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

In the Matter of	)	
	)	
Promoting Diversification of Ownership In the Broadcasting Services	)	MB Docket No. 07-294
	)	
2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 06-121
	)	
2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 02-277
	)	
Cross-Ownership of Broadcast Stations and Newspapers	)	MB Docket No. 01-235
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MB Docket No. 01-317
	)	
Definition of Radio Markets	)	MB Docket No. 00-244
	)	
Ways to Further Section 257 Mandate and To Build on Earlier Studies	)	MB Docket No. 04-228

To: Marlene H. Dortch, Secretary

For transmission to: The Commission

REPLY TO OPPOSITION TO MOTION FOR STAY

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December 4, 2009

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SUMMARY

Fletcher, Heald & Hildreth, P.L.C. hereby replies to the Opposition filed by the Office of Communication of the United Church of Christ, *etal.* to its Motion for Stay in this proceeding. The Commission should deny the Opposition and stay the requirement for the filing of biennial ownership reports incorporating FRNs from all attributable interest holders until such time as imposition of that requirement has been the subject of a notice and comment rulemaking proceeding, as required by the Administrative Procedure Act ("APA").

Contrary to the claims of the Opposition, imposition of the 323/FRN Requirement will clearly cause harm to a large number of individuals. Even if the Commission were able to ensure the security of the social security numbers and other information required to be submitted to register for FRNs (which it is not), that registration itself constitutes a troubling invasion of privacy in violation of the Privacy Act because the Commission has failed to demonstrate any legitimate need for the requested information. The imposition of the 323/FRN Requirement failed to comply with the requirements of the APA because it was adopted without notice or opportunity for comment. No party could have anticipated the scope of the 323/FRN Requirement embodied in the revised Form 323 from the Commission's previous releases in this proceeding, and indeed, the Commission's official statements repeatedly assured parties that the revised form would ***not*** raise any privacy concerns (a position from which it has since performed a complete about-face). The Opposition cannot identify any specific harm that would arise from a delay in the imposition of the 323/FRN Requirement because that requirement would fail to serve the stated purposes of the revised Form 323, and would instead impose significant privacy burdens on thousands of individuals for no legitimate purpose. Accordingly, the Commission should stay the filing of ownership reports incorporating that requirement.

1. Fletcher, Heald & Hildreth, P.L.C. ("FHH") hereby replies to the Opposition filed by the Office of Communication of the United Church of Christ, *et al.* (the "Opposition Parties") to FHH's Motion for Stay (the "Motion") in this proceeding. In the Motion, FHH requested that the Commission stay, or otherwise hold in abeyance, its requirement for the filing of biennial ownership reports by commercial broadcast stations incorporating FCC Registration Numbers ("FRNs") from all attributable interest holders, including individual interest holders (the "323/FRN Requirement") until that requirement has been the subject of the necessary notice and comment rulemaking. The Opposition is based on a misunderstanding of the burdens imposed by the Commission's revisions to the Form 323, the history of this proceeding, and the requirements of the Administrative Procedure Act ("APA"). The Commission should deny the Opposition and grant the Motion forthwith.

STANDING

2. The Opposition Parties claim that FHH lacks standing because FHH has not participated in the underlying proceeding. That argument, to the very limited extent that it may have had any arguable validity at all, is in any event now moot. On Monday, November 30, FHH filed a timely Petition for Reconsideration or such Alternative Relief as May Be Appropriate (the "Petition") of the Commission's *Memorandum Opinion and Order and Fifth Further Notice of Proposed Rulemaking*.[1] A copy of the Petition is attached hereto as Attachment A. FHH had not previously filed comments or a petition related to the Commission's imposition of the 323/FRN Requirement because, as explained more fully in the Petition, the Commission had not released any documents in this proceeding that even remotely suggested the possibility that the Commission was considering requiring all individuals holding

[1] *Memorandum Opinion and Order and Fifth Further Notice of Proposed Rulemaking* in MB Docket Nos. 07-294, *et al.*, FCC 09-92 (Oct. 16, 2009) (the "*MO&O*").

attributable interests in broadcast licensees to register for and report FRNs in those ownership reports.

3. The *MO&O* was the first and only time in this proceeding that the Commission mentioned the 323/FRN Requirement as applied to individuals, and even then the mention was only in passing, noting that the Media Bureau had added this requirement to the Form 323. The *MO&O* was published in the Federal Register on October 30, meaning that any petition for reconsideration would be due by November 30. As a precautionary measure (since the *MO&O* did not itself substantively, much less adequately, address the 323/FRN Requirement), FHH timely submitted such a petition on behalf of various of its broadcast clients, noting the harm that the individual attributable interest holders in those clients would face if the Commission were to require them to obtain FRNs by submitting their social security numbers to the Commission, along with other personal information. Accordingly, FHH is clearly a party to this proceeding, and has standing to request that the Commission stay its required filing of ownership reports incorporating the 323/FRN Requirement.

LIKELIHOOD OF HARM FROM IMPOSITION OF THE 323/FRN REQUIREMENT

4. The Opposition claims that FHH's Motion failed to show that anyone would be harmed by imposition of the 323/FRN Requirement, that FHH is unlikely to prevail on the merits in its claims that the Commission's adoption of the requirement violated the APA, and that grant of the motion would harm the public. The Opposition is wrong on all counts.

5. First, the Opposition's claim that imposition of the 323/FRN Requirement would not cause any harm is ludicrous. As FHH has demonstrated, and as the Opposition does not deny, the revised Form 323, if it incorporates the 323/FRN Requirement for individual attributable interest holders, will require thousands of individuals to register their social security numbers and other sensitive information with the Commission for no useful purpose. As has

been demonstrated many times, even the most seemingly secure government records systems are subject to both intentional and inadvertent release of information. Within the last year, for example, personal information from government job applicants was compromised by a hacker's attack on the USAJOBS.gov databases, and information on thousands of veterans was released when a government hard drive was sent for repair without being properly erased.[2] In 2008, a laptop containing social security numbers of study participants was stolen from the National Institutes of Health, a security lapse that not only threatened the privacy of the individuals involved, but ended up costing the government thousands of dollars.[3]

6. We have no reason to believe that the Commission (or any other governmental agency, for that matter) will be able to secure private data any better. But even if it could absolutely guarantee the security of the social security numbers and other private information submitted in order to obtain FRNs, that data collection raises a more fundamental problem: the mere exercise of requiring individuals to register their social security numbers represents a troubling invasion of privacy, particularly when the FCC has failed to justify that requirement. The government may collect citizens' private information where there is a demonstrated need. But absent such a need, such a collection violates the Privacy Act and is itself a harm. The Privacy Act, in addition to setting forth limits on how agencies may use or disclose information they collect, provides that any agency maintaining a system of records may "maintain in its records only such information about an individual as is relevant and necessary to accomplish a

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[2] *See, e.g.* "Monster security breach at official US Government job site," ITWire, January 26, 2009, at http://www.itwire.com/content/view/22857/53/; "Probe targets Archives' Handling of Data on 70 Million Vets," Wired, Oct. 1, 2009, at http://www.wired.com/threatlevel/2009/10/probe-targets-archives-handling-of-data-on-70-million-vets.

[3] *See* Rick Weiss and Ellen Nakashima, "Stolen NIH Laptop Held Social Security Numbers," *Washington Post*, April 10, 2008.

purpose of the agency required to be accomplished by statute or by executive order of the President."[4] As explained more fully below and in the Petition, the Commission has failed entirely to demonstrate that the collection of social security numbers that follows from the imposition of the 323/FRN Requirement on individual attributable interest holders is "relevant and necessary" to any purpose.

7. According to the Opposition, the Commission's publication of a System of Records Notice ("SORN") for the revised Form 323 in the Federal Register should alleviate any privacy concerns.[5] Although that SORN is indeed required before the Commission may impose the revised Form 323, the SORN, by itself, neither resolves the privacy concerns raised by the 323/FRN Requirement nor brings the Commission into full compliance with the Privacy Act. As FHH explains in the Petition, the Commission must also revise the SORN for its CORES system as a result of the substantial change in the parties now subject to that system.[6] The CORES SORN currently states that the purpose of the CORES system (which includes the FRN process) is "to develop and maintain a Commission-wide method of recognizing and interacting with those individuals who are doing business with the Commission as defined in 31 U.S.C. 7701(c)(2) ***and*** who incur application or regulatory fee obligations."[7] This purpose is stated in the conjunctive, meaning that it covers only individuals who satisfy both conditions. The

[4] 5 U.S.C. Sec. 552a(e)(1).

[5] Opposition at 9.

[6] In contrast to the SORN for the Form 323, the revised SORN for the CORES system should also be released in a manner that allows for compliance with the 30 and 45 day comment periods mandated by the Privacy Act.

[7] FCC/OMD-9 (emphasis added).

Opposition's claim that this definition already applies to all persons holding attributable interests in broadcast licensees is incorrect for two reasons.[8]

8. First, while the Opposition is correct that an application fee is charged for filing ownership reports, that fee applies only to a single report filed by each licensee itself.[9] Any reports filed by parent entities are fee-exempt. Moreover, the individuals listed in ownership reports as holding attributable interests in licensees (either directly or indirectly through intermediate entities) do not themselves incur any application or regulatory fee obligations by virtue of being identified in those reports.

9. Second, the Opposition asserts that *all* attributable interest holders [10] are deemed to be "doing business with" the Commission and, thus, are subject to required social security number disclosure.[11] While the Boswell Letter may indeed say that, the Commission itself has never said that, at least with respect to broadcast licensees. Nor has the Commission ever taken any steps consistent with that exceptional notion. To the contrary, the Commission has routinely accepted the licensee's FRN (and the FRN of any separately-reporting entity with an attributable interest in the licensee) as all that was necessary. The proposed requirement thus represents a stark departure from previous Commission and Media Bureau practice. Such a change in course cannot be adopted, without notice or opportunity for comment, through private correspondence

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[8] *See* Opposition at 8, n. 27.

