Comcast

May 28, 2008

Via Email
Nicholas A. Fraser
Office of Management and Budget
Nicholas_A._Fraser@omb.eop.gov

Re: Public Information Collection Requirement Submitted to OMB for Review and Approval; Comments Requested, 73 Fed. Reg. 22945 (Apr. 28, 2008)

Dear Mr. Fraser:

Comcast Corporation ("Comcast") hereby responds to the April 28, 2008 Federal Register Notice[1] inviting comments to be submitted to the Office of Management and Budget ("OMB"), 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] Comcast respectfully urges OMB to disapprove the FCC's proposed information collections, which do not comply with the PRA and OMB's regulations.[4]

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[1] Public Information Collection Requirement Submitted to OMB for Review and Approval; Comments Requested, 73 Fed. Reg. 22945 (Apr. 28, 2008).

[2] 44 U.S.C. § 3501 *et seq*.

[3] *In the Matter of Leased Commercial Access*, Report and Order and Further Notice of Proposed Rulemaking, FCC 07-208, 23 FCC Rcd 2909 (2008) ("*Leased Access Order*" or "*Order*"). The *Order* has been stayed by the U.S. Court of Appeals for the Sixth Circuit. Order, *United Church of Christ Office of Communications, Inc. v. FCC*, Nos. 08-3245/3369/3370/3450/3452 (6th Cir. May 22, 2008). However, this does not alter the timetable for OMB action on the FCC's submission under under the PRA or the need for OMB to disapprove regulations that violate the PRA and OMB regulations.

[4] The FCC published its initial request for PRA Comments on February 13, 2008. Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, 73 Fed. Reg. 8315 (Feb. 13, 2008), *corrected*, 73 Fed. Reg. 9569 (Feb. 21, 2008) ("First Notice"). Comcast and the National Cable & Telecommunications Association ("NCTA") each filed separate comments at the FCC on April 14, 2008. The FCC submitted the information collection request to OMB on April 28, 2008.

Introduction and Summary

For the vast majority of programming available on cable television, a cable operator, such as Comcast, exercises its editorial discretion to select the programming services (or networks) that it believes its customers will wish to watch, negotiates mutually agreeable arrangements to carry that programming, and then bundles assortments of programming services into packages (or tiers) that it believes will provide attractive options to consumers and be more attractive than that of direct broadcast satellite, telephone company, and other multichannel video competitors. There are, however, exceptions to the general rule that cable channel carriage arrangements are governed by commercial negotiations. One such exception involves a statutory requirement, pursuant to the Cable Communications Policy Act of 1984, under which cable operators can be required to lease channel capacity to third parties (known as leased access programmers) which seek to transmit their own programming over a cable operator's system on a full- or part-time basis.

When Congress later granted the FCC authority to set leased access rates in 1992, it left undisturbed the preexisting statutory mandate that any rates, terms, and conditions must be "at least sufficient to assure that [leased access] use will not adversely affect the operation, financial condition, or market development of the cable system."[5]

In the case where the cable operator selects the programming, it typically compensates the programmer, such as Fox News, Discovery or ESPN, for the right to distribute its network to the cable operator's customers. In the regulated model for leased access, however, programmers do not receive compensation from cable operators for their programming; rather, leased access programmers must pay the cable operator for use of the cable operator's channel capacity. This model has proven workable only for limited and discrete categories of programming – mainly that which has very low production costs and/or generates a separate direct-from-consumers revenue stream. As a result, leased access capacity has been occupied primarily by programmers that offer infomercials[6] and extremely low-budget (sometimes "adult"-oriented) programming.

Meanwhile, the goals Congress sought to realize through leased access nearly 25 years ago have more than been achieved thanks to marketplace developments. Congress established leased access 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."[7] In the quarter-century since 1984, any legitimate concerns about "diversity" of video programming have long since evaporated. Since leased access obligations were first adopted, the number of independent programming networks available on cable, satellite and telephone-company-provided multichannel video services has skyrocketed, while the percentage of programming networks 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

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[5] 47 U.S.C. § 532(c)(1).

[6] An infomercial is a lengthy commercial (usually direct sales) presented in the form of a television program.

[7] 47 U.S.C. § 532(a).

operator.[8] Last year, the FCC reported that there were 565 national cable programming networks and that cable operators were vertically integrated with only about 15% of them.[9] Furthermore, even these numbers ignore the fact that Americans have instantaneous access via the Internet to a virtually infinite array of video programming from every corner of the globe. Simply put, the marketplace has worked – without the need for government-mandated set-asides.[10]

Despite the vast diversity of programming options, the FCC's *Leased Access Order* concludes that greatly increased government regulation is needed to stimulate leased access use. The FCC has adopted a new rate formula that slashes already-low leased access rates; as a result, leased access programmers end up paying nothing – or virtually nothing – for use of channels they are "leasing."[11] The likely result of these new rates will be a surge of low-quality leased access programming, the forced displacement of numerous video programming networks that consumers watch and enjoy, and a skewing of the intense competition among multichannel video programming distributors (because providers like DIRECTV and DISH Network, which compete for customers in every community served by cable, are exempt from leased access obligations and are therefore free to use all of their capacity to serve their customers' viewing needs).

The *Leased Access Order* did more than slash leased access rates to zero or near-zero. It also adopted new burdensome information collection requirements that violate the Paperwork Reduction Act ("PRA") of 1995[12] and OMB regulations issued pursuant thereto.[13] These information collection requirements include, among others: (1) a new obligation that cable operators 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

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

[9] Press Release, FCC, FCC Adopts 13th Annual Report to Congress on Video Competition and Notice of Inquiry for the 14th Annual Report, at 4 (rel. Nov. 27, 2007).

[10] This is why Republican congressional leaders have repeatedly expressed concerns about "expanded mandates on the cable industry," which they have warned are "unsupported by the record of significant competition in the video programming marketplace, and would be harmful to innovation and consumers." Letter from Rep. Joe Barton and 22 Republican Members of the U.S. House of Representatives Committee on Energy & Commerce to FCC Chairman Kevin J. Martin (Nov. 20, 2007). As they explained, "[o]nerous rate regulation of leased access makes little sense when the [FCC] is appropriately deregulating other cable rates as required by statute because of effective competition, and when YouTube and other Internet services provide a similar outlet on an even wider scale." *Id.* This is also why respected commentators criticized the FCC's effort to slash leased access rates as "unnecessary," particularly given that "the main beneficiaries of [leased access] have been home shopping channels." James Gattuso & Adam Thierer, *TV Train Wreck: Martin, Markets, and the Potential for Regulatory Disaster* (Nov. 29, 2007), *available at* http://article.nationalreview.com/?q=MGJmNmI1MjcxNDBlZGNj MzhiNGQ0OTNmYzJhYjg1ZjU=.

