Cathy Williams

From: Shapiro, David [davidshapiro@dwt.com]
Sent: Monday, April 14, 2008 6:15 PM
To: PRA; Cathy Williams
Subject: PRA comments
Attachments: PRA Comments.pdf

Dear Ms. Williams:

Attached pleased find comments being filed in response to the Notice of Public Information Collection(s) Being Submitted for Review to the Office of Management and Budget, 73 Fed. Reg. 8315 (Feb. 13, 2008).

Sincerely,
David Shapiro

<<PRA Comments.pdf>>

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Comcast

April 14, 2008

Office of the Secretary
Room TW-A325
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554
ATTENTION: Cathy Williams

Re: Notice of Public Information Collection(s) Being Submitted for Review to the Office of Management and Budget, 73 Fed. Reg. 8315 (Feb. 13, 2008)

Dear Ms. Williams:

On behalf of Comcast Corporation ("Comcast"), this letter responds to the Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission[1] inviting comments, pursuant to the Paperwork Reduction Act ("PRA") of 1995,[2] regarding the "information collections" required by the Report and Order and Further Notice of Proposed Rulemaking issued by the Federal Communications Commission ("FCC" or "Commission") in *In the Matter of Leased Commercial Access*.[3] A summary of the *Leased Access Order* was published in the Federal Register on February 28, 2008.[4]

Introduction and Summary

The *Order* promulgates new rules regarding the provision of leased access programming by cable system operators. As the *Order* recognizes, the new rules "contain new or modified information collection requirements that have not been approved by the Office of Management and Budget."[5] These information collection requirements include, *inter alia*: (1) a new obligation that requires cable operators to generate and provide an extensive compilation of information to prospective leased access programmers within three business days of a request for information from such a programmer, and (2) a new mandate that operators provide a detailed report to the Commission on leased access each year.[6]

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[1] 73 Fed. Reg. 8315 (Feb. 13, 2008), *corrected*, 73 Fed. Reg. 9569 (Feb. 21, 2008) ("Notice").

[2] 44 U.S.C. § 3501.1 *et seq.*

[3] *In the Matter of Leased Commercial Access*, FCC 07-208, MB Docket 07-42 (rel. Feb. 1, 2008) ("*Leased Access Order*" or "*Order*").

[4] *See* 73 Fed. Reg. 10675 (Feb. 28, 2008).

[5] *Order* ¶ 89. *See also* 44 U.S.C. § 3507(a)(2) (OMB approval required for new collections of information); 5 C.F.R. § 1320.5(a)(2) (same).

[6] *Order* ¶ 89; Amended §§ 76.972 & 76.975.

These new obligations fail to meet the requirements of the PRA, and regulations issued by the Office of Management and Budget ("OMB") pursuant thereto, 5 C.F.R. § 1320.1 *et seq.*[7] *First*, the new requirement that cable operators produce an expanded panoply of information to prospective leased access programmers in only three business days violates numerous provisions of the PRA and the OMB regulations issued thereunder. Specifically,

- Section 3506(c)(3)(A) of the PRA[8] and Section 1320.5(d)(1)(i), (iii) of OMB's regulations prohibit information collections that lack "practical utility" and are not "necessary for the proper performance of the functions of the agency."[9] The shortened time period adopted in the *Order* lacks any grounding in practical utility and is not necessary to the Commission's functions because it is not essential for leased access programmers to receive the information required to be produced in only three business days.

- Because it is not necessary that leased access programmers receive the required information in only three business days, the Commission also cannot show that the three-business-day response period "is necessary to satisfy statutory requirements or other substantial need," as OMB regulations require for any response period less than 30 days.[10]

- The three-business-day deadline is not "the least burdensome necessary for the proper performance of the agency's functions to comply with legal requirements and achieve program objectives," as required by Section 1320.5(d)(1)(i) of OMB's regulations,[11] nor does the short response period "reduce[] to the extent practicable and appropriate the burden on persons who shall provide information," as required by Section 3506(c)(3)(C) of the PRA.[12] Rather, the regulation amounts to a perpetual information collection burden where cable operators will essentially need to continually update such information in the event a leased access request is received because much of the information is constantly changing. This enormous expenditure of energy and resources exceeds any necessary regulatory burden because there is no conceivable need for prospective programmers to receive the information within three business days.

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[7] The new rules also violate the Communications Act of 1934, as amended ("Communications Act"), the Administrative Procedure Act, and the Constitution of the United States. These latter violations are being raised in multiple petitions for review in the United States Court of Appeals, and they will not be addressed further herein. Comcast is not seeking reconsideration of the *Order* by the Commission.

[8] 35 U.S.C. § 3506(c)(3)(A).

[9] 5 C.F.R. § 1320.5(d)(1).

[10] *Id.* §1320.5(d)(2).

[11] *Id.* § 1320.5(d)(1)(i).

[12] 35 U.S.C. § 3506(c)(3)(C).

Second, entirely aside from the shortened production deadline, the requirement to provide "[a] comprehensive schedule showing how [leased access] rates were calculated,"[13] including "a separate calculation *detailing* how *each* rate was derived pursuant to the revised rate formula adopted [in the *Order*],"[14] is not the least burdensome obligation necessary to the Commission's functions; in this and other respects, the *Order* requires cable operators to provide prospective leased access programmers with vastly more information than they reasonably need.[15] The same type of burdensome and detailed justification is also required with respect to charges for technical support and studio assistance as well as all other "fees" and "non-monetary terms and conditions."[16] These upfront and detailed information requirements impose an immediate duty to defend and justify rates and terms before such rates and terms have even been challenged by leased access programmers. Requiring such justification might be thought necessary if a leased access programmer *complains* about a leased access rate or term under Amended Section 76.975, but it is not necessary as an immediate response to a mere "request for information about leased access channels" under Amended Section 76.972(a)(1). This is especially true given that the required rate calculation usually produces a rate of $0.00[17] – demonstrating that it lacks practical utility and is not necessary to the proper performance of the agency's functions.[18] In fact, subjecting cable system operators to a massive array of information production requirements only to produce a calculation that allows the system operators to charge *nothing* for valuable and scarce channel capacity is paperwork for paperwork's sake, the antithesis of practical utility.

Third, the PRA forbids information collections that are "unnecessarily duplicative of information otherwise reasonably accessible to the agency."[19] The Annual Report on leased access that operators must produce under the amended rules requires producing compilations of information already included in other submissions that many cable systems already must provide to the Commission, such as through the existing Price Survey Form and existing Form 325. The fact that the Commission has failed to make use of the information collected through the existing requirements in adopting the *Order* – or in any other regulatory context – further suggests that such requirements lack practical utility and counsels against their duplication.

Fourth, the new rules violate OMB regulations that prohibit requirements, unless "necessary to satisfy statutory requirements or other substantial need," to produce "proprietary, trade secret, or other confidential information unless the agency can demonstrate that it has

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[13] Amended § 76.972(b)(6).

[14] *Order* ¶ 19 (emphasis added).

[15] 35 U.S.C. § 3506(c)(3)(C); 5 C.F.R. § 1320.5(d)(1)(i).

[16] *Order* ¶ 30.

[17] *See Leased Commercial Access*, MB Docket No. 07-42, Declaration of Thomas R. Nathan in Support of Request of National Cable & Telecommunications Association for a Stay (Mar. 27, 2008) ("Nathan Decl."), ¶ 10. A copy of Mr. Nathan's declaration, previously filed before the Commission, is attached hereto as Attachment 1. Mr. Nathan is Deputy General Counsel, Senior Vice President, Law & Regulatory Affairs for Comcast Cable Communications.

[18] 35 U.S.C. §§ 3506(c), (c)(3)(A); 5 C.F.R. §§ 1320.1(d)(1)(i), 1320.5(d)(1)(i).

[19] *See* 44 U.S.C. § 3506(c)(3)(B); *see also* 5 C.F.R. § 1320.5(d)(1).

instituted procedures to protect the information's confidentiality to the extent permitted by law."[20] The new rules direct cable operators to provide prospective leased access programmers with subscribership data that are proprietary and held in the strictest of confidence.[21] In creating this burden, the Commission fails to explain why this confidential data is essential to the prospective leased access programmer or to provide any mechanism by which a cable operator can maintain the confidentiality of this information, a clear violation of OMB's regulations.

