Cathy Williams

From: Gretchen Lohmann [GLohmann@NCTA.com]
Sent: Monday, April 14, 2008 5:05 PM
To: PRA
Subject: PRA Comments - OMB No. 3060-0568
Attachments: 041408 OMB No. 3060-0568 comments.pdf

Attention Cathy Williams:

Please find the attached comments from NCTA in the Paperwork Reduction Act.

Thank you.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission	)))	OMB No. 3060-0568

ATTN: Cathy Williams

PAPERWORK REDUCTION ACT COMMENTS OF
THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

The National Cable & Telecommunications Association ("NCTA"), by its attorneys, hereby submits its comments in response to the Commission's notice soliciting public comments regarding the information collection requirements imposed by the Commission's newly adopted leased commercial access rules.[1] Specifically, as required by the Paperwork Reduction Act of 1995, the Commission has requested comments with regard to the following: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information being collected will have "practical utility"; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents.

INTRODUCTION

In its zeal to encourage greater use of a cable system's channel capacity by leased access programmers, the FCC has adopted rules that, if allowed to go into effect, will impose on the

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[1] *Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested*, 73 Fed. Reg. 8315 (Feb. 13, 2008) ("Public Notice"). These comments are submitted solely in response to the Public Notice and are not intended as nor should be regarded as a request for reconsideration of the underlying rulemaking decision giving rise to the information collections herein under review.

cable industry an unprecedented, on-going and burdensome information collection regime.[2] Individually and as a group, the elements of these proposed new leased access information collection mandates (which, include, *inter alia*, an annual reporting requirement and a greatly expanded requirement for the provision of information regarding leased access to essentially anyone who requests it) will unjustifiably and unnecessarily increase the paperwork burdens on virtually all cable operators. Under the terms of the Paperwork Reduction Act of 1995 ("PRA"), the Commission cannot certify (and the Office of Management and Budget ("OMB") cannot approve) these new information collection mandates.

The express purpose of the PRA is to "minimize the paperwork burden" imposed by the government and "ensure the greatest possible public benefit from and maximize the utility of information created, collected, maintained, used, shared and disseminated by or for" the government.[3] The legislative history describes the concerns underlying the PRA as follows:

> For the American public, government information often seems to serve either of two quite different purposes. It can be the means by which the dedicated public servant uncovers problems, reaches decisions, enforces laws, delivers services and informs the public. But it also can be the means by which the faceless bureaucrat asks time-consuming or intrusive questions, forces seemingly arbitrary changes in business practices or personal behavior, and imposes significant costs on the economy.[4]

In order to ensure that Congress' goals are met, the PRA, and the implementing rules adopted by OMB, establish a multi-step process, involving both the agency proposing information collections and OMB, for reviewing, analyzing, and, determining whether the proposed information collections meet several express statutory standards. Specifically, under

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[2] *See* Report and Order, MB Docket No. 07-42 (rel. Feb. 1, 2007) ("*Leased Access Report and Order*"). A summary of the rules was published in the Federal Register at 73 Fed. Reg. 10675 (Feb. 28, 2008). References herein to particular sections of the Commission's rules relating to leased access will be based on the revised rules found in Appendix B of the *Leased Access Report and Order*.

[3] Pub. L. 104-13, 109 Stat. 163 (1995).

[4] S. Rep. No. 104-8, 104th Cong., 1st Sess., at 4 (1995).

the PRA and OMB rules, the Commission may not conduct or sponsor any "collections of information" unless and until those collections are submitted to and approved by OMB.[5] As a prerequisite to obtaining the required OMB approval, the Commission must review the information collections and provide OMB with a certification (including a record supporting such certification) that the information collections in question: (1) are *necessary* for the proper functioning of the Commission; (2) are *not unnecessarily duplicative* of information otherwise reasonably accessible to the Commission; (3) have *actual (rather than merely theoretical or potential) practical utility* as defined by regulation; and (4) *reduce to the extent practicable and appropriate the burden on respondents*.[6] In addition, OMB's regulations impose other restrictions on agency information collections including, *inter alia*, a prohibition on the grant of approval for any information collection that requires respondents to prepare a written response in fewer than 30 days absent a demonstration by the agency that such a requirement is "necessary to satisfy statutory requirements or other substantial need" and a prohibition on information collections that require the submission of proprietary, trade secret, or other confidential information absent a showing that the agency has instituted procedures to protect the information's confidentiality.[7]

As we will show, the FCC cannot possibly certify that its new leased access information collections pass these tests. Considered individually or as a group, the Commission's proposed leased access information collections are at odds with the standards for such certification under the PRA. In particular, the Commission's estimates of the burdens imposed by its new (and existing) leased access information collection requirements – described by the Commission

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5 *See generally* 44 U.S.C. § 3507.