[11] *See infra* p. 16.

[12] 44 U.S.C. § 3501 *et seq.*

[13] 5 C.F.R. § 1320.1 *et seq.*

programmer, and (2) a new mandate that each cable operator provide a detailed report to the FCC on leased access each year.[14]

The *Leased Access Order's* new information requirements violate the PRA and OMB's regulations in all of the following respects, each of which were discussed in detail in Comcast's PRA Comments submitted to the FCC on April 14, 2008, and to which the FCC largely failed to offer a meaningful response in the Supporting Statement it submitted to OMB.[15]

First, the new requirement that cable operators produce a panoply of information to prospective leased access programmers *in only three business days* violates numerous provisions of the PRA and OMB's regulations. Specifically,

- Contrary to Section 3506(c)(3)(A) of the PRA[16] and Section 1320.5(d)(1)(i), (iii) of OMB's regulations, the shortened time period adopted in the *Order* lacks any grounding in practical utility and is not necessary to the FCC's functions because it is not essential for leased access programmers to receive the information required to be produced in only three business days.[17] Moreover, because it is not necessary that leased access programmers receive the required information in only three business days, the FCC cannot show that the three-business-day response period itself "is necessary to satisfy statutory requirements or other substantial need," as OMB regulations require for any response period of less than thirty days.[18]

- The three-business-day deadline is also 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,[19] 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.[20] Rather, as explained below, the regulation amounts to a perpetual information collection burden where cable operators will need to continually update such information, much of which is constantly changing. This enormous expenditure of energy and resources exceeds any necessary regulatory burden because there is no conceivable need, nor has the FCC provided an adequate basis, for prospective programmers to receive this information within three business days.

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[14] *Order* ¶ 89; Amended §§ 76.972 & 76.978.

[15] *See* Supporting Statement, OMB Control No. 3060-0568 (Apr. 28, 2008).

[16] 44 U.S.C. § 3506(c)(3)(A).

[17] *See* 5 C.F.R. § 1320.5(d)(1) (prohibiting information collections that lack "practical utility" and are not "necessary for the proper performance of the agency's functions.").

[18] *Id.* § 1320.5(d)(2).

[19] *Id.* § 1320.5(d)(1)(i).

[20] 44 U.S.C. § 3506(c)(3)(C).

Second, the requirement to provide "[a] comprehensive schedule showing how [leased access] rates were calculated,"[21] including "a separate calculation *detailing* how *each* rate was derived,"[22] is not the least burdensome obligation necessary to the FCC's functions. In this and other respects, the *Order* requires cable operators to provide prospective leased access programmers with more information than they reasonably need or could possibly use.[23] The same type of detailed justification is also required with respect to charges for other services cable operators are required to provide, including technical support and studio assistance, as well as all other "fee[s]" and "non-monetary terms and conditions."[24] These upfront information requirements impose an immediate duty to defend and justify rates and terms even though the potential leased access programmer is merely requesting information about leased access channels. Requiring such justification is not necessary as an immediate response to a mere request for information about leased access channels. This is all the more true given that the required rate calculation under the FCC's new formula in most cases produces a rate of $0.00.[25] Subjecting cable system operators to a massive array of information production requirements to justify a regulated rate that is almost always zero is paperwork for paperwork's sake, the antithesis of practical utility.[26]

Third, the Annual Report on leased access that operators must produce under the amended rules requires producing information already included in other submissions that many cable systems must provide to the FCC, such as through the existing Price Survey Form and existing FCC Form 325. This violates the PRA, which forbids information collections "unnecessarily duplicative of information otherwise reasonably accessible to the agency."[27] Moreover, the FCC has failed to make use of the information collected through the existing requirements in adopting the *Leased Access Order* – or in any other regulatory context – which further suggests that the requirements lack practical utility and counsels against their duplication.

Fourth, the new rules direct cable operators to provide prospective leased access programmers with subscribership data that are proprietary and held in confidence,[28] in violation of OMB regulations that prohibit agencies from requiring production of "proprietary, trade

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[21] Amended § 76.972(b)(6).

[22] *Order* ¶ 19 (emphasis added).

[23] 44 U.S.C. § 3506(c)(3)(C); 5 C.F.R. § 1320.5(d)(1)(i).

[24] *Order* ¶ 30.

[25] *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 FCC, is attached to Comcast's April 14, 2008 PRA Comments as Attachment 1. Mr. Nathan is Deputy General Counsel and Senior Vice President, Law & Regulatory Affairs for Comcast Cable Communications.

[26] 44 U.S.C. §§ 3506(c)(3)(A); 5 C.F.R. §§ 1320.1(d)(1)(i), 1320.5(d)(1)(i).

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

[28] *See* Comcast April 14, 2008 PRA Comments, Attachment 1 (Nathan Decl.), ¶ 32.

secret, or other confidential information" without procedures to protect confidentiality unless "necessary to satisfy statutory requirements or other substantial need."[29] In creating this requirement, the FCC 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 FCC has dramatically underestimated the burdens that the new requirements will pose for cable operators. In doing so, the FCC 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.[30] The current estimate of 173,610 burden hours represents only a small fraction of the annual burden hours that will be required. The FCC may have derived its burden estimate (though we can only infer this, as the Commission offers no rationale in its *Order* or in its Supporting Statement) from the erroneous assumption that the numerous new information collection requirements could all be undertaken by a cable company's centralized administrative office. However, because each cable system has unique operational variables that directly affect the required information response, and because such responses are due within three business days, Comcast will have approximately six hundred cable systems each separately responding to the new information collection requirements.[31]

Although Comcast detailed each of these arguments in its April 14 filing, the FCC largely failed to address them in its Supporting Statement. The Supporting Statement fails to justify why leased access programmers need this vast array of information from cable operators in only three business days.[32] It also dismisses Comcast's demonstration that much of the information cannot be generated in only three business days – and therefore must be constantly updated – with the assertion that "the information will already be compiled, [and] should not take longer than three business days to provide."[33] Further, Comcast pointed out that the Annual Report requirement is duplicative of existing FCC requirements,[34] yet the Supporting Statement does not mention these requirements and merely asserts that the requirements of the Annual Report are "not duplicated elsewhere."[35] The FCC does not even address Comcast's explanation that the detailed and burdensome justifications are all the more unnecessary because the leased access formula almost always yields a rate of $0.00.