Finally, the Commission has failed to provide "a specific, objectively supported estimate of burden" prior to its submission of a collection of information to OMB, as required by Section 3506(c)(1)(A)(iv) of the PRA and Section 1320.8(a)(4) of OMB's regulations.[22] Instead, the Commission has *dramatically underestimated* the burdens that the new requirements will pose for cable operators. The current estimate of 76,819 burden hours represents only a small fraction of the annual burden hours that will be required. The extensive violations of the PRA and the OMB regulations described above become all the more egregious when viewed in light of the onerous burdens the new requirements will impose on cable operators.

Background and Factual Summary

Pursuant to the Cable Communications Policy Act of 1984, cable operators can be required to provide channel capacity for lease to third parties who wish to transmit their own programming over a cable operator's system. The law was revised in the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), when Congress gave the Commission authority to enact leased access rate rules. Since the adoption of the 1992 Cable Act, the Commission has twice comprehensively analyzed potential leased access regulatory regimes (in 1992-1993 and in 1996-1997).[23] During both of these proceedings, the Commission carefully balanced promotion of programming diversity through leased access with the explicit Congressional directive that leased access must not adversely affect the operation, financial condition, or market development of cable systems.[24]

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[20] 5 C.F.R. § 1320.5(d)(2)(viii).

[21] *See* Attachment 1 (Nathan Decl.), ¶ 32.

[22] 35 U.S.C. § 3506(c)(1)(A)(iv); 5 C.F.R. § 1320.8(a)(4).

[23] *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Notice of Proposed Rulemaking, 8 FCC Rcd 510 (1992); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Report & Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631 (1993); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Order on Reconsideration of the First Report & Order and FNPRM, 11 FCC Rcd 16933 (1996); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Leased Commercial Access*, Second Report & Order and Second Order on Reconsideration of the First Report & Order, 12 FCC Rcd 5267 (1997).

[24] *See* 47 U.S.C. § 532(c)(1).

On February 1, 2008, the Commission released the *Leased Access Order*, which modifies the leased access rules in ways that depart dramatically from the Commission's traditional information collection and recordkeeping requirements and impose an array of new obligations, including:

New Requirement To Produce Detailed Records to Prospective Programmers in Only Three Business Days. Under the Commission's previous leased access rules, a cable system operator that received a request from a prospective leased access programmer had a full fifteen days to produce a limited amount of information consisting of:

(1) How much of the operator's leased access set-aside capacity is available;

(2) A complete schedule of the operator's full-time and part-time leased access rates;

(3) Rates associated with technical and studio costs; and

(4) If specifically requested, a sample leased access contract.[25]

The new rules represent both a dramatic expansion of the information that an operator must provide and an absurd reduction in the amount of time an operator has to produce the information. As opposed to the previous, already brief fifteen-day period, the new rules allow a cable operator only three business days to respond. In that extremely short period, a cable system operator must produce a panoply of new information including, at a minimum:

(1) The cable system operator's process for requesting leased access channels;

(2) The geographic and subscriber levels of service that are technically possible;

(3) The number and location and time periods available for each leased access channel;

(4) Whether the leased access channel is currently being occupied;

(5) A complete schedule of the operator's statutory maximum full-time and part-time leased access rates;

(6) A comprehensive explanation showing how those rates were calculated;

(7) Rates associated with technical and studio costs;

(8) Whether inclusion in an electronic programming guide is available;

(9) The available methods of programming delivery and the instructions, technical requirements and costs for each method;

[25] 47 C.F.R. § 76.970(*i*)(1).

(10) A comprehensive sample leased access contract that includes uniform terms and conditions such as tier and channel placement, contract terms and conditions, insurance requirements, length of contract, termination provisions and electronic guide availability; and

(11) Information regarding prospective launch dates for the leased access programmer.[26]

The *Order* further expands the scope of information an operator must provide in three business days by dividing these requirements into extensive sub-requirements for additional information, as follows:

- While the new rule would appear to require only a simple statement as to "*[w]hether* the leased access channel is currently being occupied,"[27] the *Order* actually requires an "*[e]xplanation* of Currently Available and Occupied Leased Access Channels," including: (1) the number of channels that the cable operator is required to designate for commercial leased access use pursuant to Section 612(b)(1) [of the Communications Act]; (2) the current availability of those channels for leased access programming on a full- or part-time basis; (3) the tier on which each leased access channel is located; (4) the number of customers subscribing to each tier containing leased access channels; (5) whether those channels are currently programmed with non-leased access programming; and (6) how quickly leased access channel capacity can be made available to the prospective leased access programmer."[28]

- The *Order* states that the rate calculation requires that "[c]able operators must attach to this schedule a separate calculation *detailing* how *each* rate was derived pursuant to the revised rate formula adopted herein."[29]

- The *Order* states that providing "[r]ates associated with technical and studio costs"[30] requires an operator to provide "a list of fees for providing technical support or studio assistance to the leased access programmer along with an explanation of such fees and how they were calculated."[31]

- The *Order* specifies that the requirement to state "[w]hether inclusion in an electronic programming guide is available,"[32] in fact means that, "[a]t a minimum, the cable operator must provide: (1) [t]he format in which leased access programming information must be provided to the cable operator for inclusion in the appropriate programming

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[26] Amended § 76.972(b).

[27] Amended § 76.972(b)(4) (emphasis added).

[28] *Order* ¶ 18 (emphasis added).

[29] *Id.* ¶ 19 (emphasis added); Amended § 76.972(b)(6).

[30] Amended § 76.972(b)(7).

[31] *Order* ¶ 20.

[32] Amended § 76.972(b)(8).

guide; (2) the content requirements for such information; (3) the time by which such programming information must be received for inclusion in the programming guide; and (4) the additional cost, if any, related to carriage of the leased access programmer's information on the programming guide."[33]

- The *Order* states that the requirement to provide "[t]he available methods of programming delivery and the instructions, technical requirements and costs for each method"[34] in fact means that "[f]or each method of acceptable, standard delivery, the cable operator shall provide detailed instructions for the timing of delivery, the place of delivery, the cable operator employee(s) responsible for receiving delivery of leased access programming, all technical requirements and obligations imposed on the leased access programmer, and the total cost involved with each acceptable, standard delivery method that will be assessed by the cable operator."[35]

- The *Order* explains that the sample leased access contract that system operators must provide[36] must include a "cost breakdown, for any terms and conditions that require the payment or deposit of funds. This includes insurance and deposit requirements, any fees for handling or delivery, and any other technical or equipment fees, such as tape insertion fees."[37] The *Order* further states that, "[w]ith regard to non-monetary terms and conditions, such as channel and tier placement, targeted programming, access to electronic program guides, VOD, etc., we ... require the cable operator to provide, along with its standard leased access contract, an *explanation and justification* of its policy."[38]

New Requirement To Produce an Exhaustive Annual Report. Amended Section 76.978 subjects each cable system to an annual reporting requirement – an obligation that the Commission has not previously imposed in connection with leased access requirements. The report must include, *inter alia*:

- The number of commercial leased access channels provided by the cable system;[39]

- The channel number and tier applicable to each commercial leased access channel;[40]

- The rates the cable system charges for full-time and part-time leased access on each leased access channel;[41]

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[33] *Order* ¶ 21.

[34] Amended § 76.972(b)(9).

[35] *Order* ¶ 23.

[36] Amended § 76.972(b)(10).

[37] *Order* ¶ 29.

[38] *Id.* ¶ 30 (emphasis added).

[39] Amended § 76.978(a)(1).

[40] Amended § 76.978(a)(2).

[41] Amended § 76.978(a)(3).

- The cable system's calculated maximum commercial leased access rate and actual rates;[42]
- The programmers using each commercial leased access channel and whether each programmer is using the channel on a full-time or part-time basis;[43]
- The number of requests received for information pertaining to commercial leased access and the number of *bona fide* proposals received for commercial leased access;[44]
- Whether the cable system has denied any requests for commercial leased access and, if so, with an explanation of the basis for the denial;[45]
- Whether a complaint has been filed against the cable system with the Commission or a Federal district court regarding a commercial leased access dispute;[46]
- The extent to which and for what purposes the cable system uses commercial leased access channels for its own purposes;[47]
- The extent to which the cable system imposes different rates, terms, or conditions on commercial leased access programmers (such as with respect to security deposits, insurance, or termination provisions) with an explanation of any differences;[48] and
- A list and description of any instances of the cable system requiring an existing programmer to move to another channel or tier.[49]

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[42] Amended § 76.978(a)(4).

[43] Amended § 76.978(a)(5).

[44] Amended § 76.978(a)(6).

[45] Amended § 76.978(a)(7).

[46] Amended § 76.978(a)(8).