6 44 U.S.C. § 3506(3) (A), (B), (C) (emphasis supplied).

7 5 C.F.R. § 1320.5(d)(2)(ii), (viii).

merely as ranging from 20 minutes to 40 hours – not only are unexplained and incomplete, but also are substantially, indeed egregiously, understated. Moreover, the new requirements are in whole or in part unnecessary, lacking in practical utility, duplicative of existing collections, and otherwise violative of the statutory standards. As such, the Commission would be acting in disregard for its statutory obligation if it certified their compliance with the PRA.

I. DESCRIPTION OF THE TYPES OF INFORMATION COLLECTIONS REQUIRED BY THE REVISED LEASED ACCESS RULES

The Commission's Public Notice offers only a sketchy description of the leased access collections under review and does not cite specifically to particular provisions of the new leased access rules. However, a review of those rules reveals that the Commission is proposing the imposition (or extension) of a series of extraordinarily burdensome information collections on cable operators. Identifying these collections is essential to understanding why they simply do not and cannot comply with one or more of the PRA requirements. These information collection requirements can be broadly divided into several distinct categories as follows:

A. Mandatory Submission of Leased Access Annual Report to the Commission

The proposed regulation 47 CFR § 76.978(a) requires cable operators to prepare an annual report for each cable system detailing the system's commercial leased access activity during the preceding calendar year. In order to prepare the report, cable operators must collect extensive information from each system, including: the channel and tier position of each leased access channel on a system (which can vary within a system if the system has different channel line-ups specific to particular geographic areas), the identity of each leased access programmer that placed programming on the cable system via leased commercial access, the number of requests received for information and the number of bona fide proposals received for commercial leased access, and whether the cable system has denied any requests for commercial leased

access and, if so, the basis for denial.[8] These data sets are but a portion of the information that cable operators must compile for each of its systems to prepare the massive annual leased access report required by the FCC's new rules.

B. Mandatory Calculation of Permitted Rates and Retention of Documentation Pertaining Thereto

According to the Commission's new leased access rules, a cable operator must establish a schedule of leased access rates and maintain for Commission inspection sufficient supporting documentation to justify those rates, including supporting contracts, calculations, and justifications for all adjustments.[9] This schedule includes rates calculated under three different formulas for each cable system. In particular, the Commission has established a new "marginal implicit rate" formula that each system must separately calculate for every tier of service with more than 50 percent penetration.[10] In addition, the Commission's existing "average implicit fee" and per channel leased access rate formulas remain in effect for certain categories of leased access programming. These rates also must be calculated by each system for each unique channel line-up in each community served.

C. Disclosure of Leased Access Information to any Inquirer, and Response to "Bona Fide" Proposals

Cable operators are required to disclose their leased access rate schedules (with "comprehensive" documentation of how the rates were calculated) as part of a separate information collection under which each cable system operator must provide anyone claiming to be a "prospective leased programmer" with a prescribed package of detailed information specific

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[8] 47 C.F.R. § 76.978(a)(2), (5), (6), (7).

[9] *Id.*, § 76.970(j)(3).

[10] Moreover, to the extent that a cable system serves multiple communities and those communities have varying channel line-ups, separate calculations must be performed for each unique channel line-up.

to that cable system or community.[11] The list of information that must be compiled and disclosed to satisfy this information collection obligation (in addition to aforementioned the rate schedule and detailed supporting information for that schedule) includes:

- a description of the process by which leased access may be requested from the operator;
- the geographic and subscriber levels of service technically possible;
- the number and location and time periods available for each leased channel;
- whether the leased channel is currently occupied;
- rates associated with technical and studio costs;
- whether inclusion in an electronic program guide is available to the channel lessee;
- the available methods of programming delivery and instructions, technical requirements and costs for each method;
- a "comprehensive" sample contract; and
- information regarding prospective launch dates.[12]

Requests for the above-described information must be fulfilled within three business days of the date the request is received (subject to an exception for a limited class of "small" entities who are given 30 days to respond).[13] While some of the information can be created and gathered on an annual or possibly less frequent basis, other information – such as the number, location and time periods available for each leased access channel – is in a constant state of fluctuation and thus must be collected as of the time each information request is received. Finally, a cable operator must designate a leased access "contact" person to respond to leased access information

[11] 47 C.F.R. § 76.972(b).