The PRA and OMB regulations require something very different than the perfunctory analysis provided in the *Leased Access Order* and in the Supporting Statement. "To obtain OMB

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[29] 5 C.F.R. § 1320.5(d)(2)(viii).

[30] 44 U.S.C. § 3506(c)(1)(A)(iv); 5 C.F.R. § 1320.8(a)(4).

[31] Nathan Decl. ¶ 35.

[32] Supporting Statement, § A.8.

[33] Supporting Statement, § A.8.

[34] Comcast April 14, 2008 PRA Comments, at 13-15.

[35] Supporting Statement, § A.8.

approval of a collection of information, an agency shall demonstrate that it has taken every reasonable step to ensure that the proposed collection ... (i) [i]s the least burdensome necessary; (ii) [i]s not duplicative..., and (iii) [h]as practical utility."[36] These are not steps that can be taken *after* the rules have been adopted; they are steps that must be integral to the *pre*-decisional process.[37] No such steps were taken here; in fact, most of these requirements were adopted with no advance notice from the agency, thereby foreclosing any opportunity for meaningful input from stakeholders about costs and benefits of various alternatives.[38]

Inevitably, then, the information collection requirements established by the FCC incurably fail to reflect the balancing required by Congress and by OMB regulations. Given the deeply flawed process by which these rules were created, the FCC cannot maintain – and OMB should not properly conclude – that "every reasonable step" has been taken to maximize utility and minimize burdens of the new regulatory regime.[39]

For these reasons, as set forth fully below, the FCC has failed to meet its statutory obligations. OMB disapproval of the FCC's information collection requirements in the *Leased Access Order* will ensure fresh and far more careful FCC consideration of the important goals and obligations of the PRA.[40]

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[36] 5 C.F.R. § 1320.5(d)(1).

[37] *Id.*

[38] Although the PRA and OMB regulations require agencies to submit collections of information contained in *proposed* rules and request comments on such proposed rules, 44 U.S.C. § 3507(d)(1); 5 C.F.R. § 1320.11, Comcast had no such comment opportunity in this proceeding. The NPRM, *In re Leased Commercial Access: Development of Competition and Diversity in Video Programming Distribution and Carriage*, Notice of Proposed Rulemaking, 22 FCC Rcd 11222, ¶ 26 (2007), did request PRA comments, but contained no proposed information collection rules on which to comment, rendering the comment process meaningless. The NPRM was clearly insufficient to put potential commenters on notice that the Commission was considering dramatically expanding information requirements and dramatically shortening the response deadline. Rather, the NPRM asked only whether cable operators: (1) were responsive to requests for information; and (2) provided the information required under the existing rules. *Id.* ¶ 7

[39] A recent memorandum from President Bush's Chief of Staff emphasized the need to limit "the burden imposed by new regulations" and to "resist the historical tendency of administrations to increase regulatory activity in their final months." Memorandum from Joshua P. Bolten to the Heads of Executive Departments and Agencies, at 1 (May 9, 2008), *available at* www.whitehouse.gov/omb/inforeg/cos_memo_5_9_08.pdf.

[40] Notwithstanding the recent judicial stay of the *Order*, the FCC recently clarified the OMB's ongoing role to review rules like those adopted in the *Order*. In a separate case, the FCC recently argued that an appeal in the District of Columbia Circuit should be held in abeyance pending completion of OMB review of the subject regulations. The FCC stated: "OMB could direct significant changes to the information collection in the rule, which, absent an agency vote to override, could result in the Commission deciding to make material changes to the regulation under review. Or OMB could disapprove the information collection, which potentially could

Summary of New Paperwork Burdens

On February 1, 2008, the FCC released the *Leased Access Order*, which modifies the leased access rules in ways that depart dramatically from the FCC'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 FCC's previous leased access rules, a cable system operator that received an information request from a prospective leased access programmer had 15 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.[41]

As opposed to the previous, already brief 15-day period, the new rules allow a cable operator only three business days to respond to an information request and requires a cable operator to produce a vast amount of new and constantly changing 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 schedule showing how those rates were calculated;

(7) Rates associated with technical and studio costs;

(8) Whether inclusion of the leased access programmer's schedule in an

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prevent the rule in its entirety from every taking effect." Supplemental Brief for the Federal Communications Commission, *CTIA – The Wireless Ass'n v. FCC*, Nos. 07-1475, 07-1477, 07-1480, at 10 (D.C. Cir. filed May 19, 2008).

[41] 47 C.F.R. § 76.970(*i*)(1).

electronic programming guide is available;

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

(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.[42]

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,"[43] 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."[44]

- The rate calculation requires that "[c]able operators must attach to [the rate] schedule a separate calculation detailing how each rate was derived pursuant to the revised rate formula adopted herein."[45]

- Providing "[r]ates associated with technical and studio costs"[46] 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."[47]

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[42] Amended § 76.972(b)(1)-(11).

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

[44] *Order* ¶ 18 (emphasis added).

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

[46] Amended § 76.972(b)(7).

[47] *Order* ¶ 20.

- The requirement to state "[w]hether inclusion in an electronic programming guide is available,"[48] in fact means that, "[a]t a minimum, the cable operator must provide: (1) the format in which leased access programming information must be provided to the cable operator for inclusion in the appropriate programming 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."[49]

- The requirement to provide "[t]he available methods of programming delivery and the instructions, technical requirements and costs for each method"[50] 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."[51]

- The *Order* explains that the sample leased access contract that system operators must provide[52] 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."[53] 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."[54]

New Requirement To Produce an Exhaustive Annual Report. Amended Section 76.978 subjects each cable system in the U.S. (over 6000) to a new annual reporting requirement. The report must include, *inter alia*:

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

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

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[48] Amended § 76.972(b)(8).