[47] Amended § 76.978(a)(10).

[48] Amended § 76.978(a)(11).

[49] Amended § 76.978(a)(12). The rules also impose new discovery obligations on cable operators in leased access disputes, *see* Amended § 76.975, and a requirement that cable operators must "maintain, for Commission inspection, sufficient supporting documentation to justify the scheduled rates, including supporting contracts, calculations of the implicit fees, and justifications for all adjustments." Amended § 76.970(j)(3).

The New Requirement To Provide Extensive Information in Only Three Business Days Lacks Practical Utility and Is Not Necessary to the Commission's Functions.

Under the PRA, an agency "shall not conduct or sponsor the collection of information" until OMB has approved the collection.[50] OMB regulations promulgated under the PRA provide that, "[t]o obtain OMB approval of a collection of information, an agency shall demonstrate that it has taken every reasonable step to ensure that the proposed collection of information ... [h]as practical utility."[51] "Practical utility" is defined as "the actual, not merely the theoretical or potential, usefulness of information to or for an agency, taking into account its accuracy, validity, adequacy, and reliability, and the agency's ability to process the information it collects ... in a useful and timely fashion."[52] OMB is also required to determine "whether the collection of information ... is necessary for the proper performance of the functions of the agency."[53]

Where an agency fails to demonstrate that the collection of information has practical utility or is necessary to the proper performance of the agency's functions, the Director of OMB will refuse to authorize it.[54] In the instant case, the Commission's dramatic expansion of the information that operators must provide to potential leased access programmers imposes severe burdens on operators but lacks practical utility and is not necessary to the Commission's functions. The new rules reflect a fundamental change from the previous rules, which contemplated that the system operator be prepared to respond within 15 days to a request for leased access information. Given the unprecedented three-business-day time limit, and the fact that much of the information required cannot be generated on such short notice, the new rules in effect require that much of the information mandated in Amended Section 76.972(b) must be calculated and kept current in advance of any information request being received. The fact that the three-business-day deadline has the effect of imposing an *endless* obligation to collect such information drastically adds to the costs and person-hours necessary to comply with the Commission's new requirements.

The *Order* provides no justification for truncating the deadline. It merely asserts that "[i]t does not take 15 days to provide a copy of [the] information to a potential leased access programmer. Three business days to reply to a request for such information is more than adequate."[55] This explanation not only fails to adequately consider the burdens on cable

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[50] 44 U.S.C. § 3507(a).

[51] 5 C.F.R. § 1320.5(d)(1).

[52] *Id.* § 1320.3(l).

[53] 44 U.S.C. § 3508; 5 C.F.R. § 1320.5(e).

[54] *See, e.g., Action Alliance of Senior Citizens of Greater Philadelphia v. Bowen*, 846 F.2d 1449, 1454 (D.C. Cir. 1988), *vacated on other grounds, Action Alliance of Senior Citizens of Greater Philadelphia v. Sullivan*, 494 U.S. 1001 (1990) (stating that the Director of OMB refused to authorize a Department of Health and Human Services ("HHS") reporting requirement because HHS "failed to show the practical utility of the requirement"); *see also Tozzi v. EPA*, No. 98-0169, 1998 WL 1661504, at *3 (D.D.C. Apr. 21, 1998) ("[A]n element of OMB's analysis under the PRA is an assessment of the expected usefulness of the information to be collected.").

[55] *Order* ¶ 14.

operators, but also blatantly fails to consider the practical utility of doing so in the time required. Nor does the Commission explain at all why leased access programmers need the information in three business days, which would at a minimum be required to conclude that the new deadline has any "practical utility." The Commission did not provide a rationale for a three-business-day deadline because there is no justification for it – in fact, no commenters in the proceeding even challenged the existing fifteen-day response period (although a few argued that cable operators failed to comply with the deadline in isolated instances). Furthermore, the *Order* shows no awareness of the fact that the shortened deadline itself imposes a severe burden on cable operators.

The Three-Business-Day Deadline Is Not Justified By Substantial Need.

The lack of a sufficient justification for the truncated deadline renders the Commission unable to comply with the OMB regulation prohibiting a collection of information "[r]equiring respondents to prepare a written response ... in fewer than 30 days" unless the agency can demonstrate "in its submission for OMB clearance," that a deadline of less than 30 days is necessary to satisfy statutory requirements or other substantial need."[56] No substantial need has been shown for the dramatically truncated deadline – and no such need could be shown, particularly because no parties proposed this shortened deadline in their comments during the Commission's rulemaking proceeding. Critically, even in instances where time actually is of the essence, the Commission has provided parties far more reasonable time periods to respond to requests. For example, utilities are required to respond to requests for pole access from third party attachers within 45 days,[57] and they must supply financial information about their pole costs to third party attachers within 30 days of the request.[58] The Enforcement Bureau's *accelerated* procedures for filing a complaint provide respondents ten days to submit an answer.[59] And, the three-business-day deadline for leased access requests is dramatically shorter than the twenty business days the Commission is allowed in responding to requests under the Freedom of Information Act.[60] Indeed, the Commission's three-business-day deadline for information production would appear to be without precedent under Commission rules.

The Three-Business-Day Deadline Is Needlessly Burdensome.

OMB regulations require collections of information to be "the least burdensome necessary for the proper performance of the agency's functions to comply with legal requirements and achieve program objectives,"[61] and the PRA requires that agencies "reduce[] to

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[56] 5 C.F.R. § 1320.5(d)(2).

[57] 47 C.F.R. § 1.1403(b).

[58] *Id.* § 1.1404(j).

[59] *Id.* § 1.724(k)(1).

[60] *See* 5 U.S.C. § 552(a)(6)(A)(i).

[61] 5 C.F.R. § 1320.5(d)(1)(i).

the extent practicable and appropriate the burden on persons who shall provide information."[62] As demonstrated above, the dramatically shortened deadline imposes an unduly burdensome and perpetual requirement that cable operators update and regenerate information, and it does so without the presence of any evidence either in the *Order* or in the record of the rulemaking proceeding that leased access programmers need such information in only three business days. Moreover, it strains all credulity to find a "public interest" need for a leased access programmer to obtain such information on an emergency three-business-day basis.

The Obligation To Provide a Detailed Justification for and Calculation of Leased Access Rates As Well As Other Costs, Terms, and Conditions Is Needlessly Burdensome.

The new requirement that a cable operator must provide "[a] comprehensive schedule showing how [leased access] rates were calculated,"[63] including "a separate calculation *detailing* how *each* rate was derived pursuant to the revised rate formula adopted [in the *Order*],"[64] is also not the least burdensome obligation necessary to the Commission's functions. Such a requirement could conceivably be viewed as an appropriate component of a dispute resolution process where a potential leased access programmer challenges a cable operator's rates. The new rules, however, require the justification to be provided not as part of the complaint process under Amended Section 76.975 but in response to an *initial* request from a potential leased access programmer under Amended Section 76.972.[65] Requiring such a detailed justification from a cable operator in response to a mere request from a potential leased access programmer violates the PRA by imposing needlessly burdensome requirements.

The burden of responding to an initial request is exacerbated by the additional obligation that a cable operator provide "[r]ates associated with technical and studio costs,"[66] including "a list of fees for providing technical support or studio assistance to the leased access programmer along with an explanation of such fees and how they were calculated."[67] And, the requirement that a system operator provide an "*explanation and justification* of its policy" regarding "non-monetary terms and conditions, such as channel and tier placement, targeted programming, access to electronic program guides, VOD, etc.,"[68] further compounds the information burdens imposed on cable operators as part of their initial response to a request from a potential leased access programmer.

The information to be provided as part of the rate calculation alone – which must be constantly regenerated – is sweeping in scope. A system operator must contend with a large

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[62] 35 U.S.C. § 3506(c)(3)(C).

[63] Amended § 76.972(b)(6).

[64] *Order* ¶ 19 (emphasis added).

[65] Amended § 76.972(b)(6); *Order* ¶ 19.

[66] Amended § 76.972(b)(7).

[67] *Order* ¶ 20.

[68] *Id.* ¶ 30 (emphasis added).

number of permutations of channel use and cost that are constantly changing over time. Each cable system operator must calculate four or more rates – often separately for several tiers of service on each system. Each cable operator must use a distinct mathematical formula to calculate part-time and full-time rates (marginal implicit fee formula), home shopping rates (average implicit fee formula), and pay channel rates (highest implicit fee formula). Part-time rates are permitted to, and logically will, vary according to time-of-day (morning, day time, early fringe, prime time, late night, etc.). And, in some circumstances, rates will have to be calculated for discrete portions of cable systems.

