* Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

* Enhance the quality, utility, and clarity of the information to be collected; and

* Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

III. Current Actions

Type of Review: New collection.
Title: Evaluation of the Technology-Based Learning Grants.
OMB Number: 1205–0NEW.
Affected Public: Individuals.
Form(s): n/a.
Total Respondents: 1,500.
Frequency: One-time survey.
Total Responses: 1,050.
Average Time per Response: 20 minutes.
Estimated Total Burden Hours: 350 (*see* table 1, below).
Total Burden Cost for Respondents: $17,991.

TABLE 1—ESTIMATED BURDEN HOURS

Activity	Sample size	Response rate	Number of respondents	Frequency	Time per response (minutes)	Total burden hours
Monthly Administrative Data Requests	.....	.....	20	7	120	280
Final Administrative Data Request	.....	.....	20	Once	240	80
Customer Survey	1,500	70%	1,050	Once	20	350

Comments submitted in response to this comment request will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: March 15, 2010.

Jane Oates,

Assistant Secretary, Employment and Training Administration.

[FR Doc. 2010–6026 Filed 3–18–10; 8:45 am]

BILLING CODE 4510–FN–P

LIBRARY OF CONGRESS

Copyright Office

[Docket No. RF 2009–1]

Copyright Royalty Judges' Authority to Subpoena a Nonparticipant to Appear and Give Testimony or to Produce and Permit Inspection of Documents or Tangible Things

AGENCY: Copyright Office, Library of Congress.

ACTION: Final order.

SUMMARY: The Copyright Royalty Judges, acting pursuant to statute, referred a material question of substantive law to the Register of Copyrights concerning their authority to subpoena a nonparticipant to appear and give testimony or to produce and permit inspection of documents or tangible things. The Register of Copyrights responded by delivering a Memorandum Opinion to the Copyright Royalty Board on February 23, 2010.

DATES: *Effective Date:* February 23, 2010.

FOR FURTHER INFORMATION CONTACT: Tanya Sandros, Deputy General Counsel, or Stephen Ruwe, Attorney Advisor, Copyright GC/I&R, P.O. Box 70400, Washington, DC 20024. Telephone: (202) 707–8380. Telefax: (202) 707–8366.

SUPPLEMENTARY INFORMATION: In the Copyright Royalty and Distribution Reform Act of 2004, Congress amended Title 17 to replace the copyright arbitration royalty panels with the Copyright Royalty Judges ("CRJs"). One of the functions of the CRJs is to make determinations and adjustments of reasonable terms and rates of royalty payments as provided in sections 112(e), 114, 115, 116, 118, 119 and 1004 of the Copyright Act. The CRJs have the authority to request from the Register of Copyrights ("Register") an interpretation of any material question of substantive law that relates to the construction of provisions of Title 17 and arises during the proceeding before the CRJs. *See* 17 U.S.C. 802(f)(1)(A)(ii).

On January 28, 2010, the CRJs delivered to the Register an Order referring a material question of substantive law for determination by the Register: "Whether the Copyright Royalty Judges have authority under the Copyright Act to subpoena a nonparticipant to appear and give testimony or to produce and permit inspection of documents or tangible things?" The CRJs also delivered to the Register the briefs filed with the CRJs by RealNetworks, Inc., Live365, Inc., SoundExchange, Inc., CBS Interactive, Inc., Pandora Media, Inc., and Slacker, Inc. in connection with a motion seeking the issuance of subpoenas to nonparty witnesses, as well as the transcripts of a hearing regarding consideration of that motion.

The Order stated that the CRJs were requesting an interpretation of a material question of substantive law pursuant to 17 U.S.C. 802(f)(1)(A)(ii), which allows a 14–day response period. However, section 802(f)(1)(B)(i) provides that when the CRJs request a decision by the Register on "a *novel* material question of substantive law concerning an interpretation of those provisions of this title that are the subject of the proceeding" (emphasis added), the Register shall transmit her decision within a *30*–day response period. A novel question of law is one that "has not been determined in prior decisions, determinations, and rulings described in section 803(a)." *Id.* On February 11, the Register advised the CRJs that she had determined that the material question of law that is the subject of the Order is novel because it has not been determined in prior decisions, determinations, and rulings described in 17 U.S.C. 803(a). *See* 17 U.S.C. 802(f)(1)(B)(ii).