[49] *Order* ¶ 21.

[50] Amended § 76.972(b)(9).

[51] *Order* ¶ 23.

[52] Amended § 76.972(b)(10).

[53] *Order* ¶ 29.

[54] *Id.* ¶ 30 (emphasis added).

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

- The cable system's calculated maximum commercial leased access rate and actual rates;

- The programmers using each commercial leased access channel and whether each programmer is using the channel on a full-time or part-time basis;

- The number of requests received for information pertaining to commercial leased access and the number of *bona fide* proposals received for commercial leased access;

- Whether the cable system has denied any requests for commercial leased access and, if so, an explanation of the basis for the denial;

- Whether a complaint has been filed against the cable system with the Commission or a Federal district court regarding a commercial leased access dispute;

- The extent to which and for what purposes the cable system uses commercial leased access channels for its own purposes;

- 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; and

- A list and description of any instances of the cable system requiring an existing programmer to move to another channel or tier.[55]

Expanded Requirement To Make Information Available for Commission Inspection. Amended Section 76.970(j) requires each cable system to "maintain, for Commission inspection, sufficient supporting documentation to justify" all leased access rates, "including supporting contracts, calculations of the implicit fees, and justifications for all adjustments."[56] While the FCC has had this requirement before, it has been newly promulgated here, and the materials that will need to be maintained include detailed calculations and adjustments that were not needed under the prior rule. Much like the obligation to respond to individual leased access requests, this obligation will now require cable operators to regularly update their rate calculations for each individual cable system, which calculations are subject to a number of ever-changing variables.[57]

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[55] Amended § 76.978(a)(1)-(12).

[56] Amended § 76.970(j).

[57] The rules also impose new discovery obligations on cable operators in leased access disputes. *See* Amended § 76.975.

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 and OMB's regulations, "[t]o the extent . . . that [OMB] determines that the collection of information by an agency is unnecessary for any reason, the agency may not engage in the collection of information."[58] OMB therefore is required to "determine whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility."[59]

The FCC's dramatic expansion of the information that cable operators must provide to potential leased access programmers imposes severe burdens on operators but lacks practical utility and is not necessary to the agency's functions. The new rules reflect a fundamental change from the previous rules, which contemplated that the cable system operator be prepared to respond within 15 days to a request for leased access information with a reasonably limited set of materials. 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 continuously 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 a perpetual obligation to collect such information drastically adds to the costs and person-hours necessary to comply with the FCC'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."[60] This explanation fails to adequately consider burdens on cable operators, and ignores whether there is any practical utility sufficient to impose the three-business-day response requirement. Nor does the *Order* explain why leased access programmers need the information in three business days, which rationale would at a minimum be required to conclude that the new deadline has "practical utility." The FCC did not provide a rationale for a three-business-day deadline because there is no justification for it – in fact, *not a single commenter before the agency even requested that the existing 15-day response period be shortened.* Furthermore, the *Order* shows no awareness of the fact that the shortened deadline itself imposes a severe burden on cable operators.

These burdens were made clear to the FCC in Comcast's PRA comments to the agency.[61] Yet in its Supporting Statement, the FCC merely asserts, "[a]s the information [that cable operators must provide to potential leased access programmers] will already be compiled, it should not take longer than three business days to provide the information to a potential leased

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[58] 44 U.S.C. § 3508; *see also* 5 C.F.R. § 1320.5(f).

[59] 44 U.S.C. § 3508; 5 C.F.R. § 1320.5(e).

[60] *Order* ¶ 14.

[61] Comcast April 14, 2008 PRA Comments, at 9-10.

access programmer."[62] This claim ignores Comcast's explanation that the three-business-day deadline imposes ongoing obligations on cable operators to constantly update information because "much of the information required cannot be generated on such short notice."[63]

Furthermore, the FCC failed to respond to Comcast's assertion that not a single commenter in the proceeding challenged the existing 15-day response period and, thus, there was no record support to shorten the deadline.[64] Because the FCC could find no comments asserting that the existing 15-day response period was too long, it referenced only isolated complaints that some cable operators had missed the 15-day deadline.[65] The fact that there may be instances where a cable system failed to respond in 15 days may be a rationale for enforcing the existing deadline, but it does not sufficiently explain why cutting the response period by 80% is the most practical or least burdensome basis for the new regulation.

Finally, the FCC's claim that the "shortened response period is necessary to allow the [leased access] programmers, many of which are small businesses, the ability to determine whether or not access to the cable system is a viable business opportunity,"[66] is devoid of support and wrongly assumes that the decision to lease channels on a cable system is a split-second business decision that requires information in only three business days. The mere assertion that many leased access programmers are small businesses does not lead to a rational connection between being a small business and needing instant access to information from cable operators. As such, the FCC fails to cite any genuine need for the dramatically-truncated three-business-day deadline.

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

For the reasons cited above, the new leased access rules violate OMB's prohibition against 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."[67] The FCC record is devoid of any demonstration of substantial need for the dramatically truncated deadline. In other circumstances, the FCC has provided parties far more reasonable time periods to respond to requests. For example, utilities are required to respond to

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[62] Supporting Statement, § A.8.

[63] Comcast April 14, 2008 PRA Comments, at 9.

[64] Comcast April 14, 2008 PRA Comments, at 9-10.

[65] *See* Supporting Statement, § A.8 ("The Commission received numerous complaints and comments that the cable systems would not provide the information in a timely manner to programmers, thus the Commission requires the information to be provided within three business days.").

[66] Supporting Statement, § A.8.

[67] 5 C.F.R. § 1320.5(d)(2).

requests for pole access from third party attachers within 45 days,[68] and they must supply financial information about their pole costs to third party attachers within 30 days of the request.[69] Even the FCC Enforcement Bureau's *accelerated* procedures for filing a complaint provide respondents ten days to submit an answer.[70] And the three-business-day deadline for leased access requests is dramatically shorter than the twenty business days the FCC is allowed in responding to requests under the Freedom of Information Act.[71] Indeed, the FCC's three-business-day deadline for information production would appear to be without precedent under the agency's rules.