[9] Instructions to revised Form 323 at 4.

[10] Actually, the Opposition refers to "attributable owners", rather than attributable interest holders. *See* Opposition at 8, n.27. We will assume that this was just an inadvertent slip, and that the Opposition Parties recognize that the 323/FRN Requirement would reach not simply "owners", but also each and every officer and director of the licensee and of any attributable entity in that licensee.

[11] *See* Opposition at 8, n.27, *citing* Letter ("the Boswell Letter") from Walter Boswell, Acting Associate Managing Director, PERM, FCC to Nicholas A. Fraser, Office of Information and Regulatory Affairs, Office of Management and Budget (Oct. 6, 2009) at 6.

such as the Boswell Letter, which the Commission never released to the public, much less formally endorsed through its conventional processes.[12]

10. And even if the Commission were to resolve the problems with the SORN for the CORES system, its problems would not be over. The Commission has still failed to demonstrate that the required disclosure of FRNs by every individual attributable interest holder, and the attendant need for those individuals to submit social security numbers, is relevant to or necessary for any regulatory purpose. Without such a valid justification, the disclosure requirement harms the individuals to which it would apply. The only arguable justification the Commission itself has offered for the dramatic expansion of the FRN disclosure requirement appeared in a *post hoc* conclusory remark that the Bureau had incorporated this expansion "to ensure the usefulness of its data."[13] As FHH explained in the Petition, and as echoed in a November 18, 2009 filing in this proceeding by the Minority Media and Telecommunications Council ("MMTC"), mandating the submission of social security number-based FRNs for all attributable interest holders will in no way ensure the usefulness or accuracy of the Commission's data on ownership, and in particular on minority and female ownership, of broadcast stations. The utility of an FRN as a unique identifier is severely undercut by, *inter alia*: the ability of any entity or individual to obtain multiple FRNs; the near-certainty that some parties will justifiably refuse to register for an

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[12] *See* Petition at 10-11, 14. It should also be noted that, since the proposed 323/FRN Requirement constitutes a dramatic change in substantive agency policy, the Boswell letter was ineffective at announcing that change. The Office of Managing Director does not have delegated authority to make new policy. That being the case, the Boswell Letter cannot be relied upon as a statement of FCC policy here.

[13] *MO&O* at n. 20. Although the rationale for the 323/FRN Requirement was explained to some extent in the October 6 letter to OMB, the Commission has never included such an explanation in any of its formal releases. Moreover, the validity of the post-hoc rationalizations included in the October 6 letter are questionable at best, as explained more fully in the Petition. *See* Petition at 14, *citing, e.g. Echostar Satellite v. FCC*, 457 F.3d 31, 36 (D.C. Cir. 2006).

FRN or that they will do so using inaccurate information (either intentionally or unintentionally); and the lack of any mechanism in CORES for checking the validity or consistency of the information provided to obtain an FRN.[14]

11. If the rationale behind use of the FRN in the revised Form 323 is indeed to provide unique identifying information for all individuals with attributable interests in broadcast stations, not only is the provision of FRNs not useful to achieve this goal, but it is entirely unnecessary: there are less intrusive and more effective means of accomplishing the same objective. To take just one example, the Commission could require each person to provide a consistent name and address in each ownership report in which they appear, obviating the need for registration in the CORES system at all.[15] It is highly likely that other effective means could be implemented to ensure accurate and reliable ownership information that would not infringe on individuals' privacy rights. The Commission, however, has failed to explore any such alternatives due to its procedurally defective adoption of the 323/FRN Requirement. The Commission cannot show that this collection of data is "relevant and necessary" to any legitimate goal and, as a result, such a collection would inflict harm on the individuals required to submit their social security numbers to the Commission through CORES.

ADOPTION OF THE 323/FRN REQUIREMENT FAILED TO COMPLY WITH THE APA

12. Contrary to the argument put forth in the Opposition, the Commission's adoption of the 323/FRN Requirement failed to satisfy the APA, and cannot be saved by the limited exceptions for "logical outgrowths" or changes in rules of agency procedure or practice.

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[14] It is highly likely that the revised Form 323 itself may be subject to similar flaws, but this cannot be determined until the electronic version of the form is released. As of today, little more than one month from the Commission's desired filing date, that form is still not available.

[15] This was, of course, the suggestion of MMTC. MMTC Letter at 2.

13. The Opposition claims that the Commission's imposition of the 323/FRN Requirement on all individuals holding attributable interests in broadcast licensees is somehow a "logical outgrowth" of its decision, in the *Report and Order and Fourth Further Notice of Proposed Rulemaking*,[16] to require each *entity* filing an ownership report to identify the FRN of *the entity* below it in the ownership chain. This claim stretches the idea of a "logical outgrowth" far beyond its breaking point. The focus of the logical outgrowth test is whether parties subject to the newly adopted obligation could reasonably have anticipated that the obligation would be imposed.[17] The Commission's course of action in this proceeding makes clear that even the most involved parties could not have anticipated the imposition of the 323/FRN Requirement on all individual attributable interest holders.[18]

14. First, the Opposition ignores the fact that the substantive obligation imposed by the 323/FRN Requirement far exceeds anything suggested in the *4thFNPRM*. The *4thFNRPM*'s FRN disclosure requirement was limited by its express terms to *entities*, not to individuals. Individuals (except for sole proprietors) have never been required to file their own ownership reports, regardless of the interests they hold in a licensee, and under the *4thFNPRM* would not have been required to obtain or disclose an FRN. The 323/FRN Requirement embodied in the revised Form 323, however, expands the obligation to obtain and submit an FRN to any individual holding any attributable interest in a licensee, whatever the nature of that interest. Not only did this exponentially expand the number of FRNs required to be listed in Form 323s,[19] but

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[16] FCC 09-33 (rel. May 5, 009) (the "*4thFNPRM*").

[17] *See, e.g., Covad Communications Co. v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006).

[18] *See* Petition at 2-13 for a more detailed history of this proceeding and the imposition of the 323/FRN Requirement.

[19] As an example, assume a licensee has three parent companies in its ownership chain (each owning 100% of the stock of the entity below it), and each of the companies, including the

(Footnote continued on next page)

it raised significantly different privacy concerns by requiring FRNs for individuals, who must as a result submit their social security numbers. Such an expansion does not logically follow from anything in the *4thFNPRM*.

15. The Opposition also claims that, since the revised ownership report is intended to elicit race and gender information, individuals could or should somehow have known that they would need to register for and provide FRNs. Because FRNs, and the social security numbers required to get them, provide absolutely no information about an individual's race or gender, the fact that the collection of such information may be a purpose of the Form cannot logically lead to the conclusion that individual FRNs would be required. The two types of information are simply unrelated.

16. Perhaps most damning to any claim of "logical outgrowth", however, is the fact that the Commission, through *both* its June 10 Federal Register Notice announcing changes to the Form 323 *and* its August supporting statement to OMB, affirmatively assured parties that its changes to the form did ***not*** raise any privacy concerns.[20] In light of such statements, no party could reasonably have anticipated that the form in fact did raise significant privacy concerns. When the revised form finally came to light through OMB, the inclusion of the 323/FRN

(Footnote continued from preceding page)
licensee, has 6 officers and directors. Assume also that the ultimate parent company is a limited liability company with 11 un-insulated members. (In fact, many ownership structures are far more complicated than this and would involve far more individuals and entities). Under the requirements of the *4thFNPRM*, 4 FRNs would be required – one for the licensee and one for each parent company. Under the 323/FRN Requirement incorporated in the revised Form 323, as many as an additional ***35*** individuals would need to register for FRNs.

[20] *Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested*, 74 Fed. Reg. 27549 (June 10, 2009); Supporting Statement filed by FCC with OMB in connection with revised Form 323 in August 2009. This statement has since been removed from the OMB website, replaced by a "revised" version, submitted to OMB in October 2009 disclosing the privacy impact of the revisions.

Requirement, and its major privacy implications, constituted precisely the type of "surprise switcheroo" the logical outgrowth test is intended to prevent.[21]

17. Indeed, press reports indicate that even Commissioner McDowell, who voted in favor of the *4thFNPRM*, was not aware that submission of social security numbers by individuals would be required when the *4thFNPRM* was adopted.[22] Where, as here, even one of the Commissioners considering the item did not anticipate the changes that the revised Form 323 and the 323/FRN Requirement made to the proposals in the *4thFNRPM*, and where the Commission repeatedly assured parties that it was not making such changes, it is impossible to consider those changes as a logical outgrowth of those proposals.

18. The Opposition also advances the equally untenable argument that the imposition of the 323/FRN Requirement on individuals is exempt from the APA's notice and comment requirements because it is an internal rule of agency procedure or practice that does not affect the rights or interests of any parties. The 323/FRN Requirement, however, clearly does affect the rights of individuals, specifically their rights under the Privacy Act to be free from agency collection and use of their sensitive personal information unless necessary to achieve a legitimate agency purpose. Before the Commission may impose such an intrusive requirement, it must engage in notice-and-comment rulemaking proceedings as required by the APA. This the Commission did not do, and the requirement is, as a consequence, invalid and unenforceable.

LACK OF HARM TO OTHER PARTIES

19. Finally, the Opposition argues that any further delay in the filing of the revised Form 323 would cause harm to the Commission, academic researchers, and the public by

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[21] *Covad*, 450 F.3d at 548.

