

SUPPORTING STATEMENT

A. Justification

Revised Information Collection Requirements:

1. On February 1, 2008, the Commission released a *Report and Order and Further Notice of Proposed Rulemaking*, In the Matter of Leased Commercial Access, MB Docket No. 07-42, FCC 07-208. In this *Report and Order*, the Commission modifies the leased access rate formula; adopts more extensive customer service obligations; eliminates the requirement for an independent accountant to review leased access rates; requires annual reporting of information on leased access; and expands the discovery process.

47 CFR Section 76.970 (j)(3) requires cable operators to maintain, for Commission inspection, sufficient supporting documentation to justify its scheduled rates, including supporting contracts, calculations of the implicit fees, and justifications for all adjustments.

47 CFR Section 76.972 (a)(1) requires a cable system operator to maintain a contact name, telephone number and e-mail address on its Web site and available by telephone of a designated person to respond to requests for information about leased access channels.

47 CFR Section 76.972 (a)(2) requires a cable system operator to maintain a brief explanation of the leased access statute and regulations on its Web site.

47 CFR Section 76.972(b) requires cable system operators to provide prospective leased access programmers with the following information within three business days of the date on which a request for leased access information is made:

- (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;

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- (7) Rates associated with technical and studio costs;
- (8) Whether inclusion in an electronic programming guide is available;
- (9) The available methods of programming delivery and the instructions, technical requirements and costs for each method;
- (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.

47 CFR Section 76.972(d) requires that all requests for leased access be made in writing and specify the date on which the request was sent to the operator.

47 CFR Section 76.972(e) requires a cable system operator to respond to a bona fide proposal¹ within 10 days after receipt.

47 CFR Section 76.972(g)(1) allows operators of cable systems subject to small system relief² to provide the information required in 47 CFR Section 76.972(b) within 30 calendar days of a bona fide request³ from a prospective leased access programmer.

47 CFR Section 76.975 (b) states that any person 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 provisions of Title VI of the Communications Act, or the Commission's

¹ 47 CFR Section 76.972(c) requires that a bona fide proposal, as used in this section, is defined as a proposal from a potential leased access programmer that includes the following information: (1) the desired length of a contract term; (2) the tier, channel and time slot desired; (3) the anticipated commencement date for carriage; (4) the nature of the programming; (5) the geographic and subscriber level of service requested; and (6) proposed changes to the sample contract.

² For these purposes, systems subject to small system relief are systems that either (i) qualify as small systems under 47 CFR Section 76.901(c) and are owned by a small cable company as defined under §76.901(e); or (ii) have been granted special relief.

³ 47 CFR Section 76.972(g)(2) states that bona fide requests, as used in 47 CFR Section 76.972(g)(1), are defined as requests from potential leased access programmers that have provided the following information: (i) the desired length of a contract term; (ii) the time slot desired; (iii) the anticipated commencement date for carriage; and (iv) the nature of the programming.

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implementing regulations, Sections 47 CFR 76.970, 76.971, and 76.972 may file a petition for relief with the Commission. A petitioner is no longer required to obtain an independent accountant's report prior to filing this petition. **(Before this rule section was revised, it was contained in OMB control number 3060-0569. It is being consolidated into this collection and also being revised due to FCC 07-208).**

47 CFR Section 76.975 (c) states a petition must contain a concise statement of the facts constituting a violation of the statute or the Commission's rules, the specific statute(s) or rule(s) violated, and certify that the petition was served on the cable operator. The petitioner is no longer required to attach a final accountant's report to the petition.

47 CFR Section 76.975 (d) states that a petition must be filed within 60 days of the alleged violation. The time limit on filing complaints will be suspended if the complainant files a notice with the Commission prior to the expiration of the filing period, stating that it seeks an extension of the filing deadline in order to pursue active negotiations with the cable operator, and the cable operator agrees to the extension.