Question 7 on OMB Form 83-I requires an agency's Supporting Statement to "[e]xplain any special circumstances that would cause an information collection to be conducted in a manner ... requiring respondents to prepare a written response to a collection of information in fewer than 30 days after receipt of it."[72] The FCC responded to Question 7 by stating "[t]here are no special circumstances associated with this collection of information."[73] Having already conceded that point, the FCC cannot now justify a three-business-day response.

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."[74] 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 in the *Order*, the record of the rulemaking proceeding, or the Supporting Statement 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.

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[68] 47 C.F.R. § 1.1403(b).

[69] *Id.* § 1.1404(j).

[70] *Id.* § 1.724(k)(1).

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

[72] OMB Form 83-I.

[73] Supporting Statement, § A.7.

[74] 5 C.F.R. § 1320.5(d)(1)(i).

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,"[75] including "a separate calculation *detailing* how *each* rate was derived pursuant to the revised rate formula adopted [in the *Order*],"[76] is also not the least burdensome obligation necessary to the FCC's functions. The new rules 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 for information from a potential leased access programmer under Amended Section 76.972.[77] Requiring such a detailed justification from a cable operator in response to a mere request for information from a potential leased access programmer violates the PRA by imposing needlessly burdensome requirements.

The burden of responding to an initial information request is also dramatically expanded by the additional obligation that a cable operator provide "[r]ates associated with technical and studio costs,"[78] 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."[79] 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.,"[80] further compounds the information burdens imposed on cable operators as part of their initial response to a request from a potential leased access programmer.

While Comcast explained that there is no need for such detailed rate, cost, and term and justifications in an initial response, the FCC asserted in its Supporting Statement that: "NCTA and Comcast argue that the information collection is unnecessary; however, the information required to be provided to prospective leased access programmers is the same type of information that a cable system would need to provide to any programmer interested in carriage on the cable system."[81] This is incorrect, and there is no support for this proposition in the FCC's rulemaking record. Because cable operators do not typically charge for carriage, they do not provide traditional programmers with detailed explanations and justifications of the rates, costs and terms for access. There is no meaningful analogy between the information provided to ordinary programmers in a contract negotiation and the detailed rate calculation and burdensome array of other categories of information that now must be provided to leased access programmers.

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[75] Amended § 76.972(b)(6).

[76] *Order* ¶ 19 (emphasis added).

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

[78] Amended § 76.972(b)(7).

[79] *Order* ¶ 20.

[80] *Id.* ¶ 30 (emphasis added).

[81] Supporting Statement, § A.8.

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, the new required "marginal implicit fee" rate formula yields a rate of $0.00. 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 of $0.00 per subscriber per month for full-time leased access channels. 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 FCC's functions, and is needlessly burdensome.

Of all of the deficiencies in the FCC's Supporting Statement, perhaps none is so glaring as the failure even to mention the fact that the rate calculation that it will require each cable operator to conduct for each cable system produces a rate of $0.00 in the vast majority of cases. Prior to the FCC's submission to OMB, Comcast provided the FCC with a sworn declaration by Thomas R. Nathan, Deputy General Counsel, and Senior Vice President, Law & Regulatory Affairs for Comcast Cable Communications, stating:

> *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.*[82]

Having imposed a requirement that so regularly produces a price of zero, the agency faces an insurmountable obstacle in demonstrating the utility, or justifying the burden, of requiring a cable operator to prepare in advance written justifications for the rates it is being forced to offer.[83]

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[82] Comcast April 14, 2008 PRA Comments, Attachment 1, Nathan Decl. ¶ 10 (emphasis in original).

[83] Since its April 14, 2008 PRA Comment filing, Comcast has completed hundreds of additional rate computations with approximately 95 percent resulting in a rate of $0.00.

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

OMB regulations prohibit the FCC from undertaking a collection of information that duplicates existing requirements.[84] The Annual Report required by Amended Section 76.978 is precisely the sort of duplicative requirement that the PRA forbids. For example, included in the information required in the new Annual Report is "[t]he number of commercial leased access channels provided by the cable system,"[85] and "[t]he channel number and tier applicable to each commercial leased access channel."[86] However, for a significant number of cable systems, the FCC already collects the same information through two other requirements:

- The FCC'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.[87]

- The FCC'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.[88] This information, which covers systems serving the vast majority of subscribers, is included in a database that may be accessed through the FCC's Internet site.[89]

In addition to mandating that operators submit duplicative information, the newly adopted Annual Report obligates operators to obtain certain information *from* the FCC and then resubmit it *to* the FCC. Specifically, the new rule requires an annual report on whether "a complaint [regarding leased access] has been filed against the cable system with the Commission."[90] This is obviously information that the FCC would already have, since the

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[84] 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) [I]s not duplicative of information otherwise accessible to the agency...").

[85] Amended § 76.978(a)(1).

[86] Amended § 76.978(a)(2).

[87] *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 FCC's 2007/2008 Annual Cable Price Survey on February 28, 2008.

[88] *See* 47 C.F.R. § 76.403 & Note.

[89] Copies of FCC Form 325 and the relevant instructions are attached to this filing. See Section 4 of the form and Sections 2 and 4 of the instructions.

[90] Amended § 76.978(a)(8).

requirement pertains to complaint proceedings already filed at the FCC. In addition, because the *Order* also permits complaints to be filed with the FCC informally without notice to the system operator,[91] information concerning such complaints in some cases would first have to be obtained from the FCC by the operator only to be reported back to the FCC by the operator.[92]

The fact that, for several years, the FCC has obligated cable operators to provide information 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 agency'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 programmers are "able to use the set-aside channels," and "how many leased access channels ... cable operators provide."[93] And yet, in formulating the decisions embodied in the *Order*, the FCC made no reference whatsoever to the information relevant to these very questions already in its Form 325 database and virtually no use of the data in its annual price survey database. Indeed, the FCC 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 FCC'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, or if the FCC 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 practical utility.

The FCC offers only the following inaccurate response: "This agency does not impose a similar information collection on the respondents. There are no similar data available,"[94] and, "[t]he annual reporting requirement will allow the Commission to determine the actual status of leased access [programming] and does not require any more information than necessary for that analysis. The annual report is thus necessary, practical and is not duplicated elsewhere."[95] This explanation fails to address Comcast's comments and pays short shrift to OMB's regulations.

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

[92] In addition to the fact that resubmission of such information to the FCC is duplicative, such resubmission lacks practical utility and is not necessary to the agency's functions.

