementation will require "rigorous testing . . . to ensure a smooth user experience," including "user testing and education before stations are required to upload their online public files."⁵⁹ It appears that this testing has not been yet been done. In fact, the Commission has not even indicated when the testing will begin. This admission alone is sufficient to warrant OMB instructing the FCC to undertake a pilot program to complete the necessary testing, *before* approving the information collection in sections 73.1943, 73.3526, 73.3527, and 73.1212 of the Commission's rules.

The fact that the FCC is limiting the online political file requirement only to approximately 200 television stations for the first two years is not sufficient.⁶⁰ The Commission admits that this is not a pilot program and is limited to major network affiliates in the largest

⁵⁶ See NAB Comments at 30; NAB PRA Comments at 3-7; Joint Comments of the Named State Broadcasters Associations at 12-14 (filed Dec. 22, 2011); Hubbard Comments at 3 (filed Dec. 21, 2011); NCAB, OAB, and VAB Joint Comments at 20-21; NCAB, OAB, and VAB Joint Reply Comments at 2, 4.

⁵⁷ NAB PRA Comments at 8-12.

⁵⁸ *Order* ¶ 105; see also *Supporting Statement* at 14-15.

⁵⁹ *Supporting Statement* at 15.

⁶⁰ *Id.*

markets, which the Commission believes are relatively sophisticated users of technology.⁶¹ These television broadcasters are not representative of non-network affiliated stations in large markets or of stations generally in small markets. Further, by limiting the initial application of the online political file rule only to major market network affiliates, this two-year phase-in period will provide no information regarding the implementation burdens faced by small broadcasters, in direct contradiction of the Commission's separate statutory obligation to "make efforts to further reduce the information collection burden for small business concerns with fewer than 25 employees."⁶² In any event, the Commission here is seeking OMB authority to implement the amended rules for all commercial television stations, not just those 200 television stations to which the online political file rule will apply immediately.⁶³

V. CONCLUSION

As detailed above, a review of the Commission's *Supporting Statement* makes clear that the Commission has not yet developed a "specific, objectively supported estimate of burden" associated with the new online political and public inspection files, as required by the PRA and OMB.⁶⁴ The Commission's current burden estimate is dramatically understated, especially in light of the information presented with these comments. OMB should therefore disallow the information collections in revised sections 73.1943, 73.3526, 73.2527, and 73.1212 of the Commission's rules, 47 C.F.R. §§ 73.1943, 73.3526, 73.2527, and 73.1212. At a minimum, and consistent with its rules, OMB should instruct the Commission to establish a "pilot program" to test its online public file proposals in order to develop a "specific, objectively supported estimate

⁶¹ *Id.*

⁶² 44 U.S.C. § 3506(c)(4).

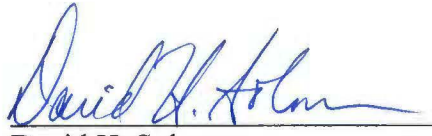
⁶³ Television stations in all markets, including medium and small, will be required to comply with the general online public file rules as soon as these rules become effective.

⁶⁴ 5 C.F.R. § 1320.8(a)(4) and (6).

of burden.”⁶⁵ The extensive burdens and costs on local stations associated with an online political file requirement in particular should be thoroughly and realistically assessed through such a program before the Commission is permitted to proceed.

Respectfully submitted,

NATIONAL ASSOCIATION OF BROADCASTERS

By: 
David H. Solomon
J. Wade Lindsay

WILKINSON BARKER KNAUER, LLP
2300 N Street, N.W., Suite 700
Washington, DC 20037
(202) 783-4141

Jane E. Mago
Jerianne Timmerman
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Sixth Floor
Washington, DC 20036
(202) 429-5430

June 11, 2012

⁶⁵

Id.