[12] *Id.*

[13] *Id.*

requests and must maintain that person's contact name, telephone number, and email address on the cable system's website along with an explanation of the leased access statute and regulations.[14]

In addition to the foregoing, the Commission's rules create another new information collection obligation by requiring cable operators to respond within ten days to any "bona fide" proposal for leased access.[15] Operators are under a continuing obligation to respond to counter-proposals on the same ten-day schedule until an agreement is reached or negotiations fail.[16]

D. Mandatory Disclosure of Information to Third Parties Who Lodge Commercial Leased Access Complaints

Any third party who claims to be aggrieved by the failure or refusal of a cable operator to make commercial channel capacity available or to charge rates for such capacity in accordance with the Commission's regulations can file a complaint with the Commission.[17] After receiving a complaint, a cable operator must file a response within 30 days and must append to that response any documentary evidence it will use to support its position and, in the case of a leased access rate dispute, evidence defending the cable operator's maximum leased access rate calculation supported by an affidavit of a responsible company official.[18] The regulations further provide that cable operators may be required to produce significant amounts of additional proprietary and confidential information in discovery and may be compelled to submit a "final

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[14] *Id.*, § 76.972(a)(1), (2).

[15] *Id.*, § 76.972 (e).

[16] *Leased Access Report and Order* at ¶ 33.

[17] 47 C.F.R. § 76.975(b).

[18] *Id.*, § 76.975(g).

and best offer" for leased access prices, terms, and conditions to the Commission for possible adoption as the resolution of a dispute.[19]

II. DISCUSSION

In order to obtain OMB approval of these massive new leased access information collection requirements (and of the existing collections retained under the new rules), the Commission is obligated to "demonstrate that it has taken every reasonable step"[20] to ensure that these information collections comply with the substantive standards established by the PRA. A key element of the process by which the Commission evaluates whether it can certify such compliance is the required solicitation of public comment regarding the proposed collections. This mandatory public consultation process is intended, *inter alia*, to allow interested parties to review and comment on not only "the accuracy of the [Commission's] estimate of the burden of the proposed collection of information," but also "the validity of the methodology and assumptions used" by the Commission in formulating such estimates.[21] The public comment period also is required in order to give interested parties an opportunity to offer their informed judgments regarding the necessity and practical utility of the proposed collections and to offer meaningful suggestions for reducing the burdens of these collections and enhancing their quality, utility and clarity.[22]

As an initial matter, NCTA notes that the FCC's Public Notice regarding the leased access information collections contains on its face only the most perfunctory and summary estimates regarding the calculation of the burdens imposed by the collections at issue and, thus,

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[19] *Id.*, § 76.975(e).

[20] 5 C.F.R. § 1320.5(d)(1).

[21] *Id.*, § 1320.8(d)(1)(ii)

[22] *Id.*, § 1320.8(d)(1)(i), (iii).

fails to give interested members of the public an opportunity to offer the meaningful, informed input required by the PRA and OMB's implementing rules. For example, it is impossible for anyone to assess the "validity of the methodology and assumptions used" by the Commission in formulating its estimate of the burdens imposed by the information collections at issue (as contemplated by the OMB rules implementing the PRA) when, as here, the Commission has not provided any description of its methodology and assumptions.

Leaving aside the issue of whether the Commission's solicitation of public comment is so lacking in information about its burden estimates as to require it to re-start the process with a new notice that is more in keeping with the letter and spirit of its obligations under the PRA, it is clear that those estimates, however they were arrived at, are not accurate. It also is clear that the proposed information collections are not the "least burdensome necessary" and do not comply in other respects with the specific requirements of the PRA.

A. The Commission Has Grossly Underestimated the Burdens Imposed By the Proposed Leased Access Information Collections

According to the Public Notice, the Commission estimates a "time per response" for the leased access information collections ranging between 20 minutes and 40 hours. As previously described, the Commission is proposing a vast array of new information collections in connection with the leased access rules. However, the Notice does not separately break out a time estimate for each of these information collections. All we know is that at least one unidentified information collection is estimated to take 20 minutes, another is estimated to take 40 hours, and the time burdens for all of the other proposed leased access information collections presumably fall somewhere in between those time frames but otherwise could be anyone's guess. The Notice also estimates that there will be 4,001 respondents annually, that the total annual

burden will be 76,819 hours and that the total annual cost will be $105,000. Again, there is no information provided as to how any of these estimates were derived.