[93] *In re Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage,* Notice of Proposed Rulemaking, FCC 07-18, 22 FCC Rcd 11222, 11224 ¶ 7 (2007).

[94] Supporting Statement, § A.4.

[95] Supporting Statement, § A.8. Incredibly, the Commission apparently intends to make this information collection requirement *retroactive.* Although cable operators were under no obligation in 2007 to collect the information needed for an annual report, and no rule requiring an annual report was in effect as of April 30, 2008, the FCC recently released an Order that assumed OMB approval would occur and would somehow be retroactive. That order stated, "we extend the Annual Report filing date for 2008 from April 30 to July 15, 2008." *In the Matter of*

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."[96] 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."[97] 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.[98] The FCC has in other contexts expressly recognized the need to safeguard the confidentiality of this information, according its compelled production special levels of protection.[99] Curiously, however, the *Leased Access Order* requires that every cable operator routinely divulge subscribership information – with no assurances that confidentiality will be maintained – when responding to mere requests for information by potentially hundreds of prospective leased access programmers.[100]

In the *Order*, the FCC failed to 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. The FCC's Supporting Statement response is similarly cursory and inaccurate: "To the extent cable systems believe certain information is confidential, they can make this information available pursuant to a non-disclosure agreements [sic], as they do with other programmers."[101] The FCC's analogy between confidentiality agreements with scores of traditional cable programmers and non-disclosure agreements ("NDAs") with potential leased access programmers is

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Leased Commercial Access 2008 Annual Report, Order Extending Filing Date, DA 08-1021, MB Docket 07-42 (rel. Apr. 30, 2008).

[96] 5 C.F.R. § 1320.5(d)(2)(viii).

[97] *Id.*

[98] *See* 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).

[99] *See 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.,* Order Adopting Second Protective Order, DA 05-3226, 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).

[100] *Order* ¶ 18.

[101] Supporting Statement, § A.8.

misplaced. When cable operators privately negotiate carriage agreements with conventional programmers, the NDA is part of a mutually beneficial negotiation process, not part of a one-sided regulated information disclosure requirement. The analogy also ignores that a cable operator has an effective remedy against a conventional programmer who breaches its confidentiality obligations under an NDA – for example, the operator can simply remove that channel for violation of the terms of the NDA or obtain other commercially reasonable relief. An operator has no such remedies against "lessees" it is compelled to carry and who may have no resources to compensate the company for the loss of its confidential information. The FCC's new rules seem to create an absolute obligation to provide confidential subscriber information to potential leased access programmers and contain no provision for protecting it.

The Supporting Statement further asserts that, "[t]o the extent sensitive commercial information is required to be produced, it may be the subject of a [*Commission-issued*] protective order pursuant to [Amended] Section 76.975(f)."[102] Under the new rules, however, *Commission-issued* protective orders are available in the discovery procedures for leased access *complaint proceedings*.[103] But the rules governing cable operators' initial responses contain no procedure to protect confidential information. This is a fatal violation of the PRA and OMB regulations.

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

The Supporting Statement also fails to address the FCC's dramatically understated estimates of the paperwork burden. Viewed in light of the actual burdens, the *Order*'s information requirements become all the more unreasonable and inconsistent with the PRA and OMB's regulations.

In its request for comments on the *Order*'s information collection requirements, the FCC estimated that the burden per entity would be somewhere between 20 minutes and 40 hours, and that the annual burden across the entire cable industry would be 76,819 person-hours.[104] Comcast responded in its April 14, 2008 PRA Comments that "[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 ...."[105] Multiplying 185 person-hours per system by the 6300 cable systems subject to the new information requirements (the number of systems estimated by the FCC in the Supporting Statement) yields 1,165,500 person-hours.

Calculating the new rates can be an extremely time consuming and burdensome process. A system operator must contend with a large number of permutations of channel use and cost that frequently change. Each cable system operator may be required to calculate four or more different leased access rates for each cable system – sometimes separately for several tiers of

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[102] *Id.*, § A.11.

[103] Amended § 76.975(f).

[104] *First Notice*, 73 Fed. Reg. 8315.

[105] Comcast April 14, 2008 PRA Comments, at 16 (citing to Attachment 1, Nathan Decl., ¶ 35).

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 must be calculated for discrete portions of cable systems.

Although one part of the rate equation is relatively stable, because an operator is permitted to use programming license fees from the previous year in the rate calculation, other parts of the analysis are potentially constantly changing. The rules are ambiguous as to how often leased access rates must be recalculated, but there are numerous events that might 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, which is a daily occurrence; and (3) tiers are created or consolidated.[106]

Moreover, identifying prospectively which among a potentially large number of channels may be displaced 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 absolutely no input as to how much time it would take and the burdens it would impose, the Commission adopted new rules that require review, negotiation, and consultation to occur *prior* to responding to a single potential leased access programmer's initial request for information. And, such analysis will vary from system to system.

Comcast further demonstrated in its April 14, 2008 PRA Comments that the FCC's burden estimate is inconsistent with the burden estimate in its 2006 Supporting Statement submitted to OMB with the previous, far less burdensome rules. There the FCC estimated that it would take 59,696 burden hours to comply with the previous information collection requirements – which required a tiny fraction of the information and did not contain a three-business-day-deadline.[107] The FCC contends in its Supporting Statement that the new burdens contained in the current information collection request are "offset by a reduction in the burden due to the elimination by the Commission of the need for a third party accountant to review rate calculations."[108] However, Comcast's demonstration that the FCC had underestimated the burden imposed by the new rules by a factor of ten did not include any time related to the old accountant review requirement. In any case, the FCC's 2006 Supporting Statement stated that

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[106] Due to the fact that many factors affecting the rate are not stable, the requirement that cable operators maintain supporting documentation regarding rates for FCC inspection, Amended § 76.970(j), poses a similar problem. *See supra* p. 11.

[107] Comcast April 14, 2008 PRA Comments, at 17.