Although part of the leased channel rate equation is stable, because an operator is permitted to use programming license fees from the previous year in the rate equation, other parts of the analysis are constantly changing. The rules are ambiguous as to how often leased access rates must be recalculated, but there are numerous events that could be deemed to require complete recalculations whenever they occur, including when: (1) channels are added or moved, an increasingly common phenomenon as cable systems move to more digital operations; (2) subscriber counts change, in the aggregate and on specific tiers; and (3) tiers are created or consolidated.

The Fact That the Rate Calculation Produces a Rate of $0.00 in the Vast Majority of Cases Demonstrates that the Detailed Information Collection about the Rate Calculation Lacks Practical Utility, Is Not Necessary to the Proper Functions of the Commission, and Is Needlessly Burdensome.

The requirement to provide a detailed rate justification also imposes unnecessary obligations on cable operators because *in the vast majority of cases, this rate formula yields a rate of $0.00.* Based on the new required formula (the "marginal implicit fee"), Comcast has calculated leased access rates for twenty of its systems. On those twenty systems, there are a total of 69 tiers of service that have subscriber penetration levels eligible for leased access under the Commission's rules. Out of these 69 tiers, 60 will have rates under the marginal implicit fee formula of $0.00 per subscriber per month for full-time leased access channels. To be clear, Comcast will receive $0.00 compensation for leased access channels on 87% of the leased access eligible tiers of service for these twenty systems.[69] To require cable operators to update rate information constantly and produce detailed justifications for those rates – only to learn that the resulting rate will usually be $0.00 – is to send them on a quintessential "fool's errand." Such an obligation plainly lacks practical utility, is not necessary to the Commission's functions, and is needlessly burdensome.

The Commission has itself concluded that the cost of a neutral accountant to verify the applicable rates when there is a dispute is too much for the process to bear.[70] Yet, the

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[69] NCTA has submitted a motion for stay of the leased access rules at the Commission, which remains pending. NCTA's motion is supported by the sworn declaration signed by Thomas R. Nathan, which attests to the accuracy of the rate calculations included in the instant letter. *See* Attachment 1, ¶ 10.

[70] *Order* ¶ 56.

Commission has no problem requiring thousands of systems to calculate multiple leased access rates potentially numerous times each year. Clearly, this cannot be "the least burdensome" paperwork requirement to establish applicable rates.

The Annual Report Requirement Violates the PRA by Duplicating Existing Requirements.

The PRA and OMB regulations prohibit the Commission from undertaking a collection of information that duplicates existing requirements.[71] The Annual Report required by Amended Section 76.978 is precisely the sort of duplicative paperwork requirement that the PRA forbids. For example, included in the information that must be provided in the Annual Report is "[t]he number of commercial leased access channels provided by the cable system,"[72] and "[t]he channel number and tier applicable to each commercial leased access channel."[73] However, for a significant number of cable systems, the Commission already collects the *same information* through two other requirements:

- The Commission's existing Annual Cable Price Survey form (OMB Control Number 3060-0647), which is sent to approximately 790 system operators, requires systems to identify "the maximum number of channels the system could be required to make available for commercial leased access," "the number of commercial leased access channels," and a complete channel lineup that identifies the tier of all leased access channels distributed.[74]

- The Commission's existing Form 325 (OMB Control Number 3060-0061), sent annually to approximately 1200 cable systems consisting of all cable systems with 20,000 or more subscribers and a sample of smaller systems, requires the *identification of the channel line-up of each system, including channels used for leased access service and the tiers on which these channels are located.*[75] This information, which covers systems serving the vast majority of subscribers, is included in a database that may be accessed through the Commission's Internet site.

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[71] *See* 44 U.S.C. § 3506(c)(3) (agency must certify "that each collection of information submitted to the Director [of OMB] for review ... (B) is not unnecessarily duplicative of information otherwise reasonably accessible to the agency"); 5 C.F.R. § 1320.5(d)(1) ("To obtain OMB approval of a collection of information, an agency shall demonstrate that it has taken every reasonable step to ensure that the proposed collection of information ... (ii) Is not duplicative of information otherwise accessible to the agency...").

[72] Amended § 76.978(a)(1).

[73] Amended § 76.978(a)(2).

[74] *See* 2007/2008 Annual Cable Price Survey, at 5-6, *available at* www.fcc.gov/Daily_Releases/Daily_Business/2008/db0125/DA-08-154A2.pdf. OMB approved the Commission's 2007/2008 Annual Cable Price Survey on February 28, 2008.

[75] *See* 47 C.F.R. § 76.403 & Note.

In addition to mandating that operators submit duplicative information, the newly adopted Annual Report obligates operators to obtain certain information *from* the Commission and then resubmit it *to* the Commission. Specifically, the new rule requires an annual report on whether "a complaint has been filed against the cable system with the Commission."[76] This is obviously information that the Commission would already have, since the requirement pertains to complaint proceedings already filed at the Commission. In addition, because the *Order* also permits complaints to be filed with the Commission informally without notice to the system operator,[77] information concerning such complaints in some cases would first have to be obtained *from* the Commission by the operator only to be reported back *to* the Commission by the operator. In addition to the fact that resubmission of such information to the Commission is duplicative, such resubmission obviously lacks practical utility and is not necessary to the Commission's functions.

The fact that the Commission has obligated cable operators to provide information for several years that is similar to the information included in the new Annual Report – but has failed to make use of such information – further suggests that such information lacks practical utility and is not necessary to the Commission's functions. Notably, the proceeding in which the *Order* was adopted was undertaken for the specific purpose of ascertaining "the current status of leased access programming," whether programmers "actually use leased access channels," to what extent are programmers "able to use the set-aside channels," and "how many leased access channels ... cable operators provide."[78] And yet, in formulating the decisions embodied in the *Order*, the Commission made no reference whatsoever to the information already in its Form 325 database and virtually no use of the data in its annual price survey database. Indeed, the Commission and most of the parties to the proceeding seemed to be largely unaware that this data was already being collected on Form 325. If the same or similar data already in the Commission's files has not been found to be sufficiently reliable to use in resolving the policy questions before the agency, as appears to have been the case in this proceeding and in the Commission's recent 70/70 (video competition)[79] proceeding, or if the Commission has for some reason chosen to ignore that body of information, then it is unlikely that the proposed data collection of the same or similar information would serve any more practical utility.

Furthermore, the proposed data collection lacks practical utility because it fails to address the question at hand – whether programmers have adequate access to distribution such that Congressional goals underlying leased access are being met. Congress established leased access

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[76] Amended § 76.978(a)(8).

[77] *Order* ¶ 34 (noting that a programmer need not file a formal complaint to bring a violation of the leased access rules to the Commission's attention. The programmer may notify the Commission orally or in writing, and where necessary the Commission will submit a Letter of Inquiry to the operator to obtain more information.).

[78] *In re Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Notice of Proposed Rulemaking, 22 FCC Rcd 11222, ¶ 7 (2007).

[79] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255, FCC 07-206.

in the hope of promoting "competition in the delivery of diverse sources of video programming" and the availability of the "widest possible diversity of information sources."[80] To the extent the ordinary program licensing and affiliation process is working – and by every Commission measurement it is – leased channels are superfluous and data on their numbers cannot be meaningful in determining whether the objectives of the statute are being met. In fact, any legitimate concerns about "diversity" of programming have long since evaporated. Since leased access obligations were first adopted, the number of independent networks has skyrocketed, while the percentage of programming owned by cable operators has dwindled. In 1992, there were only "68 nationally delivered cable networks," and 57% of those networks were vertically integrated with a cable operator.[81] Last year, the Commission reported that there were 531 national cable programming networks and that cable operators were vertically integrated with only about 20% of them.[82] Furthermore, Americans have instantaneous access via the Internet to a virtually infinite array of programming. In such an environment, the statutory objectives are being fully achieved by the marketplace, and Herculean efforts to make leased access more attractive undermine rather than advance these goals.

The Commission Fails To Demonstrate that the Production of Proprietary Information is Necessary, Nor Are There Sufficient Procedures To Protect the Information's Confidentiality.