While the Notice offers no information from which the accuracy of its estimates can be assessed, a comparison of these estimates to the Commission's estimates regarding the information collection burdens imposed by the prior leased access rules reveals that the Commission has grossly underestimated the burdens that the new leased access information collection requirements will impose on cable operators. Specifically, in a "Supporting Statement" submitted to OMB in August 2006, the Commission estimated that compliance with the prior leased access information collections would involve 11,973 total responses for a total annual burden of 59,686 hours at a total cost (excluding in-house costs) of $73,994.[23] As noted above, the Public Notice postulates an increase in the total burden imposed by leased access information collections to 76,819 hours and an increase in the total cost to $105,000. While these increases are not insignificant, and while it is impossible to fully review and evaluate them based on the information provided,[24] they plainly understate the actual extent to which the burdens imposed by the new rules will exceed those imposed by the old rules.

First, the FCC has underestimated the number of respondents. In its August 2006 Supporting Statement, the Commission estimated that there would be 4,031 respondents; in its current notice, the estimated number of respondents is 4,001. This estimate not only is inconsistent with the fact that the number of cable systems is increasing due to the growing

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[23] Supporting Statement; OMB Control Number 3060-0568 (August 2006) ("August 2006 Supporting Statement"). This estimate was based on the following assumptions: that 3,971 cable operators would spend (i) four hours per system calculating their maximum permitted rates; (ii) 10 hours per system gathering, maintaining and disclosing permitted rate information; and (iii) 1 hour per system engaging in third party billing. The estimate also assumed that 30 operators would spend four hours in connection with accountant reviews of leased access rates and that two minutes would be spent by 30 petitioners attaching information to complaints filed with the Commission.

[24] For example, in order to assess the $105,000 estimate, it would be necessary to know, *inter alia*, the amount of time attributable to each information collection being reviewed and the number of responses/ respondents for each collection. As discussed above, the Commission has not disclosed any of this information.

number of "overbuilds" and with the fairly safe assumption that the number of systems with fewer than 36 channels (and thus exempt from the leased access rules) is declining, but it also ignores the fact that many of the information collections required by the new leased access rules will have to be performed not on a system-wide basis but separately for each community in which a cable system offers a unique channel line-up. In addition, the Commission's previous estimate of the number of respondents included not only the cable operators subject to the leased access rules, but also the number of non-cable operator respondents impacted by the rules (such as petitioners in leased access disputes).[25] Given the Commission's promulgation of rules that are designed to significantly increase the use of leased access and to facilitate and streamline the process of initiating leased access complaint proceedings, the total number of respondents, encompassing both cable operators and non-cable operators, logically should have increased by a substantial amount, not decreased.

Second, the Commission has grossly underestimated the annual burden of the new leased access information collections in hours and in financial cost. As indicated above, the Commission's estimate of the "Total Annual Cost" of the new leased access information collections for the entire cable industry increased by only $31,004 over the cost estimate in the August 2006 Supporting Statement for the information collections in the Commission's prior leased access rules despite a significant increase in the number of information collections and the amount of data to be collected and disseminated. Dividing the increase in the total cost estimate by the number of affected cable systems identified by the Commission 18 months ago yields an increase in the estimated total cost of only $7.81 per system per year[26] – an amount that barely

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[25] *See* August 2006 Supporting Statement (estimating the number of respondents to be 4,031, based on an estimate of 3,971 cable systems with 36 or more channels and 30 responses each for cable operators and petitioners in the context of leased access disputes).

[26] 3,971 cable operators/$31,004 = $7.81.

will cover the cost of the copying, paper, envelope and postage used in responding to the first few requests for a leased access information package, let alone the recurring costs of printing and mailing monthly invoices to potentially scores of leased access programmers.

The Commission's estimate understates the external cost burden that will be imposed on cable operators by the leased access information collections and does so by a wide margin. One cable operator, in an affidavit prepared in connection with a petition seeking a stay of the new rules, has stated that it expects to incur legal fees of approximately $20,000 – one fifth of what the Commission estimates the entire industry will spend to comply with all of the leased access information collections – just preparing and updating the information package that must be provided upon request to anyone who requests it.[27] That same operator further notes that, in a recent leased access negotiation, it incurred more that $30,000 in outside counsel fees.[28]

Based on this record, there simply is no way that the Commission can certify that it has accurately estimated the external costs burden associated with its leased access information collections. Moreover, the Commission also has erred by completely ignoring the in-house cost burdens imposed by the proposed leased access information collections. The OMB's regulations define "burden" to mean "the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency."[29] Internal costs can only be excluded when estimating the burden of an information collection if such costs are related to "usual and customary" activities. As OMB's rules state, "[t]he time, effort, and financial resources necessary to comply with a collection of information that would

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[27] *See In the Matter of Leased Commercial Access*, Request of National Cable & Telecommunications Association for a Stay, MB Docket No. 07-42 (filed March 28, 2008) ("*NCTA Stay Request*") at Exhibit 3 (Declaration of Joseph Massa, Vice President, Regulatory Compliance, Cablevision Systems Corporation).