[108] Supporting Statement, § A.8.

the time attributable to the accountant reviews was minimal – only 120 annual burden hours, hardly sufficient to "offset" the burden caused by the dramatically expanded information requirements and truncated three-business-day response deadline.[109]

Despite Comcast's demonstration that the FCC's burden estimate missed the mark by a factor of ten, the FCC only increased its estimate from 76,819 hours to 173,610 hours when it submitted the current information collection request to OMB.[110] The new estimate still drastically minimizes the burden imposed on cable operators and fails to comply with the FCC's obligation under the PRA and OMB regulations to provide "a specific, objectively supported estimate of [the] burden" prior to submission of a collection of information to OMB.[111]

A series of errors led the FCC astray and contributed to the Supporting Statement's estimate of 173,610 burden hours. First, the FCC estimates that it will take cable operators only 30 minutes per request to furnish the vast amounts of information that must be provided in response to a request for information from a potential leased access programmer. This absurdly low estimate again reflects the FCC's erroneous assumption that all of the information to be provided is static, such that it can be determined once and for all, placed in a file, and recalled in a mere 30 minutes whenever a leased access operator makes a request for information. Comcast demonstrated in detail in its April 14, 2008 PRA Comments that much of the information is in constant flux and requires frequent updating and regeneration, and that the process of updating and regeneration is complicated and time consuming.[112]

Second, the FCC's estimate that the average cable operator will receive only 20 requests for information per year from potential leased access providers is plainly too low. Many systems already receive numerous requests for information under the current leased access rate – and the number of requests will likely increase dramatically once the new rate rules become effective and leased access programmers can use cable operator channel capacity for no charge.[113]

Third, the FCC provides the remarkably low estimate that only 2,000 burden hours will result from potential leased access programmers submitting, and cable operators responding to, bona fide requests for leased access under Amended Section 76.972(f), nationwide. A bona fide request for leased access from a potential leased access programmer is the next step after a cable operator provides the vast array of information now required in response to an initial request for information. The FCC's burden estimate assumes there will be only 1,000 bona fide proposals a year, and that each proposal will consume only two hours. Both estimates are well off the mark. When the 12,600 potential leased access programmers the FCC estimates will request information each year are informed that leased access is generally available for free under the new rules, it is hard to imagine any basis for the agency's estimate that only one in 12 of them

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[109] Comcast April 14, 2008 PRA Comments, Attachment 2 (2006 Supporting Statement), at 4.

[110] Supporting Statement, § A.12.

[111] 44 U.S.C. § 3506(c)(1)(A)(iv); 5 C.F.R. §1320.8(a)(4).

[112] Comcast April 14, 2008 PRA Comments, at 11-12; *see also supra* pp. 20-21.

[113] *See supra* p. 16.

will follow up with a bona fide carriage proposal. The result will be far more than 1,000 bona fide proposals per year. Furthermore, while the FCC estimates that preparing a bona fide request will take "2 hours/programmer," it neglected to calculate any time for a cable operators' obligation to respond to the request under Amended Section 76.972(e), despite stating in the *Order* that the Amended Section 76.972(e) and the requirement that operators respond to bona fide requests within 10 days is a "new or modified information collection requirement[]" subject to OMB review.[113]

In short, the FCC's estimate remains dramatically low and conceals the true effect caused by the new rules – a burden of at least 1,165,500 person-hours per year on cable operators alone.

Conclusion

The information collection requirements imposed by the *Leased Access Order* lack practical utility, are duplicative, and are not the least burdensome necessary to fulfill the FCC's statutory responsibilities. The FCC has dramatically underestimated the hourly and financial burdens imposed by the new requirements. In all these ways, the FCC has failed to comply with the PRA and OMB's regulations. Accordingly, Comcast respectfully suggests that OMB formally disapprove the FCC's information collection requirements in their entirety.[114]

Respectfully submitted,

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[113] *Order* ¶ 84. Comcast also estimates that the burden of producing the annual report will be 10 hours per year, twice the FCC's estimate.

[114] OMB disapproval will not create a void in leased access regulation. The FCC's current leased access rules will remain in place and effective. See 47 C.F.R. §§ 76.970-977.

ATTACHMENT 1

INSTRUCTIONS FOR FILING FCC ANNUAL CABLE OPERATOR REPORT (FCC FORM 325)

Section I: Cable Operator Information

Cable Operator Name Both the legal and assumed names of the cable operator are pre-filled from the latest information currently on file pursuant to 47 C.F.R. § 76.1801 or the most recent Operational Information Change filed pursuant to 47 C.F.R. § 76.1610.

Section II: General Information

Physical System Identification Number (PSID) The six-digit number assigned by the commission to each headend

Subscriber Information

a. **Number of Subscribers**
Total number of basic subscribers on the system computed according to the following method: Number of single family dwellings + number of individual households in multiple dwelling units (apartments, condominiums, mobile home parks, etc.) paying at the basic subscriber rate + bulk rate customers + courtesy and free service. NOTE: Bulk-rate customers = total annual bulk-rate charge divided by basic annual subscription rate for individual households

b. **Number of Potential Subscribers**
Total number of single family dwellings + total number of individual households in multiple dwelling units (apartments, condominiums, mobile home parks, etc.) for all locations with access to the existing cable plant (i.e. homes passed)

c. **Number of Cable Modem Subscribers**
Number of cable modem data service subscribers in the system

   i. **Overbuilt System**
   Was this system built over an existing operational system?

   ii. **Number of Homes passed which are overbuilt**
   The number of the system's total homes passed which overlap the existing system

   iii. **Name of incumbent operator(s)The legal name of the incumbent cable operator(s) serving the same area**

d. **Number of Telephony Subscribers**
Number of subscribers receiving telephony services through the cable system

Equipment Information

a. **Number of Leased Cable Modems**
Total number of leased cable modems deployed throughout the system

b. **Total Number of Leased set-top boxes**

Total number of leased set-top boxes deployed in the system

i. **Analog set-top boxes leased**
Number of leased set-top boxes deployed that are designed to receive only analog video services

ii. **Hybrid set-top boxes leased**
Number of leased set-top boxes that are designed to receive both analog and digital video services

iii. **Digital set-top boxes leased**
Number of leased set-top boxes that are designed to receive only digital video services

Plant Information

a. **Identify the type of system**
Please describe the type of delivery system used (i.e., xDSL, fiber to the home, HFC network, or other).