OMB's regulations state that an agency cannot require the production of "proprietary, trade secret, or other confidential information" unless the agency can demonstrate that the information collection is "necessary to satisfy statutory requirements or other substantial need."[83] To gain OMB approval, the agency also must "demonstrate that it has instituted procedures to protect the information's confidentiality to the extent permitted by law."[84] Because they operate in an intensely (and increasingly) competitive marketplace, cable operators generally treat information regarding the numbers of customers who subscribe to each programming tier in a given geographic area as confidential and proprietary.[85] The Commission has in other contexts expressly recognized the need to safeguard the confidentiality of this information, according its compelled production in a merger proceeding not just the regular protections of a protective order but a second level of protection as well.[86] Curiously, however, the *Leased Access Order*

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[80] 47 U.S.C. § 532(a).

[81] H.R. Rep. No. 102-628, at 41 (1992).

[82] *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503, ¶ 157 (2006) ("*Twelfth Annual Video Competition Report*") (reporting numbers as of June 30, 2005).

[83] 5 C.F.R. § 1320.5(d)(2)(viii).

[84] *Id.*

[85] Letter from Michael H. Hammer, Willkie Farr & Gallagher LLP, Counsel for Adelphia Communications Corp., to Donna C. Gregg, Chief, Media Bureau, in MB Dkt. No. 05-192 (Dec. 14, 2005) (seeking enhanced confidential treatment of the number of subscribers to Comcast's and Time Warner's basic, expanded basic, and digital tiers).

[86] *Applications for the Consent to the Assignment and/or Transfer of Control of Licenses from Adelphia Communications Corporation and its Subsidiaries to Time Warner, Comcast, et al. -*

requires that a cable operator routinely divulge subscribership information – with no assurances that confidentiality will be maintained – in response to any request for information by a prospective leased access programmer.[87] In creating this burden, the Commission does not explain why this information is essential to satisfy the requirements of the leased access statute or provide any mechanism by which the cable operator can maintain the information's confidentiality. Indeed, the *Order* fails to even acknowledge that confidential information will be part of the information collection under the new rules. In light of the Commission's absolute failure to demonstrate the necessity of producing the proprietary information or to institute procedures to protect the information's confidentiality, OMB will have no choice but to refuse to approve the requirement to produce this information.

The Commission Has Dramatically Underestimated the Hourly and Financial Burdens Imposed by the New Requirements.

Finally, the Commission's estimate of the burdens resulting from this information collection completely misses the mark. The Notice soliciting public comments on the PRA analysis demonstrates no meaningful effort to accurately calculate those burdens, much less to minimize them. As such, the Commission's current estimate does not contain "a specific, objectively supported estimate of [the] burden," which is required prior to agency submission of a collection of information to OMB.[88] The following examples demonstrate the deficiencies with the Commission's analysis.

Burden Per Entity. The Commission claims that the annual burden per entity is 20 minutes to 40 hours – which the Commission averages to 19 hours annually for each cable system. A more realistic estimate of the annual person-hours required for preparation of the required information runs to at least 185 person-hours per system – *nearly 10 times the Commission's estimate.*[89]

While the Commission's new rules seem to assume that a cable operator can easily ascertain which programming channels may be moved or displaced to supply leased access, the actual decision as to the 30 channels to displace for leased access on a 200-channel system will require a significant and unprecedented collaboration between system programming managers, lawyers, engineers, and marketing personnel. For example, identifying which channels can be cleared for leased access will require an extensive analysis of the carriage agreements applicable to each channel that must be moved or displaced – a process that will also require consultation and negotiation with programmers. Cable operators will also be required to consult with system engineers and marketing personnel before clearing a channel for leased access. Yet with

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Order Adopting Second Protective Order, Order, 20 FCC Rcd 20073, ¶ 8 (2005) (granting enhanced confidential treatment to the number of subscribers to Comcast's and Time Warner's basic, expanded basic, and digital tiers).

[87] *Order* ¶ 18.

[88] 35 U.S.C. § 3506(c)(1)(A)(iv); 5 C.F.R. §1320.8(a)(4).

[89] *See* Attachment 1 (Nathan Decl.), ¶ 35.

absolutely no informed consideration as to the time it would take and the burdens it would impose, the new rules require this review, negotiation, and consultation to occur *prior* to identifying the specific leased access channels available to the requester. And, such analysis will vary from system to system.

Scope of Burden. In the Supporting Statement submitted to OMB with the previous rules in 2006, the Commission estimated that it would take 59,696 hours to comply with the previous information collection requirements. Nearly the entirety of that 59,696 hours reflected time that would be spent providing potential leased access programmers with the limited information required under the existing rules.[90] As explained above, the new rules amount to a vastly increased information collection burden yet the estimated burden for compliance has only increased to 76,819 hours.[91] The 76,819 person-hour estimate represents only a small fraction of the increased annual burden hours that will be required to meet the massive array of new information requirements. Further, the estimate does not account for the fundamental shift to an ongoing obligation to continually update data caused by the three-business-day deadline. In light of these drastic changes, the Commission's burden estimate understates the true burden imposed by approximately ten-fold. Even if the Commission's conservative estimate of 4,001 affected cable systems were accurate, applying Comcast's annual burden hour estimate of 185 hours per system will result in 740,185 annual burden hours for the entire cable industry.[92]

Conclusion

The information collection requirements contained in the new rules under the *Leased Access Order* violate the PRA because they lack practical utility, are duplicative, and are unnecessary to the Commission's functions. Further, the Commission has dramatically underestimated the hourly and financial burdens imposed by the new requirements.

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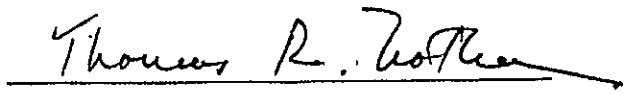
[90] *See* Supporting Statement, OMB Control No. 3060-0568 (Aug. 2006), at 4 (15,884 hours estimated for providing "Maximum Permitted Rates," and 39,710 hours estimated for "Gathering, maintaining, and disclosing permitted rate information"). A copy of the 2006 Supporting Statement is attached hereto as Attachment 2.

[91] The Notice does not specify what unit is being counted, but it appears to be person-hours (assuming about 19.2 hours times 4,000 cable systems).

[92] In the Supporting Statement submitted to OMB with the previous rules, the Commission estimated that there were 3,971 cable systems with more than 36 activated channels. *See* Attachment 2, at 4. It is extremely likely that the number of cable systems with more than 36 activated channels has significantly increased since 2006, given the dramatic growth in channel capacity that has occurred in recent years.

Respectfully submitted,



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Attachment 1

DECLARATION OF THOMAS R. NATHAN

1. My name is Thomas R. Nathan. My business address is One Comcast Center, 50th Floor, Philadelphia, PA 19103.

2. I am Deputy General Counsel, Senior Vice President, Law & Regulatory Affairs for Comcast Cable Communications ("Comcast"). In this role, I am responsible for assisting Comcast in the development and execution of business plans and policies to help ensure that Comcast complies with applicable legal requirements and obligations arising from the Communications Act of 1934, as amended, and the Federal Communications Commission's ("FCC") rules. I have carefully reviewed the new commercial leased access *Order* released by the FCC on February 1, 2008 ("the *Order*"). I have been working closely with Comcast's various operational units in an attempt to implement the substantial changes to the existing leased access rules and other new requirements and duties established by the *Order*. This declaration is based on my personal knowledge and is submitted in support of the National Cable & Telecommunications Association's motion for a stay of the *Order*.

Introduction And Summary

3. For the reasons discussed below, the operation, financial condition, and market development of Comcast's cable systems will be irreparably harmed if the *Order* is allowed to take effect. The *Order* will also harm Comcast's subscribers and existing programmers.

4. Part I of my declaration shows how the *Order* will harm Comcast by dramatically reducing the rates that it can charge programmers for leased access time and leased access channels. In most cases, the rate will be $0.00; in the remaining cases, the rate will be negligible. The *Order* denies Comcast adequate compensation for the use of

its cable systems (indeed, Comcast will not even be able to recover its associated overhead costs) and effectively forces Comcast and its subscribers to subsidize leased access programming.

5. Part II discusses how the *Order* will encourage persons and entities with little or no programming experience or long-term financial viability to obtain access to as much as 15% of Comcast's cable system channel capacity. This will increase demand for the use of our systems to show programming of dubious quality, value, or market interest. Comcast will have virtually no editorial discretion over such programming. And because all of Comcast's cable systems are already operating at or near full capacity, the *Order* will force Comcast to drop existing programming that has been carefully selected as part of existing programming tiers or "packages" with proven market demand.