On February 23, the Register responded in a Memorandum Opinion to the CRJs that addressed the novel material question of law. To provide the public with notice of the decision rendered by the Register, the Memorandum Opinion is reproduced in its entirety, below. The timely delivery of the Register's response requires that "the Copyright Royalty Judges shall apply the legal determinations embodied in the decision of the Register of Copyrights in resolving material questions of substantive law." *See* 17 U.S.C. 802(f)(1)(B)(I).

Dated: March 11, 2010

David O. Carson,

General Counsel.

Before the
U.S. Copyright Office
Library of Congress
Washington, D.C. 20559

In the Matter of

Digital Performance Right in Sound Recordings and Ephemeral Recordings

Docket No. 2009–1
CRB Webcasting III

MEMORANDUM OPINION ON MATERIAL QUESTIONS OF SUBSTANTIVE LAW

I. Procedural Background

On January 28, 2010, pursuant to 17 U.S.C. 802(f)(1), the Copyright Royalty Judges ("CRJs") referred to the Register of Copyrights a novel material question of substantive law that has arisen in this proceeding. The Copyright Royalty Judges included briefs that had been submitted in December 2009 and January 2010 by the parties to the proceeding and transcripts of a hearing held on January 12, 2010, relating to the authority of the CRJs to subpoena a nonparticipant in a proceeding.

After recounting the relevant statutory provisions of Chapter 8 of Title 17, the CRJs posed the following novel material question of substantive law:

> QUESTION: Whether the Copyright Royalty Judges have authority under the Copyright Act to subpoena a nonparticipant to appear and give testimony or to produce and permit inspection of documents or tangible things?

As required by 17 U.S.C. 802(f)(1)(B)(i), the Register hereby provides her response to the CRJs.

II. Statutory Authority in Chapter 8 of Title 17.

In 2004, Congress passed the Copyright Royalty and Distribution Reform Act ("CRDRA"). This legislation created the CRJs and provides, in 17 U.S.C. 803(b)(6)(C)(ix), that:

> In proceedings to determine royalty rates, the Copyright Royalty Judges may issue a subpoena commanding a participant or witness to appear and give testimony, or to produce and permit inspection of documents or tangible things, if the Copyright Royalty Judges' resolution of the proceeding would be substantially impaired by the absence of such testimony or production of documents or tangible things. Such subpoena shall specify with reasonable particularity the materials to be produced or the scope and nature of the required testimony. Nothing in this clause shall preclude the Copyright Royalty Judges from requesting the production by a nonparticipant of information or materials relevant to the resolution by the Copyright Royalty Judges of a material issue of fact.

III. Summary of Parties' Arguments

On December 10, 2009, RealNetworks, Inc. ("RealNetworks") filed a motion for issuance of subpoenas directing Pandora Media, Inc., Slacker, Inc., and CBS Interactive, Inc.("CBSi"), who are not participants in the proceeding, to present corporate representative witnesses competent to present documents and testify at deposition with respect to factual assertions included in the written direct statement of SoundExchange, Inc. ("SoundExchange") as to which SoundExchange has no first hand knowledge. RealNetworks' motion[1] focuses virtually all of its attention on the application of the CRJs' regulations addressing the discovery stages of a determination. In doing so, it does not attempt to analyze *who* may be the proper subject of a subpoena under the statute.