[22] "McDowell 'Very Troubled' By Social Security Number Collection," *Broadcasting and Cable*, November 24, 2009.

impeding their ability to analyze minority and female ownership. Although the Opposition Parties claim to want this information as soon as possible, they have not demonstrated any specific harm that would occur as a result of the delay necessary to ensure that the collection complies with the APA, ensures individuals' privacy, and results in reliable data. While the filing of race and gender information in a revised Form 323 may achieve some legitimate data collection goals, the 323/FRN Requirement is not in any way relevant or necessary for that purpose. Indeed, to the extent researchers need accurate and reliable public databases to perform their research, the 323/FRN Requirement itself will cause them harm because, for the reasons explained herein, in the Petition for Reconsideration, and in MMTC's November 19 filing, that requirement is in fact far more likely to lead to an unreliable and/or incomplete database. Moreover, any harm to the Commission's ability to collect this information on its desired timeframe is a harm entirely of the Commission's own making. Had the Commission provided adequate and timely notice of the anticipated 323/FRN Requirement, the obvious problems with that requirement could have been identified and acceptable alternatives might have been developed through the notice-and-comment process mandated by the APA. The Commission, for whatever reason, chose to do otherwise, and it must now accept the consequences of that decision. In any event, the current revised Form 323, insofar as it contains the 323/FRN Requirement, is fatally flawed, and its implementation must be stayed.

CONCLUSION

As demonstrated herein, the arguments raised in the Opposition rely on a misunderstanding of the burdens imposed by the revised Form 323 and the Administrative Procedure Act and Privacy Act requirements that the Commission must follow before adopting such burdens. In view of the foregoing and the entire record herein, it is respectfully requested that the Commission deny the Opposition and grant FHH's request for stay of the requirement

that broadcast licensees file biennial ownership reports incorporating the 323/FRN Requirement until such time as imposition of that requirement has been the subject of a notice and comment rulemaking proceeding, as required under the APA.

Respectfully submitted,

/s/ Harry F. Cole

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December 4, 2009

Attachment A

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To: Marlene H. Dortch, Secretary

For transmission to: The Commission

PETITION FOR RECONSIDERATION
OR SUCH ALTERNATIVE RELIEF AS MAY BE APPROPRIATE

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November 30, 2009

SUMMARY

Fletcher, Heald & Hildreth, P.L.C. hereby petitions the Commission for reconsideration of the determination to require the acquisition and disclosure of FCC Registration Numbers (FRNs) by all individual attributable interest holders in connection with the filing of Ownership Reports (FCC Form 323), or for such other relief as may be appropriate to the unusual procedural posture of this proceeding. Although the required submission of FRNs (and with it, the attendant required submission of an individual's social security number to the Commission) appears in the revised Form 323 submitted to the Office of Management and Budget ("OMB"), that requirement has never been the subject of any formal Commission action. Rather than adopt this requirement through formal Commission action after providing interested parties reasonable opportunity to comment, the Commission has instead imposed the requirement by inserting it into a revision of the Form 323 which the Commission itself has still not formally released to the public for filing.

In their apparent, and as yet unexplained, rush to adopt changes to the Form 323, the Commission has failed to comply with the Administrative Procedure Act. The Commission has failed to provide drafts of the revised Form 323 to the public in a timely manner and has failed to provide notice of, and the requisite opportunities for comment on, the proposed changes to that Form. Instead, the Commission has provided inconsistent and misleading descriptions of those changes and the disclosures of personally identifiable information that would be required by those changes. Until October of this year, after a revised form had been designed and submitted to OMB, and long after the period for seeking reconsideration of the Commission's formal action adopting changes to the Form, the Commission continued to insist that its revisions had no

impact on individuals' privacy and did not require any measures to keep individual information confidential.

Although the Commission has now recognized that its imposition of the requirement that all individuals holding attributable interests in broadcast licensees submit their social security numbers to the Commission has an impact under the Privacy Act, the Commission has not provided an explanation of why it needs this information, nor has it provided any opportunity to submit comments to the Commission on the need for this disclosure or on any alternatives with less impact on individuals' privacy. The requirement as now formulated is overly invasive in requiring the submission of social security numbers for storage in a government database the security of which cannot be guaranteed. Moreover, the usefulness of the submission of FRNs to the analysis of ownership information is highly questionable at best. Before requiring the submission of such sensitive information from thousands of individuals, the questions of whether the requested information is necessary or useful must be resolved through a notice-and-comment rulemaking proceeding.

While the Commission clearly has the authority to seek to improve its data collection procedures related to ownership information, the exercise of that authority must comply with the requirements of the APA. Because, in seeking to require submission of FRNs and social security numbers by all individuals holding attributable interests in broadcast licensees, the Commission has not complied with those procedures, Fletcher, Heald & Hildreth, P.L.C. seeks reconsideration of the Commission's imposition of that requirement, and requests that the Commission announce that the Form 323 will not require the submission of such information until such time as a notice-and-comment rulemaking proceeding is completed to explore whether any such requirement can be justified in the public interest.

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1. Fletcher, Heald & Hildreth, P.L.C. ("FHH"), on behalf of various broadcast clients and pursuant to Section 1.106 of the Commission's Rules, hereby seeks reconsideration of the determination to require, in connection with the submission of Ownership Reports (FCC Form 323), the acquisition and disclosure of FCC Registration Numbers (FRNs) by each and every individual holding an "attributable" interest in a commercial broadcast licensee. We will refer to that requirement as the "323/FRN Requirement". As discussed in detail below, the imposition of the 323/FRN Requirement has not, to date, been the subject of any formal action by the Commission (or any of its component bureaus). In the absence of any such action, it is not clear that a "petition for reconsideration" is necessarily the appropriate vehicle by which to present FHH's concerns. The Commission did allude – albeit strictly in passing, with no detailed analysis whatsoever – to the 323/FRN Requirement in its Memorandum Opinion and Order and Fifth Further Notice of Proposed Rulemaking ("*MO&O/5thFNPRM*"), FCC 09-92, released October 16, 2009 (at ¶8). That *en passant* allusion does not, in FHH's view, come close to satisfying the Commission's statutory obligations relative to the imposition of new regulatory burdens. Nevertheless, on the off-chance that the Commission might try to claim otherwise, FHH is directing the instant Petition to the *MO&O/5thFNPRM* in order to assure that its effort to secure consideration of the issues cannot be said to be untimely. [1] To the extent that the Commission concurs that, in the absence of any formal agency "action" relative to the 323/FRN Requirement, reconsideration does not currently lie as a technical matter, FHH requests that the Commission consider this Petition as a request for appropriate relief with respect to the 323/FRN Requirement, as discussed below.

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[1] The *MO&O/5thNPRM* was published in the Federal Register on October 30, 2009. 74 Fed. Reg. 56131 (October 30, 2009).

2. FHH is a communications law firm, established in 1936, which represents thousands of commercial broadcast licensees, both directly and through multiple state broadcast associations. Each of those licensees will be required to submit reports on the revised Form 323 and, if the 323/FRN Requirement were to be imposed, each of the individuals holding any attributable interest in those licensees would be required to obtain an FRN to be included in those reports. In order to obtain an FRN, each of those individuals would have to provide his/her social security number to the Commission. As multiple Federal agencies, *including the Commission itself*, have recognized, the public interest weighs heavily against the unnecessary provision of such personal identification. [2] The Commission has to date failed to articulate *any* basis (much less any valid basis) for the massive collection of social security numbers which would be triggered by the 323/FRN Requirement. Accordingly, FHH's clients would be subject to unjustified disclosure of their social security numbers – and the dangers inherent in such disclosure – if the 323/FRN Requirement were to be imposed.

BACKGROUND

3. The process from which the 323/FRN Requirement emerged began in March, 2008, with the Report and Order and Third Further Notice of Proposed Rulemaking, FCC 07-217, released March 5, 2008 ("*3rdFNPRM*"), in the above-captioned matter. The underlying proceeding was designed to "facilitate ownership diversity and new entry in the broadcasting

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[2] *See, e.g.*, "FCC and FTC Chairmen Jointly Encourage The Public To Take Safeguards to Protect Themselves, Their Privacy, and Their Personal Information Online", released October 9, 2009 (http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293921A1.pdf); "Safeguarding Against and Responding to the Breach of Personally Identifiable Information", OMB No. M-07-16, released May 22, 2007 (http://www.whitehouse.gov/OMB/memoranda/fy2007/m07-16.pdf); "Identity Theft and Your Social Security Number", SSA Publication No. 05-10064, August, 2009 (http://www.ssa.gov/pubs/10064.html).

industry". *3rdFNPRM* at 4, ¶5. In connection with that goal, the Commission tentatively concluded that it should revise Form 323 in order to "increase the accuracy of the data collected and the potential uses for the form". *Id.* at 34, ¶95. The Commission suggested several possible ways in which the form might be revised. *Id*. at 34, ¶¶95-96. None of those suggestions gave any hint, implicitly or explicitly, that the form might be revised to require the submission of FRNs by individuals with attributable interests in responding licensees, or the consequent submission of those individuals' social security numbers in order to obtain FRNs in the first place.

4. Not surprisingly, no comments proposing anything akin to the 323/FRN Requirement were submitted in response to the *3rdFNPRM*, at least as far as the Commission let on in its Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 09-33, released May 5, 2009 ("*4thFNPRM*"). The *4thFNPRM* included the Commission's disposition of the Form 323 questions raised in the *3rdFNPRM*. In particular, the Commission announced in the *4thFNPRM* that it was "adopting changes to our reporting requirements on the FCC Form 323", and it summarized those changes as follows:

> We are broadening the reporting requirements to include commercial broadcast licensees that are sole proprietorships and partnerships comprised of natural persons and are requiring low power television stations ("LPTV") licensees, including Class A stations, to file biennially. We also are requiring certain nonattributable interests to be reported.

4thFNPRM at 3, ¶3 (footnote omitted). Obviously, nothing in that summary even hinted at any possible 323/FRN Requirement.