i. **Length of coaxial cable plant**
For HFC and traditional cable systems, enter the number of kilometers of coaxial cable used in the plant (excluding drops) rounded to the nearest km

b. **Length of fiber optic plant**
Number of sheath kilometers of optical fiber used in the plant (excluding optical fiber not in use or dark fiber) rounded to the nearest km

c. **Number of fiber optic nodes**
Number of locations within the system where signals are converted from optical signals to RF signals, commonly referred to as nodes

i. **Average number of subscribers per node**
The average number of subscribers served from these nodes

d. **Is the system part of a cluster**
Indicate whether the cable system is situated in close proximity to any other commonly owned or managed cable system(s) that are operated on an integrated basis through the use of common personnel, marketing, or shared use of technical facilities

i. **Number of systems in cluster**
The number of systems included in the cluster

ii. **Number of subscribers in cluster**
The total number of subscribers served by the cluster

e. **Does the facility use CARS links**
Indicate whether the system uses Cable Television Relay Service (CARS) links for the transmission/reception of signals

i. **Callsigns**
Provide a list of all call signs used by the system

Section III: Frequency and Signal Distribution Information

Available upstream spectum

a. **Available upstream spectrum**
Total amount of upstream radio frequency (RF) spectrum available to transmit from subscribers, measured in MHz (e.g. 5-42 MHz), that the majority of the plant is capable of carrying, determined by the design specifications of the

cable plant and functional active and passive network elements regardless of whether that spectrum is used to transmit signals back to the headend

b. **Maximum activated upstream spectrum**
The maximum amount of activated upstream RF spectrum (e.g. 30 MHz) currently occupied by signals being transmitted from subscribers back to the headend

Downstream Spectrum

a. **Available downstream spectrum**
Total amount of downstream RF spectrum available to transmit communications to subscribers measured in MHz (e.g. 54-450 MHz), that a majority of the plant is capable of carrying

b. **Maximum activated upstream spectrum**
The maximum amount of activated downstream RF spectrum (e.g. 550 MHz) currently occupied by signals being transmitted to subscribers

Video Channels

a. **Analog video channels capacity/carried**
Number of 6MHz channels the system has allocated to analog video programming and the number of analog video channels the system actually uses for analog video programming

b. **Digital video channels capacity/carried**
Number of 6 MHZ channels the system has allocated to digital video programming and the number of digital video channels the system actually uses for digital video programming

Number of digital streams per 6 MHz

The largest number of video streams carried within a 6 MHz bandwidth, determined by the equipment modulating these signals onto the system

Modulation method used

Indicates the digital modulation techniques used for transmission of digital video signals in the system (8-VSB, 64-QAM, 256-QAM). If another modulation method is used, please specify

Section IV: Channel Line-up

Program Name

The call sign of the TV broadcast station or abbreviation for the pay TV service or non-broadcast (usually satellite delivered) service distributed on the system (e.g. ESPN, CSPAN, HBO). Please do not include audio services such as FM radio or digital music services

Program Type

The type of programming as defined below

1. Broadcast Must Carry
2. Broadcast Retransmission Consent
3. Leased Access
4. Public Access
5. Government Access
6. Educational Access
7. Local Origination
8. Cable Network
9. Other

Signal Type (A/D/H) Indicates whether the programming is transmitted over the system in analog (A), digital (D) or digital high definition (H) (e.g. 1080i or 720p) format

Tier The tier in which the programming is contained, abbreviated as follows:

- B Basic
- E Cable Programming Services Tier (CPST)/Expanded Basic Tier
- P Premium
- M Pay Per View
- O Other

Certification Certification of this report is required in accordance with the Commission's Rules. It shall be certified by the individual owning the reporting system, if individually owned; by a partner, if a partnership; by an officer of the corporation, if incorporated; or by a representative holding power-or-attorney in case of physical disability or an individual owner in his/her absence from the United States

Approved by OMB
3060-0061
Estimated time per response: 2 hours

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

ANNUAL REPORT OF CABLE TELEVISION SYSTEMS

FCC Form 325

Filing Year:

I. Operator Information

Cable Operator Legal Name			
Mailing Address	**City**	**State**	**Zip Code**

II. General Information

1) **PSID:** _____

2) **Subscriber Information**

a) Number of subscribers served by system _____

b) Number of potential subscribers (homes passed) _____

i.) Is this an overbuilt system? ☐ Yes ☐ No

ii.) Number of homes passed which are overbuilt _____

iii.) Name of incumbent operator(s) _____

c) Number of cable modem subscribers _____

d) Number of telephony subscribers _____

3) **Equipment Information**

a) Number of leased cable modems _____

b) Total number of leased set-top boxes (STBs) _____

i.) Analog STBs leased _____

ii.) Hybrid STBs leased _____

iii.) Digital STBs leased _____

4) **Plant Information**

a) Please identify the type of system:

☐ xDSL ☐ Fiber to the home
☐ HFC/Cable ☐ Other, Please specify _____

i.) For HFC/Cable, length of coaxial cable plant (in km) _____

b) Length of fiber optic cable plant (in sheath km) _____

c) Number of fiber optic nodes _____

i.) Average number of subscribers per node _____

d) Is the system part of a cluster of cable systems? ☐ Yes ☐ No

i.) Number of systems in the cluster _____

ii.) Number of subscribers in cluste _____

e) Does facility use CARS microwave links? ☐ Yes ☐ No

i.) If yes, list all call signs below:

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III. Frequency and Signal Distribution Information

	Lower limit (MHz)	Upper limit (MHz)
1) Upstream Spectrum		
a) Available		
b) Maximum Activated		Total (MHz)
2) Downstream Spectrum	Lower limit (MHz)	Upper limit (MHz)
a) Available		
b) Maximum Activated		Total (MHz)

	Capacity	Carried
3) Video Channels		
a) Analog video channels		
b) Digital video channels		

4) Largest number of digital streams per 6 MHz: _____

5) Modulation method used for video delivery:

☐ 8 VSB ☐ 64 QAM

☐ 256 QAM ☐ Other

Please specify _____

IV. Channel Line-up

	Program Name	Type	A/D/H	Tier
1.				
2.				
3.				
4.				
5.				
6.				
7.				
8.				
9.				
10.				
11.				
12.				
13.				
14.				
15.				
16.				
17.				
18.				
19.				

	Program Name	Type	A/D/H	Tier
20.				
21.				
22.				
23.				
24.				
25.				
26.				
27.				
28.				
29.				
30.				
31.				
32.				
33.				
34.				
35.				
36.				
37.				
38.				