In response to RealNetworks' motion, SoundExchange[2] argues that section 803(b)(6)(C)(ix) treats *subpoenas* to "participants and witnesses" separately from *requests* to "nonparticipants."[3] In SoundExchange's view, "with respect to participants and witnesses, [the statute] states that the CRJs 'may issue a subpoena commanding a participant or witness to appear and give testimony, or to produce and permit inspection of documents or tangible things,' if certain conditions are met."[4] SoundExchange argues that the CRJs could, under certain conditions, issue a subpoena in a given proceeding to either a participant or a witness whose testimony has been previously submitted to the CRJs in the given proceeding.[5] But, under SoundExchange's view, the CRJs may not issue subpoenas to persons who are neither participants nor witnesses who have previously submitted testimony in the given proceeding. SoundExchange asserts that "with respect to seeking information from *nonparticipants* like Pandora, Slacker and CBS Interactive, § 803(b)(6)(C)(ix) establishes a different standard that limits the CRJs' power. It does not include them among those individuals who may be subpoenaed. Rather, it provides that '[n]othing in this clause shall preclude the Copyright Royalty Judges from *requesting* the production by a nonparticipant of information or materials relevant to the resolution by the Copyright Royalty Judges of a material issue of fact.'" When asked by the Chief Copyright Royalty Judge at the hearing on the motion whether it was aware of any other federal statutes that provide for a power or duty but provide no mechanism for enforcement, SoundExchange stated that it was not aware of any such statute. SoundExchange further opined that the only enforcement mechanism available to the CRJs in the event of noncompliance with a subpoena would be the CRJs' authority to impose sanctions, such as striking testimony, when the subpoena was directed to a participant or a witness whose testimony has been previously submitted by a participant. SoundExchange observed that this "suggests a reason why this statute should be interpreted to mean the Court [sic] can issue subpoenas to parties, participants and witnesses, but not to nonparticipants."[6]

Having put forth an analysis of section 803(b)(6)(C)(ix) that involves a distinction between "participants and witnesses" on the one hand and "nonparticipants" on the other, SoundExchange cites to *Bobreski v. E.P.A*, 284 F. Supp.2d 67,76 (D.D.C. 2003) and *United States v. Iannone*, 610 F.2d 943, 945–47 (D.C. Cir. 1979) for the proposition that subpoena power should not be found to exist absent an express statutory grant. SoundExchange then cites to *Peters v.United States*, 853 F.2d 692, 696 (9th Cir. 1988), asserting that even where an agency has broad

[1] Another participant, Live365, Inc. ("Live365") separately filed a brief in which it adopted the relevant arguments in RealNetworks' initial motion.

[2] Pandora Media, Inc., Slacker, Inc., and CBSi adopted the relevant arguments SoundExchange's brief.

[3] In distinguishing between "participants and witnesses" on one hand, and "nonparticipants" on the other, SoundExchange apparently does not recognize that the "witnesses" that it includes within the group of "participants and witnesses" are in fact nonparticipants. In the parlance of CRJ proceedings, a "participant" is a party to the proceeding. *See* 17 U.S.C. §§ 801(b)(7)(A), 802(f)(1)(A)(ii), 802(f)(1)(B), 802(f)(1)(D), 803(b)(1)(A)(ii), 803(b)(2)(C), 803(b)(3)(A), 803(b)(4), 803(b)(5), 803(b)(6)(C), 803(c)(2), 803(c)(4), 803(d)(1), 803(d)(2)(B), 805(1)

[4] SoundExchange cites to the full text of section 803(b)(6)(C)(ix), which provides that CRJs may only issue subpoenas where "resolution of the proceeding would be substantially impaired by the absence of such testimony or production of documents or tangible things."

[5] While SoundExchange, in its written brief, initially argued that the CRJs could only subpoena "participants and witnesses" and that they could not subpoena nonparticipants, at the January 12, 2010, hearing, SoundExchange conceded that the statute's grant of authority to subpoena a "witness" includes those who are not necessarily participants, provided they have previously submitted testimony as a witness in the relevant proceeding. Hearing Transcript at 76.

[6] Transcript at 72-74.

subpoena and investigatory authority, courts should be reluctant to assume the existence of authority to issue third party subpoenas where Congress has not specifically provided for them. SoundExchange also argues that if the CRJs were granted the authority to issue subpoenas to nonparticipants, then the last sentence of 803(b)(6)(C)(ix), which authorizes them to *request* information from nonparticipants, would be unnecessary, and that such an interpretation would violate an accepted principle of statutory construction against surplusage.[7] RealNetworks and Live365 assert that section 803(b)(6)(C)(ix) authorizes the issuance of subpoenas to nonparticipants and that neither the statute nor regulations limit this power only to participants in a proceeding. Unlike the briefs supporting the initial motion, their reply briefs focus directly on whether the CRJs possess authority to issue subpoenas to persons who are neither participants in the proceeding nor persons who the participants have designated to testify. In its reply brief, and in the January 12 hearing, RealNetworks argues that the plain language of 803(b)(6)(C)(ix) demonstrates that the CRJs have power to subpoena "witnesses." It asserts that SoundExchange's citations to case law assessing agencies' subpoena authority when Congress has not provided for such power through plain language are therefore irrelevant. RealNetworks argues that SoundExchange's analysis of section 803(b)(6)(C)(ix) is unduly cramped and that the plain text of the statute undermines SoundExchange's argument that "witness" should be understood to mean only a witness previously designated by a participant to give evidence in court. RealNetworks asserts that the common meaning of "witness" and "testimony" support its proposed plain language reading of the statute. RealNetworks also asserts that the plain language and the legislative history of section 803(b)(6)(C)(ix) demonstrate that the CRJs have power to subpoena "witnesses," not just a small subset of witnesses as SoundExchange contends. RealNetworks offers that should the CRJs accept SoundExchange's argument that the CRJs may only subpoena a witness previously designated by a participant to give evidence, it would run counter to language in the legislative history of the Copyright Royalty and Distribution Reform Act of 2004 that explains that the subpoena power was intended to prevent a party from circumscribing the type and amount of evidence considered in a proceeding. H.R. Rep. No. 108–408, at 33 (2004).