5. In fact, the only point in the *4thFNPRM* at which the term "FRN" appeared was Paragraph 21 (page 13). That paragraph was devoted to a proposal by the NAB for consolidating reports in certain situations. As discussed there by the Commission, the Commission has for

some time required that, when "an entity" has an attributable interest in a licensee, then the licensee *and* the entity must both file separate Ownership Reports. NAB suggested that, in such situations, it might make sense to utilize a single form for all entities ultimately controlled by the same parent company. The Commission rejected that suggestion:

> At this time, we are not modifying the current requirement that licensees, parent entities, all attributable entities, as well as the nonattributable entities identified above, file separate forms. First, we are not convinced that requiring licensees to obtain and report all ownership data for parent corporations and attributable entities on a single form would be less burdensome than the current practice. Licensees may find it burdensome to collect ownership information as to certain entities that hold interests in the licensee indirectly through a vertical ownership chain. Moreover, there are measures in place to ensure that researchers can aggregate and cross-reference the data submitted on separate forms for a broadcast station. For instance, all Form 323s currently require filers to list facility ID numbers and call signs. However, to further improve the ability of researchers and other users of the data to cross-reference information and construct complete ownership structures, we will require each attributable entity above the licensee in the ownership chain to list on Form 323, the FCC Registration Number (FRN) of the entity in which it holds an attributable interest. In other words, each filing entity must identify by FRN the entity below it in the chain.[*] We direct staff to revise Form 323 accordingly.
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> ---
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> [*] For example, Licensee A is wholly owned by Corp. B, and Corp. B is wholly owned by Corp. C. Corp. C is required to include on its Form 323, Corp. B's FRN. Corp. B is required to include on its Form 323 the Licensee's FRN.

Unlike "entities" (*i.e.*, business organizations such as corporations, LLCs, partnerships, etc.), individuals who hold "attributable" positions or interests in licensees have never been required to file their own separate Ownership Reports. Since the Commission's discussion (quoted *in toto* above) included no mention at all of individuals and, instead, focused exclusively on the separate filing requirements of "entities" – note in particular the Commission's footnoted example, which referred only to separate organizations each filing its own separate Form 323 – nothing there could be said to have signaled to even the most cautious reader that the Commission might be

contemplating some change in the reporting requirements for individuals with attributable interests.

6. The Commission concluded its rejection of the NAB proposal by saying "[w]hile we believe these measures will resolve concerns regarding the usefulness of the data, we delegate authority to the staff to revisit this issue if additional modifications of the form are determined to be necessary." *4thFNPRM* at 13, ¶21. Again, in the context of this particular portion of the *4thFNPRM*, that "delegation" could not logically be read to include the possible imposition of additional burdens on individuals. Having failed to mention any such additional burdens at any point in the process up to then, the Commission itself would have been hard-pressed to impose them at that point. And certainly if the Commission itself could not have summarily adopted the 323/FRN Requirement without further proceedings (such as a further notice of proposed rulemaking to provide the public with opportunity to comment), the Commission could not authorize the Bureau to do so. So the "authority" which the Commission purported to "delegate" to the Bureau could not reasonably have been understood to include the capacity to impose the 323/FRN Requirement, nor is there any evidence that the Commission intended it to do so (*see* Paragraph 28, below).

7. To this point the proceeding had been a relatively conventional rulemaking involving, *inter alia*, possible changes to a form. But the delegation of authority to the Bureau to craft the new Form 323 without providing the Bureau, or the public, a draft of the revised form to consider was perhaps the first indication that the proceeding would veer far afield of the conventional. A second related aspect of the *4thFNPRM* pushed the matter still further off the tracks: even though it had no revised Form 323 ready to go or (apparently) even drafted, the Commission ordered that all commercial broadcasters (including LPTV and Class TV licensees

who had never previously had to file *any* Form 323) would have to file on the "new" form no later than November 1, 2009. *4thFNPRM* at 13-14 (¶22). The Commission provided no explanation whatsoever for why it chose that particular date. Nor did it explain why it might be appropriate to specify *any* filing deadline (and particularly a deadline a mere six months away) for a form which had not even been drafted, much less run through the conventional notice-and-comment procedures and intra-governmental review processes which are required standard operating procedure for the substantial revision of forms such as this.

8. And with that, the matter of the revised Form 323 lurched wildly off the tracks.

9. The next the public heard of the revised Form 323 was in a seemingly routine notice published in the Federal Register on June 10, 2009. *Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested*, 74 Fed. Reg. 27549 (June 10, 2009). That notice described the proposed changes to the form as follows:

> The instructions [in the draft Form 323] have been revised to incorporate a definition of ''eligible entity,'' which will apply to the Commission's existing Equity Debt Plus (''EDP'') standard, one of the standards used to determine whether interests are attributable. The instructions have also been revised to update citations to the Commission's media ownership rules.
>
> In addition, on April 8, 2009, the Commission adopted a *Report and Order and Fourth Further Notice of Proposed Rulemaking* (the ''323 Order'') [*i.e., the 4thNPRM*] in MB Docket Nos. 07–294, 06–121, 02–277, 01–235, 01–317, 00–244, 04–228; FCC 09–33. Consistent with actions taken by the Commission in the 323 Order, the following changes are made to Form 323: The instructions have been revised to state the Commission's revised Biennial filing requirements adopted in the 323 Order. The instructions and questions in all sections of the form have been significantly revised. Many questions on the form have been reworked or reordered in order to (1) clarify the information sought in the form; (2) simplify completion of the form by giving respondents menu-style or checkbox-style options to select rather than requiring respondents to submit a separate narrative exhibit; and (3) make the data collected on the form more adaptable for use in database programs used to prepare economic and policy studies relating to media ownership.

Id. at 27550.

10. That notice provided no indication whatsoever that the revised form might require the submission of social security number-based FRNs from individuals. To the contrary, the notice affirmatively and unequivocally indicated that no such requirement would be involved. According to the notice:

> *Nature and Extent of Confidentiality:* There is no need for confidentiality with this information collection.
>
> *Privacy Act Impact Assessment:* No impact(s).

Id. From these express and repeated statements that the undisclosed revisions would ***not*** entail submission of any confidential or private information, no reasonable reader could have imagined that the form envisioned by the Commission would require submission of FRNs by individuals.

11. As subsequent events have established, however, the revised form prepared by the Bureau did precisely that.

12. Let's stop here and reflect briefly on a quandary apparent on the face of the June 10 Federal Register notice. Since that notice indicated that a revised form was already available for review, it is reasonable to conclude that somebody at the Commission must have been aware that the revised form included the 323/FRN Requirement – but the Federal Register notice plainly indicated otherwise. How to explain this contradiction? At least two possible explanations spring to mind: (1) because of the near certain controversy such a revision would create, one might suspect that Commission personnel intended to keep the public in the dark; or (2) maybe Commission personnel somehow failed to appreciate the confidentiality/privacy issues inherent in its proposed revision. It is, frankly, difficult to believe that either of these explanations accurately reflects what happened: an affirmative effort to mislead the public, or

apparent incompetence in an area (*i.e.*, privacy/confidentiality) which the Commission was required specifically to consider and address in the notice. Neither is an attractive alternative, but the circumstances seem to support one or the other. (If there is some alternate, more palatable explanation, we invite the Commission to provide it – but that explanation will have to satisfactorily address the obvious problems posed by the June 10 Federal Register notice.)

13. With the benefit of hindsight, we can safely say that the train had left the tracks by the time the June 10 notice appeared. But even then the proceeding might have been righted had the Bureau made a copy of the revised Form 323 available for review and comment during the 60-day period mandated by the Paperwork Reduction Act, *i.e.*, the period that commenced with the June 10 Federal Register notice. After all, the purpose of that notice-and-comment opportunity is to afford affected members of the public a useful chance to alert the agency to potential problems. Had the public merely been given a chance to look at the revised form at that stage, the 323/FRN Requirement would have been evident, and the public would have been able to alert the Commission to the serious procedural and substantive problems with that requirement.

14. ***But no copy of the revised form was included in the June 10 notice*** – a fact which significantly diminished the utility of the review period. No problem, though: the notice contained the following explicit invitation:

> For additional information about the information collection(s) or to obtain a copy of the collection send an e-mail to *PRA@fcc.gov* and include the collection's OMB control number as shown in the ''Supplementary Information'' section below . . .

Id. at 2749. But when FHH followed those instructions, repeatedly, in an effort to obtain a copy of the revised form during the 60-day review and comment period starting on June 10, FHH was advised that the form was not available. [3]

15. The revised Form 323 finally surfaced for public review on the OMB website on August 11, after the Commission had submitted it to OMB for approval pursuant to the Paperwork Reduction Act within 24 hours of the expiration of the 60-day review comment period initiated by the June 10 Federal Register notice, and long after the time for formal reconsideration of the *4thFNPRM* had passed. [4] The form as initially submitted to OMB included the 323/FRN Requirement. The "Supporting Statement" which accompanied the submission to OMB was unsigned and unattributed to any individual or office within the Commission. A copy of that Supporting Statement as downloaded from the OMB site is included as Attachment A hereto. [5] According to page 8 of that Supporting Statement, "[t]here is

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[3] A letter submitted to the Office of Management and Budget ("OMB") on behalf of the Commission on October 6, 2009, expressly confirmed that the Commission did not in fact make the revised Form 323 available for public review at any time during the 60-day review-and-comment period from June 10-August 10, 2009.

The Bureau's refusal to make the revised form available for review further aggravates the credibility problem suffered by the Commission here. If the revised form had in fact been prepared as of the June 10 notice (as the notice seemed to say was the case), somebody at the Commission should have known that the revised form imposed a new requirement well beyond anything even hinted at in the *3rdNPRM* and *4thNPRM*. The Commission also should have known that the new, unannounced requirement raised major, valid privacy concerns. And it also should have known that, upon disclosure of the revised form to the public, those concerns would be evident. What, then, are we to make of the decision not to make the revised form available?