47 CFR Section 76.975 (e) states in addition to the general pleading and discovery rules contained in 47 CFR Section 76.7 of this part, parties to a leased access complaint may serve requests for discovery directly on opposing parties, and file a copy of the request with the Commission. The respondent shall have the opportunity to object to any request for documents that are not in its control or relevant to the dispute. Such request shall be heard, and determination made, by the Commission. Until the objection is ruled upon, the obligation to produce the disputed material is suspended. Any party who fails to timely provide discovery requested by the opposing party to which it has not raised an objection, or who fails to respond to a Commission order for discovery material, may be deemed in default and an order may be entered in accordance with the allegations contained in the complaint, or the complaint may be dismissed with prejudice.

47 CFR Section 76.975 (g) states that the cable operator or other respondent will have 30 days from the filing of the petition to file a response. To the extent that a cable operator expressly references and relies upon a document or documents in asserting a defense or responding to a material allegation, such document or documents shall be included as part of the response. If a leased access rate is disputed, the response must show that the rate charged is not higher than the maximum permitted rate for such leased access, and must be supported by the affidavit of a responsible company official. If, after a response is submitted, the staff finds that on its face, the complaint states a violation of our rules, the staff may require a respondent to produce additional information, or specify other procedures necessary for resolution of the proceeding.

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47 CFR Section 76.975 (h)(4) states that as part of the remedy phase of the leased access complaint process, the Media Bureau will have discretion to request that the parties file their best and final offer for the prices, terms, or conditions in dispute. The Commission will have the discretion to adopt one of the proposals or choose to fashion its own remedy.

47 CFR Section 76.978 (a) requires that each cable system submit a Leased Access Annual Report with the Commission on a calendar year basis, no later than April 30th following the close of each calendar year, which provides the following information for the calendar year:

- (1) The number of commercial leased access channels provided by the cable system.
- (2) The channel number and tier applicable to each commercial leased access channel.
- (3) The rates the cable system charges for full-time and part-time leased access on each leased access channel.
- (4) The cable system's calculated maximum commercial leased access rate and actual rates.
- (5) The programmers using each commercial leased access channel and whether each programmer is using the channel on a full-time or part-time basis.
- (6) The number of requests received for information pertaining to commercial leased access and the number of bona fide proposals received for commercial leased access.
- (7) Whether the cable system has denied any requests for commercial leased access and, if so, with an explanation of the basis for the denial.
- (8) Whether a complaint has been filed against the cable system with the Commission or a Federal district court regarding a commercial leased access dispute.
- (9) Whether any entity has sought arbitration with the cable system regarding a commercial leased access dispute.
- (10) The extent to which and for what purposes the cable system uses commercial leased access channels for its own purposes.
- (11) The extent to which the cable system impose 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.
- (12) A list and description of any instances of the cable system requiring an existing programmer to move to another channel or tier.

47 CFR Section 76.978 (b) states that leased access programmers and other interested parties may file comments with the Commission in response to the Leased Access Annual Reports by May 15th.

In addition, the Commission is consolidating information collection OMB Control Number 3060-0569 (Commercial leased access dispute resolution) into this collection OMB Control Number 3060-0568. The Commission will submit an 83-D Form to discontinue information

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collections 3060-0569 once we receive OMB approval for this information collection (3060-0568).

Information collection requirements that have not changed:

47 CFR Section 76.971 (f)(1) requires a cable operator shall provide billing and collection services for commercial leased access cable programmers, unless the operator demonstrates the existence of third party billing and collection services which in terms of cost and accessibility, offer leased access programmers an alternative substantially equivalent to that offered to comparable non-leased access programmers.

47 CFR Section 76.971 (f)(2) requires if an operator can make the showing required in 47 CFR Section 76.971(f)(1), it must, to the extent technically feasible make available data necessary to enable a third party to bill and collect for the leased access user.