At the hearing, CBSi pointed out that the legislative history relied on by RealNetworks addresses proposed statutory language that was markedly different, and much broader, than that which was ultimately enacted by Congress.

RealNetworks' reply brief also points out that the last sentence in section 803(b)(6)(C)(ix) does not create surplusage because the authority to subpoena and the authority to request are not redundant, especially when there are distinct threshold requirements for employing the two differing actions. Under RealNetworks' analysis, the threshold test for issuance of a subpoena to participants and witnesses is substantial impairment, whereas the threshold test for a request for information from nonparticipants is relevance.

In its reply brief, Live365 goes on to argue that if the CRJs' subpoena power were limited to participants and witnesses who have already submitted statements to the CRJs, the subpoena power would be effectively meaningless since other provisions allow the CRJs to compel testimony from parties and their witnesses. *See* 17 U.S.C. 803(b)(6)(C)(v)–(vii). Thus, according to Live 365, Congress must have been contemplating the ability to compel testimony from nonparticipant third parties.

IV. Register's Determination

A review of the written submissions and oral arguments offered by the parties and third party witnesses who supported and opposed the motion reveals that the question is not precisely whether the CRJs have the authority to "subpoena a nonparticipant," but rather whether the CRJs have the authority to subpoena a person who is neither a participant in the proceeding nor a witness whose testimony has been submitted as part of a participant's written direct statement. While SoundExchange's initial submission posited a distinction between participants and witnesses on the one hand and nonparticipants on the other hand, at the time of the hearing on the motion SoundExchange refined its position to acknowledge that some nonparticipants may nevertheless be "witnesses" for purposes of 17 U.S.C. 803(b)(6)(C)(ix). Specifically, SoundExchange acknowledged that the CRJs have the authority to subpoena a nonparticipant whose testimony has previously been submitted by a participant in the relevant proceeding.[8]

SoundExchange's refinement of its position is more consistent with the language of section 803(b)(6)(C)(ix), which empowers the CRJs to "issue a subpoena commanding a participant *or witness* to appear." (Emphasis added). The question, then, is: who may be a "witness" for purposes of section 803(b)(6)(C)(ix)?

In answering that question, one must look toward established canons of statutory construction which dictate that "the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law–making body which passed it, the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917). The plain meaning of the first sentence of this provision clearly authorizes the issuance of subpoenas to participants. The plain meaning of the same sentence also authorizes the CRJs to issue subpoenas to witnesses. Therefore, it is evident that certain persons other than participants (*i.e.* nonparticipants) may be subpoenaed, provided that they are "witnesses." Unfortunately, this analysis does not answer the critical question currently before the CRJs regarding whether the authority to subpoena "witnesses" is, as SoundExchange and the proposed subjects of subpoenas suggest, limited to witnesses whose testimony has been filed as part of a participant's written direct statement (a limited subset of nonparticipants), or whether the authority to subpoena witnesses includes any prospective witnesses, which would include all nonparticipants – subject to the other criteria regarding the probative value of their evidence.[9]

In determining whether "witness" as used in section 803(b)(6)(C)(ix) is limited to those who have already submitted testimony to the CRJs, one must, as noted above, look to the plain meaning of the statute. An accepted maxim of statutory construction dictates that in the absence of a definition, a statutory term should be construed in accordance with its natural meaning. *FDIC v. Meyer*, 510 U.S. 471 (1994). The

[7] CBSi, separately filed a brief in which it adopted the relevant arguments in SoundExchange's brief, and it reiterated many of SoundExchange's arguments at the January 12, 2010, hearing.