[28] *Id.*

[29] 5 C.F.R. § 1320.3(b)(1).

be incurred by persons in the normal course of their activities (*e.g.*, in compiling and maintaining business records) will be excluded from the 'burden' if the agency demonstrates that the reporting, recordkeeping, or disclosure activities needed to comply are usual and customary."[30]

The Commission has not even attempted to make such a showing here. Nor is there any way it could do so. The types of internal costs that will be incurred in order to comply with the leased access information collections simply do not meet the standard for exclusion. The new rules impose detailed information collection and retention requirements relative to the annual reporting requirement and the development of complex new information such as the marginal implicit fee formula as well as information to support that calculation. These are not costs that cable systems would otherwise incur "in the normal course" of their activities. Rather, they are costs that result solely from the reporting, recordkeeping, and disclosure activities mandated by the Commission's new rules.

Had the Commission attempted to assess the in-house costs imposed by its rules (and done so accurately), it would have found that those costs are dauntingly high. By way of reference, we again turn to the Commission's August 2006 PRA Supporting Statement, wherein the Commission detailed over $2 million in annual in-house costs that it estimated would be incurred by cable operators in complying with the previous leased access information collection requirements.[31]

Based on the fact that the Commission's Public Notice estimates that the per response time burden to comply with the new leased access information collection requirements going forward will range from 20 minutes to 40 hours – a four to ten-fold increase in response time

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[30] *Id.*, § 1320.3(b)(2) (emphasis added).

[31] August 2006 Supporting Statement at 4. The Commission based this cost estimate on activity under the current rules generating 11, 973 annual responses totaling 59,686 hours. *Id.*

over the estimates used in the 2006 Supporting Statement – one could conservatively estimate that the in-house costs associated with the new leased access information collection mandates will increase at least by a factor of four (assuming no change in the number of respondents that have to comply with those information collections). In fact, however, the actual in-house cost burden is certain to be much, much higher. This is because the Commission has underestimated the actual amount of time that employees of cable operators – including those that will have to be hired solely because of the quantum leap in workloads caused by the new leased access information collection obligations – will have to spend to ensure that the operator is in compliance with those obligations.

For example, one operator of multiple cable systems estimates that, in the first year of the new rules, it will take a minimum of 185 hours for each of its systems to prepare and timely respond to leased access information requests (including the time needed to regularly update such information).[32] Another cable operator has estimated that creating the information package will take an initial period of 80 hours per system, plus more than half again that amount of time per month for updating.[33] This operator also estimates that responding to information requests within the three-day timeframe required by the rules will add another 168 hours per week to the company's overall internal burden.[34]

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[32] *See NCTA Stay Request*, Exhibit 2 (Declaration of Thomas R. Nathan, Deputy General Counsel, Senior Vice President, Law & Regulatory Affairs, Comcast Cable Communications) at 13. As this operator notes, its estimate of 185 hours "per system" is almost certainly an understatement of its actual burden: "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 calculations will need to be undertaken for each channel line-up."

[33] *See* NCTA Stay Request, at Exhibit 3 (Declaration of Joseph Massa) ("We estimate that creating and updating the package of materials we are required to provide to any potentially interested party will require an initial 80 hours of work for each of our cable systems ....").

[34] *Id.*

In short, the Commission, which is under a duty to develop a "specific, objectively supported estimate" of the burdens associated with its new leased access information collections, and to ensure that those information collections are "the least burdensome necessary," has not achieved either of these goals. The Commission's burden estimates, which are essentially unexplained, egregiously understate the actual measure of the costs that will be incurred by those subject to the new leased access information collection requirements. And, as discussed in greater detail below, the Commission has done nothing to minimize those burdens. Indeed, it has exacerbated them by adopting information requirements that are unnecessary, lacking in practical utility, and duplicative of existing information collections.