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

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

2. The leased access rate data will be used by prospective leased access programmers and the Commission to verify rate calculations for leased access channels and to eliminate uncertainty in negotiations for leased commercial access. In addition, this data will be used by leased access programmers and reviewed by the Commission to resolve leased access rate disputes. The information provided in response to leased access information requests will be used by potential leased access programmers to determine what conditions will be imposed by cable system operators on leased access. The information collected annually will be used by the Commission to evaluate the status of leased access programming and whether the Commission's leased access rules are furthering congressional intent. The leased access requirements are designed to promote diversity of programming and competition in programming delivery as required by Section 612 of the Cable Television Consumer Protection and Competition Act of 1992.

3. Use of information technology is not feasible in this situation. The Commission will explore avenues for using information technology to reduce the burden of filing an annual report.

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

5. This collection of information may adversely impact small businesses or entities that have 36

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or more activated channels. However, the Commission's leased access provisions only apply to cable operators with 36 or more activated channels. Cable operators with less than 36 activated channels generally tend to be smaller businesses and are exempt from all the Commission's leased access provisions. Currently, we estimate that 300 of the existing 6,600 cable systems have less than 36 activated channels and are therefore exempt from the Commission's leased access provisions. The Commission's final leased access rules also attempt to reduce burdens on smaller cable systems by allowing them additional time to comply with information requests and increasing the burden on the information requestor.

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

7. This collection of information is consistent with the guidelines in 5 CFR Section 1320.5(d)(2). There are no special circumstances associated with this collection of information.

8. The Commission published a Notice (73 FR 8315) in the *Federal Register* on February 13, 2008. In response to the Federal Register Notice, we received two comments, one from the National Cable and Telecommunications Association ("NCTA") and one from Comcast Corporation ("Comcast"). NCTA and Comcast argue that the information collection burdens are underestimated. However, many of these burdens have already been approved and in existence for a number of years. The Commission has not received information that the existing burden estimates were inaccurate and the Commission has revised these burden estimates in accordance with the increase in information required to be provided under the revised regulations. We believe that our revised estimates are correct. NCTA and Comcast argue that the burden estimate has not increased enough to reflect the revisions to the regulations, however, the burden increases 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 prior to the filing of a complaint with the Commission. NCTA and Comcast argue that the number of respondents is underestimated. The Commission has revised the number of respondents based on survey data that indicates that there has most likely been an increase in the overall number of cable companies that are subject to 47 USC § 532. This estimate is based on the best information available to the Commission. 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. The only difference is that the cable systems are reluctant to provide this information to leased access programmers and thus the Commission has required the cable systems to provide this information, which is necessary to

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allow unaffiliated programmers access to the cable system. The Commission received numerous complaints and comments that the cable systems would not provide the necessary information in a timely manner to programmers, thus the Commission requires that the information be provided within three business days. This shortened response period is necessary to allow the programmers, many of which are small businesses, the ability to determine whether or not access to the cable system is a viable business opportunity. As the information will already be compiled, it should not take longer than three business days to provide the information to a potential leased access programmer. The annual reporting requirement will allow the Commission to determine the actual status of leased access and does not require any more information than necessary for that analysis. The annual report is thus necessary, practical and is not duplicated elsewhere. The Commission hopes to develop a format for reporting the annual information that will reduce the reporting burden on cable systems. Finally, NCTA and Comcast assert that the revised information collection requires them to divulge confidential information. The Commission's information requirements do not require the disclosure of confidential information without having safeguards in place to protect cable systems. Moreover, 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 programmers interested in carriage on the cable system. To the extent cable systems believe certain information is confidential, they can make this information available pursuant to a non-disclosure agreements, as they do with other programmers. The number of subscribers per tier is necessary to determine the level of tier penetration for leased access channel placement, which is not a new requirement. In sum, the burden estimates were made using the Commission staff's best estimates.

9. Respondents will not receive any payments.

10. Some of the information may require confidential treatment. 47 CFR Section 76.975(f) provides for the use of protective orders when necessary.

11. These collections of information do not address any matters of a sensitive nature in general. To the extent sensitive commercial information is required to be produced it may be the subject of a protective order pursuant to 47 CFR Section 76.975(f).