[8] SoundExchange acknowledges that "there are times when some of the witnesses aren't even under the control of a participant, and so you would have to issue a subpoena." Hearing Transcript at 76.

[9] With regard to both participants as well as witnesses, the CRJs may only issue a subpoena if the resolution of the proceeding would be substantially impaired by the absence of such testimony or production of documents or tangible things.

question here is, what is the natural meaning of the word "witness"? *Black's Law Dictionary* defines "witness" as "*One who* sees, knows, or vouches for something." *Black's Law Dictionary* (8th ed. 2004). Additionally, *Corpus Juris Secundum: A Contemporary Statement of American Law as Derived from Reported Cases* and *Legislation*, states "The term witness, in its strict legal sense, means one who gives evidence in a cause before a court; and in its general sense includes all persons from whose lips testimony is extracted to be used in any judicial proceeding, and so includes deponents and affiants as well as persons delivering oral testimony before a court or jury." 97 CJS Witnesses § 1 West, 1994. Neither of these definitions deems "witness" to be restricted to those whose testimony has been filed with the CRJs as part of a written, direct statement or, more generally, to those who have already given testimony. Therefore, there is no basis to conclude that Congress intended an alternative, more restrictive, meaning. Instead, the Register determines that "witness" as used in section 803(b)(6)(C)(ix) includes anyone *who knows something* that is relevant, or alternatively anyone who has or gives evidence (as opposed to one who *has given* evidence) in a rate determination proceeding. This plain meaning interpretation includes witnesses who are nonparticipants, including those who have not previously been designated by a participant as a witness as well as those whose testimony has not been filed as part of a written direct statement.

The statutory interpretation principle of *in pari materia*, which offers that statutes relating to the same or a closely allied subject or object should be construed together and compared with each other, indicates that it is also useful to look to other federal statutes that authorize the issuance of subpoenas. 73 Am. Jur. 2d Statutes § 103 (2009). The United States Code is replete with provisions that authorize various officers of the United States to issue subpoenas, and it is common for those provisions expressly to provide a power to "subpoena witnesses" or "issue subpoenas for the attendance of witnesses," or contain similar language. *See, e.g.*, 5 U.S.C. § 1305 (Office of Personnel Management & Merit Systems Protection Board may "subpena witnesses and records" in certain matters relating to administrative law judges); 8 U.S.C.A. § 1229a(b)(1) (Immigration judges "may issue subpoenas for the attendance of witnesses and presentation of evidence"); 2 U.S.C. § 437d(a)(3) (Federal Election Commission may "require by subpoena, signed by the chairman or the vice chairman, the attendance and testimony of witnesses and the production of all documentary evidence relating to the execution of its duties"). In each of these cases, a plain reading of the statute leads to the conclusion that Congress was empowering the named officers to issue subpoenas to "witnesses" as the term is commonly understood, and not just to persons who were already participating in their proceedings. The same reading is the natural reading of section 803(b)(6)(C)(ix).

In arguing for a more narrow interpretation of "witness," SoundExchange, joined by the proposed subjects of subpoenas, suggests that the final sentence of section 803(b)(6)(C)(ix) limits the CRJs' power with regard to nonparticipants. Under SoundExchange's reading, if section 803(b)(6)(C)(ix) were interpreted to allow the issuance of subpoenas to nonparticipants, the last sentence of the provision would be superfluous, and such a result would violate an accepted principle of statutory construction. However, the final sentence of section 803(b)(6)(C)(ix), which states "[n]othing in this clause shall preclude the Copyright Royalty Judges from requesting the production by a nonparticipant of information or materials relevant to the resolution by the Copyright Royalty Judges of a material issue of fact," does not address the CRJs' power to *subpoena* testimony. Instead, it speaks to the power of the CRJs to *request* testimony. As RealNetworks accurately points out, there may be situations where the CRJs conclude that it might be useful to have a nonparticipant testify, but at the same time conclude that the resolution of the proceeding would *not* be substantially impaired by the absence of such testimony. In such instances, the CRJs would not be able to *subpoena* the nonparticipant. However, in such instances, the CRJs could, under the final sentence of section 803(b)(6)(C)(ix), *request* the relevant testimony. Such a scenario clearly demonstrates that the final sentence is not rendered superfluous by a nonrestrictive interpretation of the subpoena power. The first part of section 803(b)(6)(C)(ix) authorizes the issuance of a subpoena to participants and witnesses, albeit bound by a finding that the absence of testimony would substantially impair the resolution of the proceeding. The second part of section 803(b)(6)(C)(ix), in a non–superfluous manner, preserves the ability to *request* testimony from a nonparticipant, provided that such testimony is relevant to the resolution of a material issue of fact and even if the absence of that testimony would not substantially impair the resolution of the proceeding.