6. Part III shows that Comcast faces the imminent loss of existing customers (who are disaffected or offended by these changes) and potential new customers to competing distributors, such as DIRECTV and DISH Network. These competitors are not encumbered by the *Order* and are free to select and offer programming packages that consumers actually prefer. Comcast also faces the loss of business opportunities and diminished goodwill with existing programmers that are displaced to accommodate leased access demands under the *Order*.

7. Finally, Part IV addresses the burdensome new administrative requirements and unrealistic time periods imposed in the *Order* for responding to leased access requests. These new requirements will significantly change and complicate the ways in which Comcast interacts with parties who seek leased access, for no apparent reason. The *Order* also requires Comcast to provide proprietary and competitively sensitive

business information in response to every request for leased access information, without any mechanism for guarding or maintaining the information's confidentiality. Comcast will expend hundreds of thousands of dollars and thousands of employee-hours in attempting to implement the *Order*. These expenditures will never be recovered if the *Order* is ultimately vacated.

I. The *Order* Will Require Comcast To Give Away A Significant Portion Of The Channel Capacity On Its Cable Systems.

8. The *Order* dramatically lowers leased access rates for our systems-- typically by more than 90% -- and will force us to finance leased access programmers at the expense of our own business operations. In particular, the *Order* creates a new formula for calculating leased access rates that pegs a channel's lease value to the *lowest amount* a cable operator pays for existing programming services on a particular tier (or program package). The *Order* also "caps" the new formula's leased access rates for a full-time channel at $0.10 per subscriber per month.

9. Under the existing formula, the leased access rates for our systems average about $0.45 per month per subscriber for a full-time leased access channel. Under these current rates, a leased access programmer could lease a full-time channel on a 10,000 subscriber cable system for an entire month for $4,500, and could lease one hour of time on that same system for $6.25. These existing rates provide leased access programmers with an opportunity to distribute their programming at far less than the market rate for distribution via other means (such as by purchasing time on local broadcast stations).

10. Based on the new required formula (the "marginal implicit fee"), we have calculated leased access rates for a diverse cross section of our systems. Of the twenty systems surveyed, there are a total of 69 tiers that have subscriber penetration levels

eligible for leased access under the Commission's rules. *Out of the 69 tiers run under the required new leased access formula, 60 tiers will have a rate of $0.00 per subscriber per month for full-time leased access channels.* Computations for the other nine tiers produced rates of just a few cents per subscriber per month. Thus, under the *Order*'s new leased access formula, Comcast will be literally giving away scarce and competitively critical channel capacity. *To be clear, the compensation Comcast will receive for its channel capacity in nearly every case will be $0.00 or close to $0.00.*

11. The new formula produces this bizarre and unsupportable result because it erroneously equates the value of a channel to Comcast with the license fee we pay to carry it. Such a calculation fails to recognize that on most programming tiers, Comcast is able to negotiate for a certain number of quality programming channels without paying an "affiliation fee" for some initial period of time. For example, we may have reached an agreement that affiliation fees for a new service will commence in later years, or come to an arrangement to pay increased affiliation fees for an established programming service that is rolling out a new programming service -- but the increase in affiliation fees is not contractually attached to the new programming service. Thus, even though these channels have significant value to Comcast and our subscribers, because they do not presently have an affiliation fee associated with them, they are valued at $0.00 under the formula.

12. Because it assigns no value to channels occupied by services that do not carry a separate identifiable fee, the rate formula imposed under the *Order* fails to account for the value of these existing services in attracting new subscribers or retaining existing subscribers, and is fundamentally flawed. As a result, the new rates will not adequately

compensate Comcast for the use of its cable systems or for the value of networks that are displaced to make room for leased access programming.

13. The new leased access rates allowed under the *Order* are grossly inadequate and confiscatory. The rates are so low that Comcast will not even be able to recover the overhead associated with providing leased access channels (such as employee salaries and administrative costs), much less for anything approaching fair value for use of the channel itself. As explained below, unless the *Order* is stayed, Comcast has little prospect of ever receiving fair compensation for the use of its systems by parties that take advantage of these artificially low rates if the *Order* is later vacated.

II. The *Order* Will Force Comcast To Displace Existing, Quality Programming With Leased Access Programming Of Dubious Quality And Minimal Market Demand.

14. By requiring Comcast to lease channel capacity for free or at negligible rates, the *Order* will permit parties with no commitment to producing quality or sustainable programming and virtually no risk of financial liability to occupy significant portions of our channel capacity. Further, by slashing leased access rates to the point where they are cost-free, the *Order* will inevitably drive up demand for leased access channels and make it much more likely that we will be required to devote the statutory maximum 15% of our channel capacity for leased access. This would mean, for example, that a cable system with 200 video channels would be required to "lease" 30 channels of that capacity for literally or effectively nothing.

15. Historically, leased access programming has been poorly produced, low quality, and of minimal interest to subscribers. Some leased access programming is also adult-oriented and offensive to viewers. Short of pornography, Comcast has virtually no

ability to block or exercise editorial control over the quality or content of leased access programming.

16. As a consequence of the *Order*, Comcast will be forced to discontinue carriage of programming that Comcast, in its editorial judgment, has selected for its desirability and consumer appeal, in order to accommodate such leased access programming. The vast majority of our cable systems are "channel-locked" -- that is, all of the capacity is already being used in one way or another. Because there is no "empty space" for the leased access programming to occupy, any increase in leased access programming will lead to a concomitant reduction of other programming.

17. Under the zero and near-zero rates prescribed by the *Order*, Comcast can expect that it will face enormous demand for leased access and will be required to honor those requests for up to 15% of its channel capacity. Any such demands will require that we displace program networks that we currently carry. Even requests for part-time access, such as one additional hour of leased access per day, may force us to drop a program network from one of our tiers. To comply with the *Order*, therefore, our systems will have to prepare to displace some existing networks almost immediately and notify others that they may be dropped in the near future. Inexpensive and independently-owned program networks that have been recently added to Comcast system line-ups are especially at risk of such displacement. Many of these networks offer diverse ethnic, cultural, and specialized news and sports programming, as well as other programming targeted to "niche" audiences such as senior citizens, "do-it-yourselfers," nature enthusiasts, history buffs, and so on.

18. The *Order* wrongly presumes that the decision to displace a particular program network from our line-up will be based solely on the amount of revenue that the network generates for a system. In fact, removing an existing channel implicates a host of issues besides revenue generation, including whether our affiliation agreement will allow us to replace the network, the impact that replacing a channel will have on our business relationships, and our ability to satisfy our customers' preferences. Even networks that do not generate large amounts of revenue can be important to our service if they target underserved audiences and have achieved popularity among the subscribers of the particular cable system.

19. Each Comcast system invests enormous efforts in carefully creating programming service tiers that will attract and retain customers. There are numerous factors that we consider in deciding which networks will comprise a service tier, including subscriber interest in program networks, creation of a diverse mix of networks that will appeal to the widespread views and interests of our subscribers, providing alternatives to the line-ups offered by our competitors, the amount of available channel capacity, costs, and the size and content of our tier offerings. We also work hard to develop programming tiers that reflect the interests and sensibilities of our local communities. For instance, systems in areas with large Latino populations carry more Spanish-language channels than systems in areas with different demographics. By forcing Comcast to displace up to 15% of the existing channels on a programming tier to accommodate leased access demands, the *Order* will wreak havoc on these current offerings. The quality, value, and content of our service will be adversely affected,

resulting in the dissatisfaction and loss of current customers and impeding our ability to attract new customers.

20. Importantly, many of the programming services subject to displacement under the *Order* were selected because of their perceived value to current or potential subscribers. And, as Comcast has discussed in numerous other proceedings at the FCC, Comcast is affiliated with *fewer than ten percent* of the program networks that it carries on its systems. By forcing us to drop independent and diverse program networks, the *Order* will substantially reduce our carriage of such networks -- contrary to the explicit goal Congress established in the leased access law.

III. The *Order* Will Cause Irreparable Harm To Comcast, Consumers, and Existing Programmers.

21. If the *Order* is allowed to go into effect, current subscribers will not understand why some of their favorite programming has been displaced in favor of undesirable leased access content. Experience shows that dropping even a single channel agitates our subscribers, leading to hundreds of phone calls, letters, and e-mails from angry or confused customers. In the worst case, some subscribers may terminate their service altogether.

22. Because the *Order* does not apply to our two biggest competitors -- DIRECTV and DISH Network (which now have over 30 million customers between them) -- they will not be required to modify their programming offerings to accommodate the demands of leased access programmers. Instead, these competitors will retain the ability to select and provide programming tiers, packages, and other offerings that consumers actually prefer. By distorting marketplace competition in this way, the *Order*

will harm our ability to serve consumers and will inevitably cause Comcast to lose existing and potential new customers to these rivals.