APPENDIX

Overlaps in FCC political file/FEC online information

<u>Data</u>	<u>FCC Political File</u>	<u>Available through FEC?</u>
Who authorized a spot about a federal election/candidate or a political matter of national importance?	the name of the candidate and the name of candidate-authorized committee (for requests made by, or on behalf of, a candidate) (47 U.S.C. § 315(e)(2)(F)); the name of the person purchasing the time, and the name, address, and phone number of a contact person for the buyer (for spots that communicate a message relating to any political matter of national importance) (§ 315(e)(2)(G))	<p>✓ all political committees must file reports of receipts and disbursements, which identify the filing committees (2 U.S.C. § 434(a)(1))</p> <p>✓ all authorized committees must identify in these reports the recipient of each expenditure to persons who received more than \$200 total in a calendar year or election cycle (2 U.S.C. § 434(b)(5)(A), (b)(6)(A))</p> <p>✓ all other political committees or other persons must identify the recipient of any independent expenditure if the person received more than \$200 total in a calendar year or election cycle; the reports show the name and contact information for the person or committee that purchased the spot (2 U.S.C. § 434(b)(6)(B)(iii), (c)(2); FEC Form 3X Schedule E and Form 5)</p> <p>✓ electioneering communications reports identify the person making the disbursement (2 U.S.C. § 434(f)(2)(A))</p>
Who controls the buyer and its finances?	for sponsored broadcast matter that is political or involves the discussion of a controversial issue of public importance, public files must include a list of the sponsor's chief executive officers or the members of the executive committee or of the board of directors; BCRA requires the same for spots that communicate a message relating to any political matter of national importance, and the identification of the committee's treasurer for candidate spots (47 C.F.R. § 73.1212 and 47 U.S.C. § 315(e)(2)(F), (G))	<p>✓ electioneering communications reports must identify "any person sharing or exercising direction or control over the activities of" the buyer, meaning "officers, directors, executive directors or their equivalent, partners, and in the case of unincorporated organizations, owners" (2 U.S.C. § 434(f)(2)(A); 11 C.F.R. § 104.20(a)(2)(3))</p> <p>✓ each political committee must report on all receipts and disbursements, with these reports signed by the committee's treasurer (2 U.S.C. § 434(a)(1))</p>

Overlaps in FCC political file/FEC online information

<u>Data</u>	<u>FCC Political File</u>	<u>Available through FEC?</u>
Who sold the spot?	each station maintains a file of the political spots it sold (47 U.S.C. § 315(e); 47 C.F.R. § 73.1212 and § 73.1943)	<p>✓ all authorized committees must report the recipient of each expenditure to persons who received more than \$200 total in a calendar year or election cycle (2 U.S.C. § 434(b)(5)(A), (b)(6)(A))</p> <p>✓ all other committees or persons must report each independent expenditure to persons who received more than \$200 in a calendar year or election cycle (§ 434(b)(6)(B)(iii), (c)(2))</p>
Which candidate(s) and election(s) are referred to in an electioneering communications spot?	the name of the candidate to which the communication refers and the election to which the communication refers (47 U.S.C. § 315(e)(2)(E))	<p>✓ electioneering communications reports identify the elections to which the communications pertain and the candidates identified or to be identified (2 U.S.C. § 434(f)(2)(D))</p> <p>✓ all independent-expenditure reports must indicate whether the expenditure supported or opposed a candidate, along with the candidate's name and office sought (2 U.S.C. § 434(b)(6)(B)(iii); FEC Form 3X Schedule E and Form 5)</p>

Overlaps in FCC political file/FEC online information

<u>Data</u>	<u>FCC Political File</u>	<u>Available through FEC?</u>
What was the charge for the advertising flight?	amount of the expenditure is clear because file must include rates charged (and net price if any rebates were made) (47 U.S.C. § 315(e)(2)(B)); NAB's PB-17 Form (widely used by stations) calls for "total charge" information	<p>✓ electioneering communications reports identify the amount of disbursements made over \$200 (2 U.S.C. § 434(f)(2)(C))</p> <p>✓ authorized political committees must report the recipient, date and amount for all disbursements to persons who receive more than \$200 during a calendar year or election cycle (§ 434(b)(6)(A))</p> <p>✓ non-authorized committees and all other persons must report the recipient, date, amount and purpose of independent expenditures to persons who receive more than \$200 in a calendar year or election cycle (§ 434(b)(6)(B)(iii), (c)(2))</p>
Did the buyer receive any rebates on the amount charged?	file must include information on rebates to candidates, including the date and amount of the rebate (47 U.S.C. § 315(e)(2)(B); 47 C.F.R. § 73.1942(a)(1)(ix)) (as interpreted by the Commission; <i>see Codification of the Commission's Political Programming Policies</i> , Memorandum Opinion and Order, 7 FCC Rcd 4611, para. 89 (1992): "If a rebate is subsequently issued, we would expect to find an appropriate notation on the contract or in another document in the political file, identifying at a minimum the amount and date of the rebate and the order to which it relates")	<p>✓ all political committees must identify persons who provided "a rebate, refund, or other offset to operating expenditures," as well as the date and amount of the rebate, if the person provided rebates worth more than \$200 in a calendar year or election cycle (§ 434(b)(3)(F))</p>