

Before the
Federal Communications Commission

PAPERWORK REDUCTION ACT COMMENTS ON BROADCAST LOCALISM

**THE FCC'S FAILURE TO PROVIDE THE PROPOSED COLLECTION OF
INFORMATION CONCURRENT WITH THE PROPOSED RULE
AS REQUIRED BY THE PAPERWORK REDUCTION ACT**

In the Matter of)
)
Broadcast Localism) MB Docket No. 04-233
)

The Center for Regulatory Effectiveness
Suite 500
1601 Connecticut Avenue, NW
Washington, DC 20009
202.265.2383
www.TheCRE.com

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THE FCC’S FAILURE TO PROVIDE THE PROPOSED COLLECTION OF INFORMATION CONCURRENT WITH THE PROPOSED RULE AS REQUIRED BY THE PAPERWORK REDUCTION ACT

The Federal Communications Commission’s (“FCC’s”) Report on Broadcast Localism and Notice of Proposed Rulemaking (“NPRM”)¹ stated, “This document has been analyzed with respect to the Paperwork Reduction Act of 1995 (“PRA”), and contains proposed information collection requirements.”²

The NPRM also specifically invited “the general public and the Office of Management and Budget (OMB) to comment on the proposed information collection requirements contained in this Notice, as required by the PRA.” The FCC noted that “Written comments on the PRA proposed information collection requirements must be submitted by the public, the Office of Management and Budget (OMB), and other interested parties” no later than sixty days after the NPRM is published in the Federal Register.³

When the NPRM was published in the Federal Register on February 13, 2008,⁴ the FCC repeated their declaration that “This document contains new and modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA)” and reiterated that “OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection requirements contained in this proceeding.”⁵

Unfortunately, the FCC has not provided in the NPRM, on its website, or on the OMB/GSA RegInfo.gov website, the Information Collection Request (“ICR”) and Supporting Statement providing a description and estimation of paperwork burdens for OMB and the public to comment on, as required by the PRA. Stakeholders are thus being denied a meaningful opportunity for comment on the utility, burden, and other aspects of the proposed information collection.

¹ “Report on Broadcasting Localism and Notice of Proposed Rulemaking,” MB Docket No. 04-233; FCC 07-218, Adopted December 18, 2007, Released January 24, 2008.

² *Ibid.*, para. 145 [footnote omitted.]

³ *Ibid.*, para. 146.

⁴ 73 Fed. Reg. 8255, February 13, 2008.

⁵ *Ibid.*, p. 8257.

It is important to note that a future opportunity to comment on a Broadcast Localism ICR does **not** provide this same opportunity since the PRA specifically directs agencies “for any proposed collection of information contained in a proposed rule (to be reviewed by the Director under section 3507(d)), provide notice and comment through the notice of proposed rulemaking for the proposed rule....”⁶ Thus, the opportunity for comment on the proposed collection of information must be provided during the opportunity for comment on the proposed rule.

Concurrent release of proposed information collections with proposed rules is particularly important with respect to Broadcast Localism NPRM since some FCC proposals, such as the one for Local Programming Renewal Application Processing Guidelines, are vague and amorphous – failing to provide the public with sufficient data to assess the utility and burden of the proposed information collection as well as evaluate potential burden-minimizing alternatives.

Proposed Local Programming Renewal Application Processing Guidelines

The impossibility of providing meaningful comment on the NPRM’s proposed collection of information is of particular importance with respect to the proposed Local Programming Renewal Application Processing Guidelines since any specific information collection and the specifics of the rule itself are so closely intertwined. Unfortunately, the description of the proposed rule on which the FCC is requesting comment is nothing but a series of hypothetical questions that give no substantive clue regarding what data the agency actually intends to collect and how it intends to use that data.