B. Various Elements of the Leased Access Information Collections Are Unnecessary, Lacking In Practical Utility, Duplicative, and Otherwise Inconsistent With the PRA

Even if the Commission adjusts its burden estimates to more accurately reflect the real costs in money and time that its leased access information requirements will impose on cable operators, several of the information collections cannot, under any circumstances, be certified as compliant with the PRA. These information collection requirements run afoul of specific provisions of the PRA, including the requirement that information collections be necessary, of actual (not theoretical or potential) practical utility, and non-duplicative. The Commission's rules also violate the specific restrictions in the PRA on the imposition of response deadlines of less than 30 days and on mandated disclosure of proprietary and confidential information.

1. The Annual Report Requirement

The new annual leased access report requirement that the Commission has proposed imposing on cable operators is, in terms of the PRA, clearly indefensible. This mandatory reporting obligation subjects cable operators to information collection requirements that are completely *unnecessary* to accomplish the proper performance of the functions of the

Commission. Looked at in whole and in part, the annual reporting requirement is deficient under the PRA because it is unnecessary and will not (and cannot) be of any "practical utility."

There is no need to require every cable operator to file an annual report regarding its leased access activities. First, while the Commission extensively regulates cable, it has not found it necessary in any instance to require every cable system to file a comprehensive annual report containing the volume of transaction data demanded by the leased annual report requirement. Second, while the Commission suggests that it needs the annual report so that it can monitor how the leased access rules are working and whether they need to be further revised, the agency plainly can keep tabs on its rules and make changes without imposing this onerous annual information collection burden on every cable operator. In the 24 years since Congress imposed leased access obligations on the cable industry, the Commission has conducted several inquiries and rulemakings relating to the implementation of those obligations.[35] It has done so based on information that it gathers in the ordinary course of business (*i.e.*, petitions, letters, etc. from the public raising issues) and through the regular notice of inquiry and notice and comment rulemaking procedures. This is the approach the Commission follows with respect to other complaint-driven cable-related rules and there is no reason why it cannot and should not continue this approach with respect to leased access.

The annual report rule not only is wholly unnecessary, it also is lacking in any "practical utility" as that concept is applied under the PRA. Specifically, for purposes of the PRA, the

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[35] *See Amendment of Parts 1, 63, and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984*, Report and Order, 58 RR 2d 1 (1985) at ¶¶ 28-41; *Competition, Rate Deregulation, and the Commission's Policies Relating to the Provision of Cable Television Service*, Report, 67 RR 2d 1771 (1990); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation,* Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631 (1992); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Leased Commercial Access,* Order on Reconsideration of the First Report and Order and Further Notice of Rulemaking, 11 FCC Rcd16933 (1996); Second Report and Order and Second Order on Reconsideration of the First Report and Order, 12 FCC Rcd 6267 (1997).

practical utility of an information collection refers to its "actual, not merely theoretical or potential, usefulness of information to or for an agency."[36] Moreover, in order to satisfy the practical utility requirement, the Commission must be able to demonstrate to OMB an "actual timely use for the information" and that the Commission will be able "to receive and process the information it collects ... in a useful and timely fashion."[37]

By this standard, it is indisputable that the Commission cannot certify, and OMB cannot approve, the annual leased access reporting requirement. There is no indication that the Commission can or will "receive and process" the annual reports in a timely fashion. Compliance with this across-the-board annual reporting requirement (which applies to all cable operators regardless of size) will inundate the Commission with more information than it can conceivably process or use in a timely fashion. It is a regulatory fishing expedition gone wild.

In addition, the Commission's stated reasons for imposing this extraordinary and unnecessary burden cannot withstand scrutiny. According to the Commission, "gathering up-to-date information and statistics on an annual basis ... is critical to our effort to track trends in commercial leased access rates as well as to monitor any efforts by cable operators to impede use of commercial leased access channels" and "will allow us to determine whether further modifications to the commercial leased access rules ... are needed based on a more concrete factual setting."[38] However, the collection of data for such "theoretical" and "potential" use is exactly the kind of collection for the sake of collection that the PRA specifically is designed to prevent.

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[36] 5 C.F.R. § 1320.3(l).

[37] *Id.*

[38] *Leased Access Report & Order* at ¶ 68.

Looking at the various elements of the annual reporting requirement reveals even more specific reasons why these information collections cannot be certified or approved. For example, the annual report requires the collection and submission of information identifying the programmers using each commercial leased access channel and whether each programmer is using the channel on a full-time or part-time basis.[39] The collection and use by the government of information as to the identities of users of commercial leased access raises concerns that the Commission could base its judgments regarding the uses of leased access on the content of such uses. There is no need for the Commission to collect this information and no valid use for it. Even if the Commission did not like the mix or distribution of leased access programmers, it has no statutory or other authority to seek to adjust such usage based on content.