[4] The draft Form 323 was posted *by OMB*, ***not*** the Commission. As late as the end of November, the Commission itself had never issued its form in any manner. At most, a one-line entry on a webpage buried deep on the fcc.gov website instructed that "[a] copy of the draft Form 323, for reference purposes only, is currently available at the OMB's website."

[5] The Supporting Statement filed with OMB in August, 2009, has since been removed from the OMB website, replaced by a "revised" version submitted to OMB in October, 2009. To the best

(Footnote continued on next page)

no need for confidentiality with this collection of information" and "[t]his information collection does not address any private matters of a sensitive nature."

16. Since the draft form included the 323/FRN Requirement, those last two statements were, of course, hopelessly inaccurate, a fact which a number of commenters brought to OMB's attention when they were finally able to review the draft form. Copies of those comments are available at the OMB website. [6] Even if we assume, charitably, that the Commission had not been aware up to that point that the inclusion of the 323/FRN Requirement was inconsistent with the Commission's multiple representations about privacy – and, again, it is difficult to conceive of how the Commission could not have been aware of that – the comments filed with OMB clearly and unequivocally placed the Commission on notice of the fatal problems with the 323/FRN Requirement.

17. While the train was now well off the tracks, the comments filed with OMB should at least have caused the Commission to slam on the brakes to minimize the damage. Instead, the Commission hit the accelerator. In a 22-page single-spaced letter on Commission letterhead dated October 6, 2009, addressed to an OMB official and signed by "Walter Boswell, Acting Assoc. Managing Director, PERM", the 323/FRN Requirement was defended to the hilt. For the first time the 323/FRN Requirement was formally acknowledged at all, and a range of purported explanations and justifications were advanced. While Mr. Boswell's letter makes for interesting reading, its legal significance is, at best, dubious. Since the Commission had not theretofore ever

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of FHH's knowledge, neither the August Supporting Statement nor the revised October, 2009 version was ever publicly released by the Commission in any manner which would permit the Commission to rely on the statement. *See* Section 0.445 of the Commission's Rules.

[6] *See* http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=200908-3060-001 (visited November 27, 2009).

formally acknowledged the 323/FRN Requirement, much less attempted to justify it, Mr. Boswell's letter cannot be read to be merely a summary or recapitulation of established Commission policy. Rather, it appears to be a *de novo* statement of Commission policy. The problem there is that the Managing Director's office does not appear to have the delegated authority to make such *de novo* policy statements. *See* Section 0.231 of the Commission's Rules. Moreover, Mr. Boswell's letter was not, to the best of our knowledge, published in the Federal Register, the FCC Record, FCC Reports, or Pike and Fischer Communications Regulation. [7] As a result, the letter – even if it were deemed, *arguendo*, to be an authorized exercise of legitimately delegated authority – could not be relied upon by the Commission. *See* Section 0.445(e) of the Commission's rules.

18. Meanwhile, the clock was ticking down to the November 1, 2009, filing deadline which the full Commission had expressly mandated in the *4thFNPRM*. As of October 2 – less than a month before that deadline – OMB was still awaiting some Commission response to the various comments which had been filed with it in September, and OMB approval of the form was thus still days, if not weeks or months, away. On October 2, acting on its own motion, the Media Bureau announced that the deadline would be extended to no less than 30 days following OMB approval of the form. *Order*, DA 09-2165, released October 2, 2009. [8]

19. On October 16, the Commission released the *MO&O/5thFNPRM*. While the Commission rescinded at least one modification to Form 323 which it had made in the *4thFNPRM*, the Commission made only passing reference (as noted in Paragraph 1, above) in the

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[7] In fact, FHH understands that copies of Mr. Boswell's letter were not even sent to the OMB commenters to which the letter was responding.

[8] Since the November 1 deadline had been imposed by the full Commission, it is not clear that the Media Bureau had the authority to extend the deadline on the Bureau's own motion. However, the Commission has since ratified the extension. *MO&O/5thFNPRM* at 2, ¶3.

MO&O/5thFNPRM to the 323/FRN Requirement. By October 15, 2009 – the date on which the *5thFNPRM* was adopted by the Commission – the Commission had been placed on notice of many of the flaws of the 323/FRN Requirement as a result of the comments filed with OMB (to which Mr. Boswell's letter was responsive). To be sure, no formal petition for reconsideration had specifically challenged the 323/FRN Requirement up to that point, but that was likely because the Commission had not theretofore taken any formal action adopting that requirement in any way that would have put interested parties on notice of the requirement. Indeed, no draft of the revised form had even been made publicly available until well after the period for reconsideration of the last formal Commission action (the *4thFNPRM*) had expired.

20. Also on October 16, a "Revised Supporting Statement" was uploaded to the OMB website. [9] In that unsigned and unattributed Revised Supporting Statement, the Commission abandoned the claim which it had advanced in its initial Supporting Statement (and in its June 10 Federal Register notice) that the revised Form 323 did not entail any confidentiality or privacy concerns. Now, for the first time, the Commission admitted that the revised form would require the submission of personally identifiable information and would, therefore, trigger significant concerns and related obligations under federal rules and regulations regarding privacy. Even though this was a 180º u-turn from the position the Commission had previously advanced, the

[9] To the best of our knowledge, the Revised Supporting Statement was never formally released by the Commission in any way, and no public notice of the submission of that statement to OMB was issued. In fact, the Revised Supporting Statement does not itself disclose who prepared the statement or who authorized its submission to OMB. Indeed, there is no indication that the full Commission had the opportunity to review and approve the Revised Supporting Statement, even though that statement clearly announced a dramatic change from previous statements ostensibly made by (or at least on behalf of) the Commission. The legal significance of the Revised Supporting Statement for any purposes – other, perhaps, than the limited OMB review process – is unclear. *See* Section 0.445 of the Commission's Rules.

Commission offered no explanation or apology. Without so much as an Emily Litella-esque "never mind", the Commission's multiple earlier contrary statements were rendered inoperative.

21. With the acknowledgement of legitimate privacy concerns underlying the 323/FRN Requirement, the Revised Supporting Statement also committed to complying with certain requirements related to the collection of personally identifiable information. Revised Supporting Statement at 3. Presumably on that basis, OMB approved the revised Form 323 on October 19, 2009. Since then, however, the revised Form 323 has not been released by the Commission or the Bureau.

DISCUSSION

22. As a preliminary matter, FHH notes that, aside from its other flaws (including those discussed below), the 323/FRN Requirement has never been the subject of any formal agency action adopting that requirement. The *4thFNPRM*, which purported to effectuate revision of Form 323, made no mention of any 323/FRN Requirement. And while the *4thFNPRM* delegated the final preparation of the revised form to the Media Bureau, it did not delegate, and could not have delegated, any authority to devise some new, wholly unforeseen and unforeseeable requirement which even the Commission could not have imposed in the *4thFNPRM*. [10] And even if the Bureau were thought, *arguendo*, to have the authority to impose the 323/FRN Requirement, the Bureau has taken no formal action to do so. At most, the Bureau has forwarded a draft of its revised version of the form to OMB. As noted above at Footnote 4, the Bureau has not even bothered to make a copy of the revised form available for review on the Commission's website.

[10] As discussed in the text below, imposition of the 323/FRN Requirement would have required a further notice of proposed rulemaking, since nothing in the*3rdFNPRM* (or the *4thFNPRM*, for that matter) afforded any notice that such a requirement might be anticipated.

23. In view of these circumstances, we are faced with a stealth target. We believe that, to the extent that it has thought about it all, the Commission should re-think the 323/FRN Requirement. But the Commission itself has declined to address that requirement except *en passant* in the *5thFNPRM*, and the Bureau has never addressed it in any context which would ordinarily be susceptible to conventional review processes. Thus far, the only detailed attempts to justify the 323/FRN Requirement appear in the two unsigned and unattributed "Supporting Statements" filed on the Commission's behalf with OMB. [11] And those Supporting Statements are comical in their dramatic, unexplained and inexplicable inconsistencies. Moreover, since they lack any signature or other indication of responsibility for authorship, we can't even be sure that either of those statements in fact reflects the position of a majority of the Commissioners. [12]

24. Despite all of that, the Commission appears determined to impose the 323/FRN Requirement, perhaps hoping that, as a result of the muddled procedural posture the Commission has created, it may be able to evade effective judicial review of the 323/FRN Requirement. To avoid precisely that situation, FHH hereby submits that the Commission must review – whether as a technical "reconsideration" or merely as a matter of prudent and legally defensible regulation – the 323/FRN Requirement. If the Commission concludes that such a requirement

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[11] We disregard Mr. Boswell's October 6, 2009, letter to an OMB official because, as noted above, that letter appears to have been little more than *post hoc* rationalization advanced by a Commission staff-member, a rationalization which cannot be substituted for the Commission's own analysis (which, as discussed above, has been essentially non-existent). *See, e.g., Echostar Satellite v. FCC*, 457 F.3d 31, 36 (D.C. Cir. 2006).

[12] Since the Supporting Statements are flatly inconsistent in important respects, we do know for sure that they cannot *both* reflect the agency's official position. But we can't even be sure which should be viewed as the official position. While the "Revised Supporting Statement" submitted in October post-dates the version filed in August – and, therefore, might be said to be the official "last word" – the latter statement failed even to acknowledge, much less explain, the earlier inconsistencies. That being the case, how is anyone (including a reviewing court) to understand which (if either) is the *real* Commission position . . . and more importantly, why.

may be in the public interest (notwithstanding the legitimate privacy concerns it raises), then the Commission should formally propose the imposition of that requirement through a notice of proposed rulemaking ("NPRM"), consider all comments submitted in response thereto, and then – and only then – take action on the proposal. In the meantime, the Commission should formally and clearly announce that the revised Form 323 which the Bureau has submitted to OMB will ***NOT*** be implemented unless and until the Commission concludes, following such further notice-and-comment proceedings, that such implementation is warranted.