SoundExchange correctly observes that the legislative history cited by RealNetworks was referring to proposed statutory text that was quite different from the statute as passed. However, it is unnecessary to look toward the legislative history for clarification where the plain meaning of the statute is clear. Even if there were ambiguity or lack of specificity in the statute, the legislative history that exists is consistent with the Register's finding that the CRJs' subpoena power is broad and not restricted to witnesses who have already submitted testimony to the CRJs. The legislative history evidences Congress's intent to allow "the CRJs to subpoena additional witnesses." H.R. Rep. No. 108–408, at 33 (2004). This portion of the House Report indicates that Congress intended the word "witness" to include additional persons beyond merely those who have previously been designated by a participant to give evidence. While it is true that the language discussed in the House Report imparted broader authority than the statue as passed, there is no indication that in the legislation as enacted, Congress intended a more restrictive meaning of "witness." Rather, it appears that subsequent to the filing of the House Report, Congress refined the statutory language in a way that required the CRJs to find a much higher degree of relevance and materiality before they would be permitted to issue subpoenas to witnesses, but not in any way that could affect the determination whether a particular person would be considered a "witness."[10]

The complete legislative history regarding the CRJs' subpoena power indicates that the type of restrictions that SoundExchange currently argues for were largely reflected in statutory language that was reported by the Senate Judiciary Committee but that ultimately was not adopted by Congress. As laid before the Senate, H.R. 1417 provided that the CRJs "may issue a subpoena commanding a participant or

[10] At the time the House Report was filed, the language in the pending legislation permitted the CRJs to issue subpoenas "only if the evidence requested to be produced or that would be proffered by the witness is relevant and material." H.R. Rep. No. 108-408, at 8 (2004). In the enacted legislation, that authority was narrowed to permit the issuance of subpoenas "if the Copyright Royalty Judges' resolution of the proceeding would be substantially impaired by the absence of such testimony or production of documents or tangible things." 17 U.S.C. 803(b)(6)(C)(ix).

witness *in a proceeding to determine royalty rates* to appear and give testimony or to produce and permit inspection of documents or tangible things." 150 Cong. Rec. S10499 (daily ed. October 6, 2004) (Emphasis added). The final sentence of the relevant subparagraph also stated that "A Copyright Royalty Judge may not issue a subpoena under this clause to any person who was a participant in a proceeding to determine royalty rates and has negotiated a settlement with respect to those rates." *Id.* However, these two limitations on the CRJs' subpoena power were amended on the Senate floor. The floor amendment removed the above–referenced final sentence of the relevant subparagraph, which would have prevented the CRJs from issuing a subpoena to any person who had been a participant in a proceeding to determine royalty rates and had negotiated a settlement. The floor amendment also removed any indication that a "witness" must be one "*in a proceeding to determine royalty rates.*" 150 Cong. Rec. S10590 (daily ed. October 6, 2004). The fact that these two restrictions, which are closely analogous to the one SoundExchange currently argues for, were not included in the statute as enacted indicates that Congress did not intend such limitations to be placed on the CRJs' subpoena power.

The cases cited by SoundExchange are also inapplicable to the current inquiry. *Bobreski v. E.P.A*, 284 F. Supp.2d 67 (D.D.C. 2003) addressed a statute that specifically withheld any grant of subpoena authority; *United States v. Iannone*, 610 F.2d 943 (D.C. Cir. 1979) spoke solely to the authority to subpoena the attendance and testimony of a witness, versus the mere authority to subpoena documentary information; and *Peters v. United States*, 853 F.2d 692 (9th Cir. 1988) addressed limitations on an administrative agency's ability to issue a very unique type of subpoena often referred to as "'John Doe' subpoenas" which are directed in a blanket manner at unidentified targets. The court observed that such subpoenas, which are not at issue here, carry heightened privacy concerns and it was therefore "reluctant to assume the existence of the power to issue third–party subpoenas directed at unidentified targets where Congress has not provided for them specifically, nor provided procedural safeguards." 853 F.2d 696.