The annual report requirement also calls on cable operators (i) to collect and disclose, on a system-by-system basis, whether they have denied any requests for commercial leased access and, if so, to include an explanation of the basis for the denial; (ii) to report each complaint that has been filed against it with the Commission; and (iii) to disclose the number of leased access channels provided by the system and the channel number and tier for each such channel.[40] These information collections highlight the Commission's total indifference to its substantive obligations under the PRA.

In particular, the Commission does not explain in the record the precise reason that warrants requiring operators to report every complaint filed against them. Nor can it. The Commission already will have in its possession any complaint filed with it against any cable operator. Consequently, this information collection fails on its face to meet one of the most basic tests under the PRA by requiring the submission of information that is *unnecessarily duplicative*

[39] 47 C.F.R. § 76.978(a)(5).

[40] *Id.*, § 76.978(a)(1), (2), (7), (8).

of information otherwise reasonably accessible to the Commission.[41] The requirement that the annual report include data regarding the number of leased access channels that a system offers also is unnecessarily duplicative since such information is collected by the Commission as part of its annual cable price survey and its Form 325 "annual report" data collection – annual information collections that, it should be pointed out, rely on statistical samples rather than imposing paperwork burdens on every single cable operator.[42]

Similarly, the Commission cannot justify requiring cable operators to maintain and annually report information regarding every instance in which a request for leased access was denied (or, presumably, the operator and programmer failed to reach an agreement on the terms of a leased access agreement) and an explanation for each such "denial."[43] Apart from the lack of any evidence that the Commission needs this information or would put it to any "practical" use, the Commission cannot legitimately certify that this information collection "reduces to the extent practicable and appropriate the burden on persons who shall provide information."[44]

Rather than require information about legitimate decisions made by cable systems with respect to leased access, the Commission can satisfy any need it might have to monitor non-compliance by, as discussed above, tracking complaints filed with the Commission.[45]

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[41] 44 U.S.C. § 3506(3)(B).

[42] *See, e.g., Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992; Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment,* Report on Industry Prices, 20 FCC Rcd 2718 (1995) at ¶ 40 (number of leased access channels offered).

[43] Indeed, in light of the new marginal rate formula, which produces a zero or near zero leased access rate in many (if not most) instances, it is conceivable that a cable system could receive hundreds of bona fide requests for commercial leased access in a single calendar year. This requirement is yet another example of an information collection that likely will require the creation of new record retention information systems.

[44] 44 U.S.C. § 3506(c)(3)(C).

[45] In this regard, it is noteworthy that by streamlining the leased access complaint process the Commission has reduced the time and cost associated with processing complaints and effectively removed any barriers that would keep a wrongfully denied leased access programmer from filing a complaint.

2. The Preparation and On-Demand Distribution of a Comprehensive Package of Leased Access Information

Another particularly burdensome element of the new information collections proposed by the Commission is the requirement that cable operators compile and maintain a detailed leased access information package and, upon request, deliver such information package within three days to anyone claiming to be a "prospective leased access programmer."[46] It does not matter whether the person requesting this information actually has any sincere interest, intent or ability to provide programming over a leased channel – persons requesting information are not required to make any threshold showing that they actually are "prospective" leased access programmers. In addition to subjecting a cable operator to a virtually unlimited number of requests, some of the information that must be provided as part of the mandated information package requires real-time collection that will be extremely burdensome, such as specific channel availabilities (dates and times not already scheduled for each channel on each system subject to the request).

Mandating the collection and submission of this information to essentially anyone making even the most casual of inquiries about leased commercial access is simply unnecessary to accomplish the proper performance of the functions of the Commission and fails to "reduce[] to the extent practicable and appropriate the burden on persons who shall provide information" as required by the PRA.[47] The Commission appears to have made no effort to limit, as a practical matter, the significant burdens imposed by this information collection, both with regard to the virtually boundless universe of persons to whom the information must be provided and with respect to the unnecessarily broad range of information that an operator is required to compile and regularly update.

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[46] 47 C.F.R. § 76.972(b).

[47] 44 U.S.C. § 3506(c)(3)(A), (C).