12. Currently, there are approximately 6,600 cable systems. Approximately 300 have less than 36 activated channels, and are therefore exempt from the Commission's leased access provisions, leaving approximately 6,300 cable systems subject to the leased access rules. We estimate that approximately 15 petitions for relief under 47 CFR Section 76.975 are filed annually with the Commission. Each petition filed also will most likely result in a response being filed by the defendant party. We estimate that approximately 20 bona fide requests will be filed with small systems and 1,000 bona fide proposals will be filed. We also estimate that each cable system

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will receive 20 requests each for leased access information.

Total number of annual respondents = 6,300 operators⁴ + an estimated 15 leased access programmers involved in the leased access rate dispute process + 20 small system information requests by programmers + 1,000 programmers filing bona fide proposals + 30 commenters = **7,365 respondents**

Total number of annual responses = 6,300 rate calculation supporting documents + 126,000 responses to requests for leased access information⁵ + 6,300 website postings + 6,300 annual reports + 6,300 contacts of billing and collection services + 30 petitions and responses + 5 extensions + 30 comments to annual reports + 15 discovery requests + 15 discovery responses + 20 small system information requests + 1,000 bona fide proposals = **152,315 responses**

The total annual burden hours is calculated as follows:

47 CFR Section 76.970 (j)(3): The average annual burden to maintain sufficient supporting documentation to justify its scheduled rate, including supporting contracts, calculations of the implicit fees, and justifications for all adjustments is six (6) hours per cable system.

$$6,300 \text{ systems} \times 6 \text{ hours/system} = 37,800 \text{ hours.}$$

47 CFR Section 76.971: We estimate an average burden of no more than 1 hour per cable system operator to identify a third party billing and collection service and then make the necessary information available.

$$6,300 \text{ systems} \times 1 \text{ hour/system} = 6,300 \text{ hours.}$$

47 CFR Section 76.972: We estimate that each operator will spend 15 hours per year to perform these tasks. We estimate a burden of 5 hours⁶ for each operator to gather and prepare necessary materials for website preparation, the public file and then furnish materials to an estimated 20 requesters per year at a rate of 30 minutes (0.5 hours) per request. The 20 small system information requesters will undergo one (1) hour burden per information request to small

⁴ Out of these 6,300 operators 15 will have to respond to a petition or complaint.

⁵ These responses are to requests for lease access information (6,300 operators x 20 requests/operator for leased access information = 126,000 requests).

⁶ This 5 hour burden also includes burden associated with website postings.

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systems. We also estimate that the 1,000 programmers that file the bona fide proposals with undergo a two (2) hour burden:

6,300 systems x 5 hours/system =	31,500 hours
6,300 systems/ 0.5 hours/system x 20 requests/year =	63,000 hours
20 small systems x 1 hour/system =	20 hours
1,000 programmers x 2 hours/programmer =	<u>2,000 hours</u>
	96,520 hours

47 CFR Section 76.975: We estimate that 15 petitions for relief are filed annually. Each petition filed will most likely result in a response being filed by the defendant party. We estimate a burden of 45 hours for the respondent for each petition and response, including filing best and final offers. It will also take the respondent 1 hour to prepare and file extensions with the Commission. These petitions, responses and discovery requests will also require 10 hours of outside legal counsel.

15 petitions x 45 hours	=	675 hours
15 responses x 45 hours	=	675 hours
5 extensions x 1 hour/extension filing	=	5 hours
15 discovery request x 1 hour/request	=	15 hours
15 discovery responses x 4 hours/response =	<u>60 hours</u>	
		1,430 hours

47 CFR Section 76.978: We estimate that operators need five (5) hours to gather the annual report information, maintain it, and disclose it to the Commission. We estimate approximately 30 commenters will respond to the annual reports which will take two (2) hours per commenter:

6,300 systems x 5 hours/system =	31,500 hours
30 commenters x 2 hours/commenter =	<u>60 hours</u>
	31,560 hours

Total annual burden hours = 37,800 hours for rate calculation documents + 6,300 hours for service identifications + 94,500 hours for responses to information requests/web postings + 20 hours for small system requests + 2,000 hours for bona fide proposals + 1,350 hours petitions and responses + 5 hours for extension filings + 75 hours for discovery requests and responses +

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31,500 hours for annual reporting + 60 hours for commenter responses = **173,610 hours**

Annual “In-house” Costs to Respondents: We estimate the average salary of the respondent is \$70,000/year (\$33.52/hour).

$$173,610 \text{ hours} \times \$33.52/\text{hour} = \mathbf{\$5,819,407.20}$$

These estimates are based on FCC staff's knowledge and familiarity with the data required.