A. The 323/FRN Requirement Violates the Administrative Procedure Act.

25. Section 553 of the Administrative Procedure Act ("APA"), 5 U.S.C. §553, requires that an agency engaging in the rulemaking process provide adequate notice of proposed changes in the substantive burdens which its rules would impose on regulatees. Such notice is to be provided in an NPRM. While the changes which an agency ultimately adopts may vary to some degree from those set out in the NPRM, they may do so only to the extent that the changes are a "logical outgrowth" of the proposals articulated in the NPRM. *E.g., Covad Communications Co. v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006). The focus of the "logical outgrowth" test is whether parties subject to the new regulatory obligation should have anticipated, *ex ante* as a result of the agency's NPRM, that such a requirement might be imposed. *Id.* The goal is to prevent the agency from sucker-punching its regulatees through what the courts have referred to as a "surprise switcheroo". *Id*.

26. In the instant case, it is clear beyond argument that no notice at all of the possible imposition of the 323/FRN Requirement was provided at any time by the Commission. Nothing in either the *3rdFNPRM*, which initially proposed changes to Form 323, or the *4thFNPRM*, which adopted the changes, provided ***any*** indication at all that the Commission might be

contemplating the required submission of FRNs by each and every individual with an attributable interest in a broadcast licensee.

27. The Commission itself has effectively conceded as much. How? We know for sure that the 323/FRN Requirement – which requires, as an antecedent matter, the submission of social security numbers in order to obtain an FRN in the first place – entails disclosure of personal information and thus triggers serious privacy concerns. That incontestable point has been expressly conceded in the Revised Supporting Statement submitted in the Commission's name to OMB in October, 2009. But no reference to any such concerns was included in either the *3rdFNPRM* or the *4thFNPRM*. And even more conclusively, the FCC – in its June 10, 2009 Federal Register notice *and* in the August, 2009 Supporting Statement filed with OMB – repeatedly, expressly and affirmatively declared that the revised Form 323 would ***not*** give rise to ***any*** privacy concerns. Having given no hint about the 323/FRN Requirement – indeed, having given clear repeated indications that no such requirement was under consideration – the Commission cannot blithely abandon that position through a series of unpublished communications to OMB, communications which were not announced or made available to the public by the Commission. That is the essence of a sucker punch.

28. We are not the only ones expressing surprise here. According to a published report, Commissioner McDowell, who voted in favor of the *3rdFNPRM* and *4thFNPRM*, has said that "I remain very troubled that the Commission finds itself asking for Social Security numbers in connection with the filing [of revised Form 323]". "McDowell 'Very Troubled' By Social Security Number Collection", *Broadcasting and Cable*, November 24, 2009. Even more damning to any claim of "logical outgrowth" here, Commissioner McDowell is further quoted as saying that "[h]ad I known when I voted in favor of collecting more data about the race and

gender of broadcast owners that the process also would involve collection of Social Security numbers, I would not have endorsed using that means to what remains a worthwhile end." *Id.* If a Commissioner himself was not aware of this aspect of the proposed revision to Form 323, how could any member of the public have been expected to guess it?

29. In the absence of any notice of the proposed requirement – indeed, in view of the fact that the Commission repeatedly signaled that no such requirement was at issue here – imposition of the 323/FRN Requirement would unquestionably violate the APA at this stage of the proceedings.

B. Review of the 323/FRN Requirement is Warranted In View of Serious Privacy Considerations

30. As multiple federal officials and agencies – including Chairman Genachowski – have urgently warned, protection of personal identification information is of paramount importance. *See, e.g.,* Footnote 2 above. But as has now been conceded in the Revised Supporting Statement filed with OMB in defense of the revised Form 323, the 323/FRN Requirement would entail submission to the Commission of thousands, perhaps tens or even hundreds of thousands, of social security numbers by individuals seeking FRNs in order to complete the revised Form 323. Before the Commission undertakes such a vast collection of sensitive personal information, it should explore any and all possible alternatives. While it is remotely conceivable that no practical non-social-security-number-based alternative exists , we doubt it. [13] But at this point, the Commission is not in a position to state conclusively that there

[13] Although FHH takes no position on their specific proposals, we do note that even the Minority Media and Telecommunications Council, one of the strongest supporters of the collection of enhanced ownership information, has stated its belief that the collection of social security numbers is unnecessarily intrusive and has suggested a number of alternatives in a November 18 filing in this proceeding.

are no viable alternatives because the Commission does not appear to have delved particularly deeply into that question. As discussed above, no public comment on the 323/FRN Requirement was sought. Moreover, the 323/FRN Requirement appears to have been concocted by the Bureau following the unusual delegation of authority in the *4thFNPRM*. It is entirely possible that the Bureau felt the need to glom onto the first alternative it could come up with (that is, an alternative based on FRN collection) because, with the previously-announced November 1 filing deadline quickly and inexorably approaching, the Bureau felt it had no time to ponder alternatives. Since neither the Bureau nor the Commission has shared any information about the precise genesis of the 323/FRN Requirement, we can't be sure exactly whose idea the 323/FRN Requirement was, or why. But in view of the important privacy interests at risk here, the public should be apprised of what alternatives (if any) were considered, and the public should be permitted to submit comments including suggestions of their own.

31. The need for careful consideration of alternatives is particularly acute in view of the fact that the Commission itself seems inadequately sensitive to these important privacy-related concerns. Most obviously, we need point only to the fact that the Commission was apparently in denial about the intrusive aspects of the 323/FRN Requirement for months. The June 10 Federal Register notice and the August, 2009 Supporting Statement to OMB both expressly denied the existence of any privacy interests here – even though the 323/FRN Requirement meant that every individual attributable interest-holder would have to obtain an FRN, which in turn would require them to provide their social security numbers. How the privacy component of such a requirement could have escaped the Commission's attention is a mystery. But the fact that the Commission, wittingly or otherwise, failed to see this is undeniable.

32. That is not the only indication that the Commission is not particularly attuned to privacy-related issues. For example, the October Revised Supporting Statement filed with OMB acknowledged that the Commission would have to take certain steps, under the Privacy Act, before it could implement the 323/FRN Requirement. The Commission there committed to comply with those steps – starting with the publication of a "System of Records Notice" ("SORN"). But the Revised Supporting Statement was uploaded on the OMB website on October 16, and the required SORN didn't show up in the Federal Register until more than a month later. *See Privacy Act System of Records*, 74 Fed. Reg. 59978 (November 19, 2009). By that time, though, the Commission had announced that the re-scheduled deadline for filing the revised Form 323 was to be December 15, 2009. "Media Bureau Announces 2009 Biennial Filing Deadline for Commercial Broadcast Ownership Report", DA 09-2275, released October 30, 2009. Before the SORN could take effect, it was subject to a 30-day notice-and-comment period (for members of the public) and a separate 40-day review period by OMB, the House of Representatives and the Senate. Presumably these separate review opportunities were designed to afford adequate time in which to assess the adequacy of the agency's proposed system of records maintenance. But do the math: the Commission's self-imposed extended deadline of December 15 would not permit completion of *either* of those review periods. What does this say about the Commission's sensitivity for privacy concerns? [14]

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[14] The Commission's request for waiver of privacy-related review periods circles us back again to the matter of the Form 323 filing deadline. Recall that, in the *4thFNPRM* the Commission reached into thin air and picked November 1 as the initial Form 323 filing deadline, even though at that time the Commission had not developed a draft revision of the form. As discussed above, in early October the November 1 deadline was abandoned and replaced by December 15, even though the revised form *still* wasn't ready at that point. (Most recently the deadline has again been extended, this time to January 11, 2010. "Media Bureau Extends the Biennial Filing Deadline for the Commercial Broadcast Ownership Report (Form 323)", DA 09-2457, released November 24, 2009.) In view of the obvious unresolved privacy issues here, it is odd that the

(Footnote continued on next page)

33. Moreover, while the Commission did, finally, publish a SORN relative to the proposed revised Form 323, it has apparently failed to undertake an updated Privacy Impact Assessment relative to Form 160, the form by which a person obtains his/her FRN. The 323/FRN Requirement would enormously expand the number of individuals seeking FRNs. Moreover, Form 160 is covered by its own separate SORN, denoted FCC/OMD-9. According to FCC/OMD-9, the purpose of the records collected through Form 160 is "to develop and maintain a Commission-wide method of recognizing and interacting with those individuals who are doing business with the Commission as defined in 31 U.S.C. 7701(c)(2) ***and*** who incur application or regulatory fee obligations" (emphasis added). But the 323/FRN Requirement has absolutely nothing to do with incurring fee obligations. To the contrary, that requirement appears to be intended to permit the Commission to conduct a demographic census of everyone with an "attributable interest" in any broadcast licensee(s). The universe of attributable interest holders includes interests held not only in the licensee but also in every entity that itself holds an attributable interest in the licensee. Moreover, "attributable interest holders" include every officer and director and most owners of 5% or greater interests in corporate licensees *as well as* all non-insulated members of LLC's, limited partnerships and the like. It is self-evident that the vast majority of such attributable interest holders will never incur any application or regulatory

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(Footnote continued from preceding page)
Commission would persist in setting seemingly arbitrary dates for implementation of the revised form. When the new reporting regimen begins, it will merely produce historical data. Whether those data are collected on November 1, 2009, or January 11, 2010, or some later date is not likely to have any significant impact on anything. By contrast, once private information has been lodged in government databases, it is vulnerable. Moreover, it is impossible to ignore the troubling implications of requiring registration of thousands of individuals in yet another government database for no apparent reason. Why then is the Commission so eager to put private information at risk simply to obtain historical data? The Commission has shed no light on that particular conundrum.

fee obligations. That being the case, the existing statement of purpose underlying FCC/OMD-9 would no longer be accurate if the 323/FRN Requirement were to be implemented. Moreover, the fact that the FRN data may now be involved in data-crunching far different from that originally contemplated by FCC/OMD-9 raises further questions about the continued validity of that document should the 323/FRN Requirement ultimately be implemented.