23. The loss of revenue resulting from the decrease in existing and new customers also will impede Comcast's ability to expand its own competitive service offerings, such as more high-definition channels and more video-on-demand choices. The lost revenue and decreased attractiveness of "bundles" that include video service will likewise hinder investment in our facilities-based phone service, which has already saved consumers hundreds of millions of dollars, as well as in higher-capacity, faster high-speed Internet services for which there is demonstrated marketplace demand.

24. In addition, Comcast will suffer diminished goodwill with program networks that it is forced to drop to accommodate leased access demands under the *Order*. And the *Order* will undermine and complicate our ability to negotiate affiliation agreements with program networks, which will seek to protect themselves from the consequences of the *Order* (i.e., displacement) during contract negotiations.

25. Displaced program networks and consumers will suffer related harms under the *Order*. Networks typically rely on dual revenue streams (affiliation fees paid by cable operators and advertising sales revenue) in their business plans. As a network is displaced for leased access, its revenues from affiliation fees will drop; the lower number of subscribers that the network reaches will diminish the amount that advertisers are willing to pay for advertising on the network. The only way for networks to survive under these circumstances is to raise their affiliation fees for those systems that continue to carry them in order to make up lost revenue. These higher affiliation fees to cable operators will be passed on to consumers in the form of higher monthly bills.

26. By permitting free or virtually free, no-risk access to Comcast's cable systems, the *Order* ensures dramatically increased demand for leased access, resulting in the continual addition of leased access programming and the displacement of other program networks. This will confuse and annoy customers, and make it virtually impossible for Comcast to provide accurate or current information about its channel line-ups to existing and potential subscribers, as well as to advertisers. It will also necessitate frequent revision and reprinting of marketing and promotional materials, modifications to electronic channel guides, and complicated changes to the instructions provided to our customer service representatives, who need to be prepared to respond to any inquiries or complaints lodged by subscribers.

27. For all of these reasons, Comcast faces the imminent loss of customers, goodwill, and business opportunities if the *Order* becomes effective. The requested stay of the *Order* is vitally necessary to protect Comcast from these irreparable harms.

IV. Comcast Will Never Recoup The Substantial Administrative Costs And Burdens Of Implementing The *Order* If It Is Ultimately Vacated.

28. The *Order* also imposes extraordinary administrative burdens that are unrealistic, unnecessary, and unworkable. Our systems will be obligated to produce several times the amount of information currently required in response to a request for information from a prospective leased access programmer and *in less than one-fifth of the time*. These changes will significantly alter and complicate our interactions with leased access programmers. Nothing in our experience with leased access programmers under the existing rules justifies such burdensome new requirements.

29. Specifically, the *Order* will require each of our more than 600 systems to produce the following information within three business days of when a request for leased access is made:

> (a) a description of its process for requesting leased access channels;
>
> (b) the geographic levels and subscriber tiers on which it is technically possible for the system to place leased access programming;
>
> (c) the number, location, and time periods available for each leased access channel;
>
> (d) whether the leased access channel is currently occupied;
>
> (e) the system's full-time and part-time leased access rates;
>
> (f) a comprehensive explanation of how those rates were calculated;
>
> (g) the rates the system charges for technical and studio costs;
>
> (h) whether the leased access programmer can be included in the system's electronic programming guide;
>
> (i) a description of the ways the programmer can deliver the programming to the system and the instructions, technical requirements, and costs for each of these methods; and
>
> (j) information about when the system can begin showing the prospective programmer's content.

30. The *Order* will also require us to provide additional, sub-categories of information within the same unrealistically short time period. For instance, instead of simply stating which channel or channels are available for leased access, the *Order* will require us to provide a detailed explanation of:

> (a) the number of channels the system can be required to clear for leased access use;
>
> (b) the availability of those channels on a full-time or part-time basis;
>
> (c) the service tier on which each channel is located;
>
> (d) the number of subscribers to each of these tiers;

(e) whether the channels are currently used for non-leased access programming; and

(f) how quickly the channel can be made available to the prospective leased access programmer.

31. In addition, the *Order* will require us to provide each prospective lessee with a sample leased access contract, which must include a cost breakdown for any terms and conditions that require the payment or deposit of funds, such as insurance and deposit requirements, fees for handling or delivery, and any technical or equipment fees. We also must prepare -- *prior* to receiving a specific leased access request -- an explanation and justification of each system's policy with regard to so-called "non-monetary terms and conditions" of the contract (such as those dealing with channel and tier placement, access to electronic program guides, video-on-demand, etc.). These "justifications" will be system-specific and time intensive -- and must be provided along with the rest of the sample contract within three business days of the initial information request.

32. The *Order* also mandates that we disclose to prospective leased access programmers --without adequate protections -- information that is proprietary and highly confidential. For instance, we do not publicly reveal the number of subscribers to each tier of each system, and the FCC has accorded such information enhanced confidentiality protections in the rare instances when it has felt it necessary to review this information. If competitors had access to these numbers, they would be able to glean how successful our programming line-ups and pricing strategies have been in attracting customers, as well as how dropping a program network affects our subscribership levels over time. Release of this information would place us at a substantial disadvantage vis-à-vis our competitors, some of which are not subject to the *Order* and therefore not required to

release this type of information, but which will be able to use this information to target us competitively.

33. Given the sheer volume, complexity, and confidentiality of information required under the *Order*, it is unrealistic for the FCC to expect a cable system to be able to respond to every leased access request within three business days. Yet, the penalty for failing to do so is steep. The FCC has said that it will impose a $500 penalty per system for every day that a response to any particular leased access request is late.

34. Because we only have 90 days from the time the *Order* is officially published (or until OMB approves the rules) before the rules become effective, Comcast has already started mobilizing the massive efforts to implement the internal controls, processes, and other administrative steps necessary to attempt to comply with this onerous regulatory scheme. We are gathering information and calculating new leased access rates for each of our more than 600 systems. However, it turns out that a large percentage of the information that we must produce in response to a request for information is subject to change -- some of it on a weekly or daily basis (e.g., as channel line-ups are altered). So, no matter how much work we frontload, there will continue to be heavy burdens on our systems' personnel.

35. Due to the increased administrative burdens imposed under the *Order*, we anticipate that in the first year it will take a minimum of 185 hours -- the equivalent of four-and-one-half work-weeks -- for *each of our more than 600 systems* to prepare to respond within three business days to leased access requests and to update much of the information regularly. It is very likely the total annual system burden hours will substantially exceed this estimate because many of our systems have separate channel

line-ups for various geographic areas within a single system. Therefore, separate leased access rate calculations will need to be undertaken for each channel line-up.

36. Simply stated, the regulatory regime imposed by the *Order* is burdensome in the extreme and punitive. If the *Order* becomes effective but is later vacated, Comcast will never be able to recoup the lost value of its prime asset, the goodwill of its customers and program networks. Further, Comcast will never be able to recoup the thousands of employee-hours that will be required in the first few months of attempting to comply with these new requirements. The requested stay is thus vitally necessary to protect Comcast from these additional harms.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 27th day of March, 2008.

Thomas R. Nathan

Attachment 2

OMB Control Number: 3060-0568 **August 2006**
Sections 76.970, 76.971 and 76.975, Commercial Leased Access Rates, Terms and Conditions

SUPPORTING STATEMENT

A. Justification

1. **47 CFR Section 76.970(h)** requires cable operators to provide the following information within 15 calendar days of a request regarding leased access (for systems subject to small system relief, cable operators are required to provide the following information within 30 days of a request regarding leased access):

(a) a complete schedule of the operator's full-time and part-time leased access rates;
(b) how much of the cable operator's leased access set-aside capacity is available;
(c) rates associated with technical and studio costs;
(d) if specifically requested, a sample leased access contract; and
(e) operators must maintain supporting documentation to justify scheduled rates in their files.

47 CFR Section 76.971 requires cable operators to provide billing and collection services to leased access programmers unless they can demonstrate the existence of third party billing and collection services which, in terms of cost and accessibility, offer leased access programmers an alternative substantially equivalent to that offered to comparable non-leased access programmers.

47 CFR Section 76.975(b) requires that persons alleging that a cable operator's leased access rate is unreasonable must receive a determination of the cable operator's maximum permitted rate from an independent accountant prior to filing a petition for relief with the Commission.

47 CFR Section 76.975(c) requires that petitioners attach a copy of the final accountant's report to their petition where the petition is based on allegations that a cable operator's leased access rates are unreasonable.