13. Annual Burden Cost:

a. **Total capital and start-up costs:** We estimate the annual costs of \$45,000 by cable operators for leased access recordkeeping and reporting, for sending out leased access information to prospective programmers, for identifying third party billing collection services.

b. **Total operation and maintenance costs:** Petitioners and respondents will require approximately 10 hours of outside legal assistance paid at \$200 per hour to file leased access disputes:

$$15 \text{ petitioners} + 15 \text{ respondents} \times 10 \text{ hours each} \times \$200 \text{ per hour} = \$60,000$$

c. **Total costs to respondents: \$45,000 + \$60,000 = \$105,000**

14. **Cost to the Federal Government:** The FCC will review an estimated 15 petitions (47 CFR Section 76.975), 6,300 annual reports (47 CFR 76.978), 30 comments (47 CFR 76.978), 15 discovery requests and 15 discovery responses (47 CFR 76.975), and 5 extension requests (47 CFR 76.975) are filed with the Commission per year. The Commission will use professional staff at the GS-13/Step 5; managerial staff at the GS-14/Step 5; and clerical staff at the GS-5/Step 5 levels to review and process these petitions, reports, comments, discovery requests and responses and extensions:

Petitions:

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	Hours	Cost	Cost	Number of	Total
	p/Case	p/Hour	p/Case	<u>Cases</u>	<u>Cost</u>
Professional	38 hours	\$45.05	\$1,711.90	15	\$25,678.50
Managerial	1 hours	\$53.24	\$ 53.24	15	\$ 798.60
Clerical	1 hours	\$17.24	\$ 17.24	15	<u>\$ 258.60</u>
					\$26,735.70

Annual Reports, Comments, Extensions, and Discovery Documents:

Professional	60 hours	\$45.05	\$2,703.00
Managerial	10 hours	\$53.24	\$ 532.40
Clerical	80 hours	\$17.24	<u>\$1,379.20</u>
Total			\$4,614.60 ⁷

In addition, the Commission will design, implement and maintain a system for collecting and analyzing annual report data. At this time, we estimate the cost to the Commission at \$100,000 to design the system.

TOTAL COST TO GOVERNMENT: \$26,735.70 + \$4,614.60 + \$100,000.00 = **131,350.30**

15. As a result of the Commission's final rule released February 1, 2008, FCC 07-207, and consolidation of information collection 3060-0569 into 3060-0568,⁸ we have revised the annual burden hours and costs.

The requirements adopted in the final rule add a program change to the total annual burden hours of +113,924 and annual costs of +31,006.

16. The data will not be published for statistical use. The annual report data may be published for statistical use.

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

⁷ This number represents the total cost to process annual reports, comments, extensions, and discovery documents that the Commission receives on an annual basis.

⁸ The requirements for the rules that were consolidated into 3060-0568 from 3060-0569 were revised. Therefore, the consolidation was a result of a program change instead of an adjustment.

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18. The Commission published a Federal Register Notice (“Notice”) (73 FR 8315) in the *Federal Register* on February 13, 2008. The Notice contained the following information that was published incorrectly: number of respondents as 4,001; estimated time per response as 20 minutes to 40 hours; and the total annual burden as 76,819. We correct those numbers to read: number of respondents – 7,365; estimated time per response – 0.50 - 45 hours; and the total annual burden as 173,610 hours. There are no other exceptions to Item 19 of the Certification Statement.

B. Collections of Information Employing Statistical Methods

No statistical methods are employed.