34. In such cases, OMB Directive M-03-22 (September 26, 2003) indicates that an amended Privacy Impact Assessment ("PIA") must be conducted. But to date, the Commission has given no indication that any new PIA is even contemplated, much less underway. Again, this reflects an attitude which is at best neglectful, at worst affirmatively dismissive, of the agency's responsibility for the privacy of its regulatees.

35. These considerations strongly suggest that the Commission's attention to privacy matters is less than optimal and less than desirable. That being the case, extra care must be taken to make sure that the Commission's apparent lack of regard for the privacy of its regulatees does not place that privacy at risk unnecessarily. [15]

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[15] It should be noted that even agencies which have demonstrated extreme care with respect to private information have found that information compromised, despite their best efforts. The IRS, National Institutes of Health, Department of Veterans Affairs, FAA, and Department of Agriculture have all suffered breaches when laptops containing sensitive information were stolen from employees. *See, e.g.*, "Another Data Security Breach," The Baltimore Sun, Mar. 25, 2008, available at http://articles.baltimoresun.com/2008-03-25/news/0803250142_1_laptop-arai-private-information. Within the last year, USAJOBS.com, the government's official employment website, was hacked and tens of millions of veterans were placed at risk when a hard drive containing personally identifiable information was accidentally sent to a repair contractor without being erased. *See* "Monster security breach at official US Government job site," ITWire, January 26, 2009, at http://www.itwire.com/content/view/22857/53/; "Probe targets Archives' Handling of Data on 70 Million Vets," Wired, Oct. 1, 2009, at http://www.wired.com/threatlevel/2009/10/probe-targets-archives-handling-of-data-on-70-million-vets.

C. Premature Implementation of the 323/FRN Requirement Will Be Counter-productive to the Commission's Goals.

36. If the imperatives of the APA and the obvious value of prudent and cautious deliberation are not enough to convince the Commission to put implementation of the 323/FRN Requirement on indefinite hold, the Commission should consider the most obvious practical effect likely to result from a Farragut-like "damn the torpedoes" approach: a corrupted and unreliable database. The goal of the 323/FRN Requirement appears to be the creation of an accurate depiction of the racial and gender composition of broadcast ownership. That goal depends on near-100% compliance with the 323/FRN Requirement. As matters now stand, the prospects for anything near 100% compliance appear dim.

37. First, in view of the Commission's failure to comply with the APA relative to the development of the 323/FRN Requirement, it is entirely possible, if not likely, that a significant number of licensees may choose simply to ignore that requirement, comfortable in the knowledge that an unlawfully-imposed requirement is unenforceable. Other licensees may find themselves unable to comply if any of the individuals with attributable interests refuse to provide their social security numbers and, as a result, are unable to provide FRNs.

38. The Commission should also be aware that the FRN-acquisition process includes a number of "work-arounds" which obviate the need for social security number disclosure. [16] For example, an FRN may be obtained if the individual seeking one asserts that he/she is simply a "petitioner" or that he/she has "applied for" a social security number. Since the Commission does not appear to investigate such representations after-the-fact to determine whether those representations were accurate, those "work-arounds" permit the assignment of FRNs without

[16] Additional work-arounds to use of the FRN in the Form 323 may also exist, although these cannot be identified until the Commission actually releases the new form.

disclosure of social security numbers. A more extreme "work-around" involves submission of an inaccurate nine-digit number instead of an actual social security number. It does not appear that the Commission's FRN-generation system has the capability of determining whether any particular number entered into the social security number field is, in fact, a valid social security number at all, much less whether that number has been assigned to the individual seeking the FRN. FHH does not endorse any of these "work-arounds", all of which could be seen as involving at least some level of lack of candor, if not affirmative misrepresentation. But the existence of the "work-arounds" is undeniable, and the Commission appears to have neither any effective means of policing such misconduct, nor the inclination and resources to do so even if the means were available. That being the case, any hope that the Commission might have of amassing reliable data based on social security number-anchored FRNs is unrealistic.

39. And finally, the Commission's insistence on an FRN-based reporting system is something of a mystery because the Commission's system permits an individual or entity to have more than one FRN. In other words, an FRN is ***not*** a unique identifier. And even if the Commission were to modify its FRN-generation system to prevent issuance of more than one FRN per social security number on a going-forward basis, the fact is that the FRN database is *already* cluttered with many, many individuals and entities holding multiple FRNs. It is therefore unrealistic to believe that relying on FRNs will permit the Commission to create a complete and reliable database permitting tracking of each and every individual and entity through a system of unique FRNs. [17]

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[17] Moreover, even for parties acting in the best of faith, it is clear that errors could easily be made, either substantive errors with regard to which FRN is to be used for an individual or typographical errors that would not be easily caught upon review of the apparently random series of numbers that makes up each FRN.

40. So if the goal of the 323/FRN Requirement is to obtain a reliable, trackable database of all "attributable" interest holders in broadcast licensees, the Commission is likely to be disappointed if it proceeds under the present circumstances.

CONCLUSION

41. FHH does not question the authority of the Commission to seek to compile a reliable database of attributable interest holders. But the exercise of that authority is subject to limits which the Commission has thus far ignored in its unexplained head-long rush to compile that database. For reasons known only to the Commission, the development of the 323/FRN Requirement has occurred outside of public view, with no opportunity for comments or criticisms or suggestions likely to produce a lawful and effective end-product. The Commission's approach to date has produced little more than confusion and apprehension, and has raised serious concern about the transparency of the Commission's processes.

42. As described above, this train left the rails long ago, and there can be no real hope of getting it back on track from its present posture. Rather, if the Commission remains committed to compiling a reliable database of attributable broadcast interest holders, and if the Commission remains convinced that that may be achieved only through a system requiring the submission of sensitive personal information (*e.g.*, social security numbers), then the Commission should initiate a notice-and-comment rulemaking proceeding to explore how that might be accomplished consistently with the range of procedural and substantive concerns which have, to date, been ignored by the Commission. And in the meantime, the Commission should

announce clearly and unequivocally that the revised Form 323 containing the 323/FRN Requirement will ***not*** be implemented unless and until the 323/FRN Requirement has been subjected to the crucible of the rulemaking process, as mandated by law.

Respectfully submitted,

/s/ Harry F. Cole

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November 30, 2009

Attachment A

OMB Control Number: 3060-0010 **August 2009**
Ownership Report for Commercial Broadcast Station, FCC Form 323

SUPPORTING STATEMENT

A. Justification:

1. Under the revised filing requirements adopted by the Federal Communications Commission on April 8, 2009 (see below), Licensees of commercial AM, FM, and full power television broadcast stations, as well as Licensees of Class A and Low Power Television stations must file revised FCC Form 323 every two years, no later than November 1 of the applicable filing year, and must report information accurate as of October 1 of that year.

Unchanged are the requirements that (1) Licensees and Permittees of commercial AM, FM, or full power television stations must file Form 323 following the consummation of a transfer of control or an assignment of a commercial AM, FM, or full power television station license or construction permit; (2) a Permittee of a new commercial AM, FM or full power television broadcast station must file Form 323 within 30 days after the grant of the construction permit; and (3) a Permittee of a new commercial AM, FM, or full power television broadcast station must file Form 323 to update the initial report or to certify the continuing accuracy and completeness of the previously filed report on the date that the Permittee applies for a license to cover the construction permit.

In the case of organizational structures that include holding companies or other forms of indirect ownership, a separate FCC Form 323 must be filed for each entity in the organizational structure that has an attributable interest in the Licensee if the filing is a nonbiennial filing or a reportable interest in the Licensee if the filing is a biennial filing. The terms "attributable interest" and "reportable interest" are defined in the instructions to the Form.

On December 18, 2007, the Commission adopted a *Report and Order and Third Further Notice of Proposed Rulemaking* (the "Diversity Order") in MB Docket Nos. 07-294; 06-121; 02-277; 04-228, MM Docket Nos. 01-235; 01-317; 00-244; FCC 07-217; 23 FCC Rcd 5922 (2008). The Diversity Order adopts rule changes designed to expand opportunities for participation in the broadcasting industry by new entrants and small businesses, including minority- and women-owned businesses.

On April 8, 2009, the Commission adopted a *Report and Order and Fourth Further Notice of Proposed Rulemaking* (the "323 Order") in MB Docket Nos. 07-294, 06-121, 02-277, 01-235, 01-317, 00-244, 04-228; FCC 09-33; 24 FCC Rcd 5896 (2009). The 323 Order directs the Commission to revise Form 323 to improve the quality of the data collected in order to obtain an accurate, reliable, and comprehensive assessment of minority and female broadcast ownership in the United States. Specifically, the Commission changed the biennial reporting requirements on Form 323 so that there is a uniform filing date, broadened the biennial reporting requirements to include commercial broadcast licensees that are sole proprietorships and partnerships comprised of natural persons, and expanded the class of persons and entities that must file to include low power television stations ("LPTV") licensees, including Class A stations, and provided that the form should be electronically searchable and that there should be edit checks built in. The

Commission also adopted changes requiring certain non-attributable interests to be reported on biennially-filed Form 323s.