To illustrate the nebulous nature of the proposed information collection which prevents meaningful comment under the PRA, the following is the complete text of the “proposed rule” for the Renewal Application Processing Guidelines, other than the discussion of why the FCC tentatively favors the rule:

We seek comment on this proposal. Specifically, should these guidelines be expressed as hours of programming per week or, as in the past, percentages of overall programming? Should the guidelines cover particular types of programming, such as local news, political, public affairs and entertainment, or simply generally reflect locally-oriented programming? What should the categories and amounts or percentages be? Should we adopt processing guidelines regarding specific types of locally-oriented programming to be aired at particular times of the day? Should the Commission create other renewal processing guidelines that give processing priority to stations that meet certain measurable standards? How should we define local programming? Must it be locally produced? We seek comment on these questions and invite comment on any related issues that commenters feel the Commission should consider in connection with the possible adoption of specific localism processing guidelines for broadcast renewal applications.⁷

⁶ 44 U.S.C. § 3506(c)(2)(A).

⁷ NPRM, para. 124.

Based on the above text, it is impossible for OMB and other stakeholders to evaluate and comment on:

- ▶ What information the agency intends to collect;
- ▶ The utility of the information in achieving the agency's objectives;
- ▶ How the agency would use the information;
- ▶ The paperwork burdens associated with collecting, maintaining and reporting the information; and
- ▶ How the agency would minimize that burden, particularly with regard to small entities and would further reduce the information collection burden reductions for small business with fewer than 25 employees.

The description of the proposed rule is so open-ended and shapeless that it may not even meet the Administrative Procedure Act's requirement that proposed rules include "either the terms or substance of the proposed rule or a description of the subjects and issues involved."⁸

With respect to the PRA, once final regulatory text has been approved by the Commission, comments on an ICR would be effectively moot since the rule incorporating the information collection would have already been finalized. Thus, should OMB disapprove the ICR, they would effectively be retroactively disapproving the rule itself; a lawful action that could be avoided if the FCC adhered to the PRA and allowed comment on the ICR concurrent with comment on the proposed rule.

One of the problems with the agency certifying that they have minimized paperwork burdens, particularly with respect to small entities, is that the FCC's Initial Regulatory Flexibility Analysis ("IRFA") is wholly inadequate since it provides no description of compliance requirements and regulatory alternatives. This issue will be discussed in detail in CRE's subsequent comments on the IRFA that was requested by the NPRM.

Since it is not possible to determine from either the proposed rule or the accompanying IRFA what paperwork burdens would be imposed on small businesses, it is not possible for the agency to "certify (and provide a record supporting such certification, including public comments received by the agency) that each collection of information submitted to the Director for review...reduces to the extent practicable and appropriate the burden on persons who shall provide information to or for the agency, including with respect to small entities...."⁹

⁸ 5 U.S.C. § 553 (b)(3).

⁹ 44 U.S.C. 3506(c)(3) [Emphasis added.].

Furthermore, the Small Business Paperwork Relief Act of 2002 (“SBPRA”) specifically requires agencies to “make efforts to further reduce the information collection burden for small business concerns with fewer than 25 employees.” Since it is not possible to determine the proposed rule’s paperwork burdens, it is not possible to determine whether they have been minimized. It is also, therefore, impossible for the agency to demonstrate that they have made good faith efforts to further reduce paperwork burdens for small businesses with fewer than 25 employees as required by the SBPRA.

In short, the FCC is not able to meet their statutory duties under the PRA, as amended, unless and until the agency allows simultaneous comment on both the proposed rule and the ICR.

It is the Commission’s legal duty to provide the public with an opportunity to comment on the proposed collection of information by providing the ICR and Supporting Statement concurrent with a request for comment on the proposed rule.

Proposed Main Studio Rule

The FCC’s proposal to revert to their pre-1987 main studio rule,¹⁰ would also impose substantial burdens. In addition to the PRA-specific burdens which must be provided in the ICR, the proposed rule would force at least some firms to establish separate studios in new locations instead of the current regulatory situation where a broadcaster could maintain a single main studio for a number of stations in the same area. Thus, broadcasters would be forced to spend their finite resources on purchasing/leasing additional real estate and broadcast equipment instead of devoting those resources to local programming and other community-related services. Small companies would be particularly hard hit by additional non-productive costs such as establishing separate studios in separate locations, an issue which CRE will address in our comments on the agency’s IRFA.