On February 4, 1997, the Commission released a Second Report and Order and Second Order on Reconsideration of the First Report and Order ("Order"), *In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Leased Commercial Access*, CS Docket No. 96-60, FCC 97-27, regarding implementation of the leased commercial access provisions of the 1992 Cable Act. The Order addressed comments and petitions for reconsideration filed in response to the Order on Reconsideration of the First Report and Order and Further Notice of Proposed Rulemaking in CS Docket 96-60, FCC 96-122 (released March 29, 1996). The Order:

(a) revised the maximum rate formulas for use of full-time leased access channels;

(b) declined to impose a transition period for the implementation of the revised rate formulas;

(c) maintained the current rules for maximum part-time rates and adopted a rule that cable operators are not required to open additional leased access channels for part-time use until all existing part-time leased access channels are substantially filled or until a programmer requests a year-long eight-hour daily time slot that cannot otherwise be accommodated;

(d) allowed the resale of leased access time;

(e) granted leased access programmers the right to demand access to a tier with a subscriber penetration of more than 50%;

(f) stipulated that minority and educational programming does not qualify as a substitute for leased access programming unless it is carried on a tier with a subscriber penetration of more than 50%;

(g) declined to mandate preferential treatment for certain types of leased access programmers;

(h) required operators to accept leased access programmers on a non-discriminatory basis so long as available leased access capacity exceeds demand;

(i) required that an independent accountant review an operator's rate calculations prior to the filing of a rate complaint with the Commission;

(j) established a standard of reasonableness for certain contractual requirements;

(k) specified when leased access programmers must pay for technical support; and

(l) defined the term "affiliate" for purposes of leased access.

The *Order* also addressed several issues on reconsideration, including the exclusion of programming revenues from the maximum rate calculation, the maximum rate calculation for a la carte channels, cable operators' obligations to provide certain information to potential leased access programmers and the need for operators to comply with those obligations, time increments, the calculation of the leased access set-aside requirement, and billing and collection services.

The Commission is requesting an extension of this information collection in order to receive the full three year OMB approval/clearance.

As noted on the OMB Form 83-I, this information collection does not affect individuals or households; thus, there are no impacts under the Privacy Act.

Statutory authority for the collection of information is contained in Sections 154(i) and 612 of the Communications Act of 1934, as amended.

2. The data is used by prospective leased access programmers and the Commission to verify rate calculations for leased access channels and to eliminate uncertainty in negotiations for leased commercial access. The Commission's leased access requirements are designed to promote diversity of programming and competition in programming delivery as required by Section 612 of the Cable Television Consumer Protection and Competition Act of 1992.

3. Use of information technology is not feasible in this situation.

4. This agency does not impose a similar information collection on the respondents. There are no similar data available.

5. This collection of information will not have a significant economic impact on a substantial number of small entities/businesses due to small entities/businesses being exempt of all the Commission's leased access provisions.

6. Pursuant to Section 612 of the 1992 Cable Act, the Commission is responsible for promoting diversity of programming and competition in programming delivery. If these information collection requirements were not conducted, the Commission would be in jeopardy of not accomplishing that task.

7. The Commission requires cable operators to provide the following information within 15 calendar days of a request regarding leased access: (a) a complete schedule of the operator's full-time and part-time leased access rates; (b) how much of the cable operator's leased access set-aside capacity is available, (c) rates associated with technical and studio costs; and (d) if specifically requested, a sample leased access contract. Operators of small cable systems with 36 or more channels are allowed 30 days to provide the information listed above.

Regarding rate disputes, we require that if parties cannot agree on a mutually acceptable accountant within five business days of the programmer's request for a review, they must each select an independent accountant on the sixth business day. These two accountants will then have five business days to select a third independent accountant to perform the review. To account for their more limited resources, operators of systems entitled to small system relief have 14 business days to select an independent accountant when no agreement can be reached.

8. The Commission published a Notice (71 FR 35674) in the *Federal Register* on June 21, 2006. No comments were generated as a result of this Notice. A copy of the Notice is attached.

9. Respondents will not receive any payments.

10. There is no need for confidentiality.

11. These collections of information do not address any matters of a sensitive nature.

12. Currently, there are approximately 7,219 cable systems, of which approximately 45% have channel capacities of less than 36 channels, and are therefore exempt of the Commission's leased access provisions. Therefore, number of cable system not exempt from the Commission's leased access provisions/rules is 3,971 operators (55% of 7,219 cable systems). The Commission calculated the burden on the public/respondent as follows:

RESPONSES & SERVICE(s)	RESPONDENT'S HOURLY BURDEN	ANNUAL BURDEN HOURS	Respondent's Hourly Wage	Annual In-house Cost
Maximum Permitted Rates				
3,971 cable operators	4 hours/system	15,884 hours	$33.52/hour	$ 532,431.68
Gathering, maintaining and disclosing permitted rate information				
3,971 cable operators	10 hours/system	39,710 hours	$33.52/hour	$1,331,079.20
Third party billing				
3,971 cable operators	1 hour/system	3,971 hours	$33.52/hour	$ 133,028.50
Accountant Leased Access Reviews				
30 cable operators	4 hours/review[1]	120 hours	$33.52/hour	$ 4,022.40
Petitions for Relief				
30 petitioners	2 minutes/report	1 hour	$33.52/hour	$ 33.52
TOTALS: 11,973 responses		**59,686 hours**		**$2,000,595.20**

[1] Cable operators will coordinate rate information with accountants to allow the accountant to complete leased access rate reviews.

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These calculations were arrived based on the following information/data:

*The average annual burden of calculating maximum permitted rates is estimated to be 4 hours per cable system for each type of leased access rate calculations, including the average implicit fee for full-time channel placement, the highest implicit fee for full-time channel placement as an a la carte service, and for any part-time channel placement.

*We estimate that each operator will undergo an average burden of 10 hours per year to gather this information, maintain it, and disclose it to requesting potential leased access programmers.

*The Commission estimates that identification of a third party billing and collection service rarely needs to occur, because the vast majority of leased access programming is placed on a program services tier and is billed as part of that tier. Nonetheless, the Commission estimates an average burden of no more than 1 hour per cable system operator to identify a third party billing and collection service and then make the necessary information available:

*We estimate that operators will undergo an average burden of 4 hours to arrange for an independent accountant review and coordinate rate information with the selected accountant. This average burden accounts for those instances where parties that cannot agree on a mutually acceptable accountant must each select an independent accountant who in turn selects a third independent accountant. Nationwide, we estimate a need for 30 accountant leased access rate reviews per year.

*We estimate that petitioners will undergo an average burden of 2 minutes to attach such reports. Nationwide, we estimate that petitioners will need to attach a total of no more than 30 accountant's reports when filing petitions for relief.

Total number of respondents:

3,971 operators
30 operators coordinating information with accountant for accountant reviews
30 petitioners involved in the leased access rate dispute process
4,031 (respondents)

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Total number of responses:

3,971 Maximum Permitted Rate Document
3,971 Permitted Rate Information
3,971 Third Party Billing
30 Petitions for Relief
11,973 (responses)

Total annual burden hours: 59,686 hours

Total Annual "In-house cost": $2,000,595.20

13. a. **Total capital and start-up costs:** We estimate the annual costs incurred by cable operators for leased access for sending out leased access information to prospective programmers, for identifying third party billing collection services, and for selecting accountants to be $50,000, equating to approximately $12.59 per operator:

$12.59 x 3,971 respondents (operators) = **$49,994**

b. **Total operation and maintenance costs:** We estimate that accountants will undergo an average burden of 8 hours to review an operator's maximum rate calculations and to prepare the required report. Accountants are estimated to be paid $100 per hour for their services:

30 accountant reviews x 8 hours per review x $100 per hour = **$24,000**

c. **Total annual cost: $49,994 + $24,000 = $73,994**

14. There is no cost to the federal government.

15. There is an adjustment to the total annual burden hours and cost burden. These adjustments are due to a decrease in the number of cable systems in the industry. There are no program changes.

16. The data will not be published for statistical use.

17. We do not seek approval not to display the expiration date for OMB approval of the information collection.

18. The Commission stated the number of respondents and total annual burden hours incorrectly in its initial 60-day Federal Register Notice. We correct the number of respondents to read "4,031" and the total annual burden hours to read "59,686." There are no other exceptions to Item 19 of the Certification Statement.

B. Collections of Information Employing Statistical Methods

No statistical methods are employed.