3. The Three-Day Deadline for Responding to Requests for Leased Access Information

OMB's regulations expressly restrict the approval of any collection of information "requiring respondents to prepare a written response to a collection of information in fewer than 30 days after receipt of it."[48] The regulations establish a high threshold to justify a response period of less than 30 days: such collections can only be approved if the requesting "agency is able to demonstrate, in its submission for OMB clearance, that such characteristic of the collection of information is necessary to satisfy statutory requirements or other substantial need."[49]

No such showing has been nor can be made with respect to the Commission's adoption of the requirement that cable operators respond to a request for leased access information within three business days of when such a request is made.[50] The *Leased Access Report and Order* explains this obligation by summarily declaring that the prior 15-day response period was "unnecessarily long" and that "[t]hree business days to reply to a request for [leased access-related] information is more than adequate."[51] There is no showing or claim that a response period of only three business days – one-tenth the period presumed reasonable by OMB – is *necessary* to satisfy any statutory requirement or any other substantial need.

Nor is it possible for the Commission to make such a showing. Nothing in the law indicates that Congress viewed leased access in terms of "faster is essential." The stated statutory goal of the leased access requirements is to promote "competition in the delivery of

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[48] 5 C.F.R. § 1320.5(d)(2)(ii).

[49] *Id.*, § 1320.5(d)(2).

[50] We note that a 30-day response period is permitted for small cable systems owned by small cable companies. 47 C.F.R. § 76.972(g)(1).

[51] *Leased Access Report and Order* at ¶ 14. In the August 2006 Supporting Statement, the Commission recited the 15-day response period, but made no attempt to justify the collection period being less than 30-days as required by regulation.

diverse sources of video programming" and the availability of the "widest possible diversity of information sources."[52] There is absolutely no basis in the record of the leased access rulemaking proceeding or elsewhere to support the conclusion that mandating a three-day deadline for responding to initial requests for leased access information (or even a 15-day response deadline) is more effective than a 30-day response window in achieving those goals. In fact, the Commission's decision to excuse smaller operators from the three-day response deadline is itself further proof that the three-day deadline is not "necessary."

Also weighing decisively against the certification and approval of the three-day deadline is the fact that there is no requirement that the parties requesting leased access information packages demonstrate any bona fide interest in actually using leased access capacity. Furthermore, reducing the response deadline from 15 days to three days is irrational given that the information required by the new rules is far more extensive and detailed than was the case under the old rules. Compiling the required information package will be an on-going, time-consuming process because it must include information regarding leased access availabilities that are constantly in a state of flux. And while the Commission makes much of comments that claim that some cable operators have ignored requests for leased access information or have given non-compliant responses, imposing a three-day deadline, as opposed to a 15- or 30-day deadline, will not in any way alleviate these concerns.[53]

4. Mandated Disclosure of Confidential, Proprietary Information

The information that the cable operators would be required to disclose to the public as part of the information collections herein under review includes highly confidential proprietary data. For example, the information package that a cable operator must provide to anyone

[52] 47 U.S.C. § 532(a).

[53] *Leased Access Report & Order* at ¶ 14.

requesting it must include "the number of customers subscribing to each tier containing leased access channels."[54] In addition, the rules require that the information package include not only a leased access rate schedule, but also a "calculation" of those rates. Under the Order, calculation of the "marginal implicit fee" rate is based on the monthly per subscriber affiliation fee to programmers on each tier for which a leased access rate is calculated.

To the extent the Commission contemplates disclosure of a breakdown of individual programming costs to comply with this requirement, the types of data described above are among the most sensitive, proprietary business information that cable operators possess. Under the OMB's regulations, information collections that mandate the submission and release to the public of such confidential material cannot be approved unless the Commission can demonstrate that "it has instituted procedures to protect the information's confidentiality to the extent permitted by law."[55] Again, no such showing has been nor can be made.

CONCLUSION

The Commission has failed its PRA obligations on numerous fronts. It has failed to give the public the required opportunity to comment meaningfully on its estimates of the burden imposed by the new leased accession information collections by failing to provide any information about the methodology and assumptions it used in creating those estimates. It has grossly underestimated the burden with respect to the information collections. And it has proposed information collections that do not and cannot meet the substantive statutory standards set forth in the PRA with regard to necessity, practical utility, and non-duplicativeness or specific restrictions in the OMB's rules pertaining to the time allowed to comply with an information collection requirement and to the disclosure of confidential information. The Commission's

[54] *Id.*, at ¶ 18.

[55] 5 C.F.R. § 1320.5(d)(2)(viii).

failure to comply with these substantive and procedural requirements of the PRA thus precludes the Commission from certifying its compliance therewith and from obtaining the Director of OMB's approval for the proposed collections.

Respectfully submitted,

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