It should be noted that the PRA’s definition of “burden,” includes the “financial resources expended” for “acquiring, installing, and utilizing technology and systems” needed for information collections. Thus, the costs associated with any additional information systems a company needed to acquire in order to meet reporting burdens stemming from having additional studio locations, would need to be included in the agency’s main studio rule ICR.

It is not possible, however, for OMB and other stakeholders to comment on these PRA burdens because the agency has not provided the legally-required information collection request data. For example, the agency has not even provided an estimate of how many businesses would be forced to relocate their studios or establish new ones should the proposed rule be enacted let alone estimated the paperwork-related burdens on those affected businesses.

Given the complete lack of information about the PRA-related impacts, how is it possible for stakeholders to provide meaningful input into the PRA process? If the FCC releases an ICR after adopting a reversion to the pre-1987 main studio rule, what purpose would any comment serve?

¹⁰ NPRM, para. 41.

The FCC's notice and comment process is so deficient with respect to the main studio rule proposal as to raise serious concerns under the APA as well as the PRA.

Information Collection Requests Must Comply with the Data Quality Act

Agency paperwork burden estimates contained in ICR must be accurate and comply with the Data Quality Act ("DQA") as a requirement for their approval by OMB. Specifically, as OMB explained to the President's Management Council,

*In this light, we note that each agency is already required to demonstrate the "practical utility" of a proposed collection of information in its PRA submission, i.e., for draft information collections designed to gather information that the agency plans to disseminate. ... It is important that we make use of the PRA clearance process to help improve the quality of information that agencies collect and disseminate. Thus, OMB will approve **only** those information collections that are likely to obtain data that will comply with the OMB and agency information quality guidelines.*¹¹

The Commission has integrated ICR compliance with DQA standards into their own Information Quality Guidelines. As the FCC's Guidelines explain:

*The Commission is committed to the quality, objectivity, utility, and integrity of information throughout the information life cycle and will ensure that Paperwork Reduction Act clearance packages will result in information that will be collected, maintained, and used in a way consistent with the Commission's and OMB's information quality standards.*¹²

It should be noted that OMB's statement that they will approve ICRs only if they comply Data Quality standards is a simply way of ensuring that agencies adhere to their statutory duty under the PRA to certify that "each collection of information...is necessary for the proper performance of the functions of the agency, including that the information has practical utility."¹³ If the information to be collected would not meet DQA standards, than it would not have "practical utility" as defined by the PRA.

Thus, the FCC's specific PRA duties with respect to the DQA include demonstrating in the ICR that the specific information they ask permission to collect would be accurate, objective and posses utility. Therefore, under the Commission's Guidelines, the information they seek with respect to Broadcast

¹¹ John D. Graham, Memorandum for the President's Management Council, June 10, 2002. [Emphasis added.]

¹² Federal Communication Commission, "Information Quality Guidelines," FCC-02-277, Released October 8, 2002, p. 5. [Emphasis added.]

¹³ 44 U.S.C. 3506(c)(3)

Localism would need to be both “objective,” as defined by OMB and the FCC, and useful “to its intended users, including the public.”

It is difficult to understand how an ICR based on the NPRM as currently drafted could comply with the DQA requirements.

Recommendations

1. **Certification.** As explained above, OMB will approve only those ICRs which are DQA-compliant. When the FCC submits the ICR for the Renewal Application Processing Guidelines, Main Studio Rule, and the other localism proposals, the documentation must demonstrate that the information collected would meet Data Quality standards.
2. **Local Programming Renewal Application Processing Guidelines.** In that the proposed Renewal Application Processing Guideline rule does not identify what data would be collected; the FCC needs to re-propose the guidelines with sufficient specificity as to allow the public to comment on: the paperwork-related burdens associated with collecting and providing the specific data sought by the FCC; the Commission’s efforts to minimize that burden, particularly on small businesses; and the utility of that data to the Commission and the public.
3. **Main Studio Rule.** Since the Commission has not identified the number of businesses that would need to relocate their main studio and/or establish separate studios in new locations under the proposed rule, the FCC needs to re-propose the rule with sufficient detail as to allow the public to comment on: the PRA compliance burdens associated with the rule; the utility of the information collection; and the efforts made by the Commission to minimize those burdens, particularly with respect to small businesses.