Additionally, the CRJs' regulations cited by the parties are not instructive in answering the referred question. The question presented to the Register is the breadth of the CRJs' statutory authority to issue subpoenas. In answering that question, the statutory language, as well as the relevant legislative history and case law, provide the appropriate authority. Any limitation adopted through regulation by the CRJs regarding their ability to issue subpoenas during the discovery process prior to the consideration of the underlying statutory question cannot inform the Register's determination as to the scope of the CRJs' subpoena power under the statute.

Finally, Live355 argues in its reply brief that the CRJs would not need the subpoena power provided in the statute if it extended only to participants and witnesses identified in a party's direct case. It maintains that the subpoena power would be effectively meaningless under this interpretation since other statutory provisions allow the CRJs to compel testimony from parties and their witnesses, citing 17 U.S.C. 803(b)(6)(C)(v)–(vii). That observation is persuasive. The CRJs can order a participant to provide additional documentation or testimony under their authority to conduct the rate setting proceeding. They do not need subpoena power to compel compliance from a participant. The participant can comply with the order or, should it or its witnesses fail to do so, the CRJs can strike the affected portion of the participant's testimony. This option is a powerful enforcement mechanism but it only can work with participants and witnesses that voluntarily appear before the CRJs. Subpoena power, on the other hand, allows the CRJs to reach nonparticipants who are not part of the proceeding and it provides the CRJs with tools to compel compliance from persons who are not initially part of the proceedings. While it is true that, as SoundExchange points out, the statutory authority to issue subpoenas is silent with regard to enforcement, that is irrelevant to the inquiry at hand. It is not uncommon for Congress to grant subpoena authority in a statute that contains no stated enforcement mechanism. Where Congress grants subpoena authority in a statute that contains no stated enforcement mechanism, enforcement is achieved through a U.S. district court, and may be sought through the assistance of the United States Attorney's office. *Office of Legal Policy, U.S. Department of Justice, Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities, Pursuant to Public Law 106–544*, at 9–10 (2002), (available at http://www.usdoj.gov/archive/index–olp.html).

For the above–stated reasons, the Register concludes that the CRJs do have the authority to subpoena a witness to appear and give testimony or to produce and permit inspection of documents or tangible things even when that witness is not a participant in the proceeding and his or her testimony has not yet been submitted in the proceeding. This authority is restricted to instances where the resolution of the proceeding would be substantially impaired by the absence of such testimony or production of documents or tangible things. Additionally, Congress expressly preserved the CRJs' power to request information from nonparticipants in certain cases when the CRJs do not have the power to issue subpoenas. This power to request information may be invoked in those instances where such testimony is relevant to the resolution of a material issue of fact, even when its absence would not substantially impair the resolution of the proceeding (and, therefore, a subpoena could not be issued). The CRJs have not asked for any determination regarding what may constitute either substantial impairment of resolution of the proceeding or relevance to the resolution of a material issue of fact, and therefore no guidance is offered on those questions. It is, however, pertinent to observe that while the statute grants the CRJs the authority to issue subpoenas in certain circumstances, it does not compel them to issue subpoenas in any circumstance. Furthermore, it is noteworthy that even under the broader grant of subpoena power in the provision initially introduced in the House, Congress stated that it "does not anticipate that the use of subpoena power will become a common occurrence" and that "[t]he CRJs are expected to exercise this power judiciously and only in those instances where they believe a subpoena is necessary to obtain information that the parties have not provided and that the judges deem necessary to make their decision." H.R. Rep. No. 108–408, at 33 (2004).

February 22, 2010

Marybeth Peters,

Register of Copyrights.

[FR Doc. 2010–5806 Filed 3–18–04; 8:45 am]

BILLING CODE 1410–30–S

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[NOTICE 10–027]

Notice of Information Collection

AGENCY: National Aeronautics and Space Administration (NASA).