Consistent with actions taken by the Commission in the Diversity Order and 323 Order, the following changes are made to Form 323: The Instructions and questions in all sections of the form have been significantly revised. The instructions to Form 323 have been revised to incorporate a definition of "eligible entity," which will apply to the Commission's existing Equity Debt Plus ("EDP") standard, one of the standards used to determine whether interests in a media entity are attributable. The instructions to Form 323 have also been revised slightly to provide updated citations to the Commission's applicable rules governing media ownership. The instructions for Section I have been revised to state the Commission's revised Biennial filing requirements adopted in the 323 Order. Many questions on the form have been reworked or reordered in order to (1) clarify the information sought in the form; (2) simplify completion of the form by giving respondents menu-style or checkbox-style options to select rather than submit a separate narrative exhibit; and (3) make the data collected on the form more adaptable for use in database programs used to prepare economic and policy studies relating to media ownership. The instructions to the Form have been revised to make them clearer and easier to follow by going question-by-question and having each instruction correspond to a relevant question. In addition, portions of the Form that relate only to non-biennial or to biennial filings separately have been placed into separate subsections of the Form. Respondents using the Commission's electronic filing system will be required to launch only the portions of the form that are applicable depending on the purpose of the filing (i.e, whether it is a biennial filing or a non-biennial filing) and complete only those sections. **These revisions to FCC Form 323 need OMB approval.**

This information collection does not affect individuals or households; thus, there are no impacts under the Privacy Act.

Statutory authority for this collection of information is contained in Sections 154(i), 303, and 310 of the Communications Act of 1934, as amended.

2. The minority and female ownership data in the revised Form 323, filed biennially, will be used by FCC staff to assess the level of minority and female broadcast ownership in the United States. Form 323 is also used by FCC staff to verify the ownership of broadcast stations and to determine whether the licensee/permittee is complying with the multiple ownership requirements as set down by the Commission's Rules. The data may also be used to conduct empirical studies to support the Commission's quadrennial ownership review proceeding.

3. The Commission requires FCC applicants to file FCC Form 323 electronically via the Media Bureau's Consolidated Database System (CDBS).

4. No other agency imposes a similar information collection on the respondents. There is no similar data available.

5. In conformance with the Paperwork Reduction Act of 1995, the Commission is making an effort to minimize the burden on all respondents. This information collection as revised may have an impact on a substantive number of small entities, as described below but the Commission has taken steps to minimize the additional burden.

Specifically, the 323 Order expanded the class of entities that are required to file the Form 323 biennially to include additional classes of commercial licensees previously exempt from filing. Sole proprietorships, partnerships of natural persons, LPTV licensees, and Class A Television licensees must now file biennial ownership reports on Form 323.

The reporting requirement will affect radio and TV stations, including LPTV and Class A stations.

With respect to full-power television stations, the Small Business Administration defines a television broadcasting station that has no more than $14 million in annual receipts as a small business. According to Commission staff review of the BIA Financial Network, Inc. Media Access Pro Television Database as of February 19, 2009, about 918 (71 percent) of the 1,292 commercial television stations in the United States have revenues of $14 million or less. Based on staff analysis of the 2002 Census, about 180 (14 percent) of the 1,292 commercial television stations are owned by sole proprietorships or partnerships and would be subject to new reporting requirements. However, these figures take into account all partnerships, and only partnerships comprised of natural persons are subject to new reporting requirements. Therefore, our estimate likely overstates the number of small entities that might be affected. In addition, we note that in assessing whether a business entity qualifies as small under the above definition, business control affiliations must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by any changes to the filing requirements for FCC Form 323, because the revenue figures on which this estimate is based do not include or aggregate revenues from affiliated companies.

An element of the definition of "small business" is that the entity not be dominant in its field of operation. The Commission is unable at this time and in this context to define or quantify the criteria that would establish whether a specific television station is dominant in its market of operation. Accordingly, the foregoing estimate of small businesses to which the rules may apply does not exclude any television stations from the definition of a small business on this basis and is therefore over-inclusive to that extent. An additional element of the definition of "small business" is that the entity must be independently owned and operated. It is difficult at times to assess these criteria in the context of media entities, and our estimates of small businesses to which they apply may be over-inclusive to this extent.

With respect to radio stations, the Small Business Administration defines a radio broadcasting entity that has $7 million or less in annual receipts as a small business. According to Commission staff review of the BIA Financial Network, Inc. Media Access Radio Analyzer Database as of February 19, 2009, about 10,600 (96 percent) of 11,050 commercial radio stations in the United States have revenues of $7 million or less. Based on staff analysis of the 2002

Census, about 1,440 (13 percent) of the 11,050 commercial radio stations are owned by sole proprietors or partnerships, and would be subject to the new reporting requirements. However, these figures take into account all partnerships, and only partnerships comprised of natural persons are subject to new filing requirements. Therefore, our estimate likely overstates the number of small entities that would be affected. In addition, we note that in assessing whether a business entity qualifies as small under the above definition, business control affiliations must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by any changes to the ownership rules, because the revenue figures on which this estimate is based do not include or aggregate revenues from affiliated companies.

In this context, the application of the statutory definition to radio stations is of concern. An element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time and in this context to define or quantify the criteria that would establish whether a specific radio station is dominant in its field of operation. Accordingly, the foregoing estimate of small businesses to which the rules may apply does not exclude any radio station from the definition of a small business on this basis and is therefore over-inclusive to that extent. An additional element of the definition of "small business" is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities, and our estimates of small businesses to which they apply may be over-inclusive to this extent.

The rules and policies adopted herein apply to licensees of Class A TV stations and low power television ("LPTV") stations, as well as to potential licensees in these television services. The same SBA definition that applies to television broadcast licensees would apply to these stations. The SBA defines a television broadcast station as a small business if such station has no more than $14.0 million in annual receipts. Currently, there are approximately 554 licensed Class A stations and 2,300 licensed LPTV stations. Given the nature of these services, we will presume that all of these licensees qualify as small entities under the SBA definition. We note, however, that under the SBA's definition, revenue of affiliates that are not LPTV stations should be aggregated with the LPTV station revenues in determining whether a concern is small. Our estimate may thus overstate the number of small entities since the revenue figure on which it is based does not include or aggregate revenues from non-LPTV affiliated companies.

The Commission considered and adopted a number of measures designed to minimize the burden on all respondents, including the new classes of broadcast licensees required to file biennially, many of whom may be small entities/businesses. Form 323 has been revised significantly in order to make it simpler, easier to understand, and more user-friendly. First, the instructions to the form have been reworked to provide question-by-question guidance to respondents to provide increased clarity and reduce the need for clarification and advice from outside counsel or Commission staff. Thus, although the Form and instructions appear longer, the additional length relates to the additional instructions intended to make completing the Form easier. Second, the Commission has attempted to simplify the form by adding text boxes, check boxes, and other menu-style options to the form. Currently, respondents filling out Form 323 must prepare and attach to the electronic filing separately-created Word or PDF narrative exhibits that contain the information requested on the

form. The new text boxes, check boxes, and other menu-style options allow respondents to quickly select and/or enter in the requested information directly into the form itself, which will both improve the quality of the data collected and remove the need for preparation of separate exhibits. Third, portions of the Form that relate only to non-biennial or to biennial filings separately have been placed into separate subsections of the Form. Respondents using the Commission's electronic filing system will only need to launch the portions of the Form that are applicable depending on the purpose of the filing. Finally, the FCC's electronic filing system is designed so that many of the form fields in Section 1 of the form automatically pre-populate with data taken from the respondent's previously submitted electronic account records. For example, data fields for the respondent's name, address, and contact representative information pre-populate from data saved on the system when the respondent set up the initial account on the filing system.

To further alleviate the filing of duplicative information and minimize the burden on respondents, the persons or entities filing Form 323 Reports may, if no changes have occurred in the information previously filed, electronically validate and resubmit a previously filed application. However, because of revised information required to be submitted in response to the revised Form 323, persons or entities filing the revised FCC Form 323 for the first time, due on November 1, 2009, will not have the option to validate and re-submit an earlier, out-of-date version of the Form 323. After the November 1, 2009 Biennial filing date, however, the option to validate and re-submit a previously filed Form 323 will be available.

In addition, the expansion of the filing requirements only affects biennially-filed Form 323 reports. Small businesses/entities that may be affected by the revised requirements of this information collection will only need to file once every two years. The 323 Order changed the time frame in which respondents must file biennial Form 323 reports by eliminating the staggered filing deadlines (which were formerly tied to individual stations' renewal cycles) and replacing them with a single, uniform filing date for all biennial reports.

6. Less frequent reporting could result in violations remaining undetected and become established in a manner contrary to the purpose of the multiple ownership rules. For reports filed on a biennial basis, less frequent reporting would not provide FCC staff enough information to establish trends in minority and female ownership as accurately. The frequency of filing has not been changed. However, we are changing the timing of biennial filing to a uniform date, instead of a staggered filing date tied to licensees' renewal anniversaries, so that a more accurate snapshot of minority and female ownership may be obtained that could then later be used to assess trends. In addition, the data collected on biennially-filed Form 323 Reports are intended to be used by the Commission to prepare economic analyses in conjunction with its statutorily-mandated periodic review of the FCC's media ownership regulations. The Commission requires collection of data on a regular periodic basis in order to track ownership trends over time and gauge the effects of FCC policy on media ownership in the United States. Less frequent reporting would materially degrade the quality of the data collected and would hamper the ability of the Commission to make meaningful evaluations of ownership trends.

7. This collection of information is consistent with the guidelines in 5 CFR 1320.5(d)(2).

8. The Commission published a Notice (74 FR 27549) in the Federal Register on June 10, 2009 seeking public comments for the information collection requirements contained in this supporting statement. The Commission received two comments on the Commission's collection of data on Form 323 in response to the PRA notice of the 323 Order. Joseph A. Belisle argues that collection of race, gender and ethnicity data from broadcasters will do "absolutely nothing to foster diversity in broadcasting" and that "enhanced broadcast ownership reporting" is not sufficient to "address economic inequality and [] lack of opportunity disadvantaged groups face every day." The Commission disagrees with Mr. Belisle's assessment of the purpose, utility, and necessity of the collected information. Indeed, Mr. Belisle's comment essentially constitutes an untimely petition for reconsideration of the underlying 323 Order, disagreeing with the Commission's policies and methods with respect to promoting diversity, rather than an assessment of the specific information collection at issue here. In its separate comment, the National Association of Broadcasters argues that without being able to examine a draft Form 323 or additional description of the changes, it is unable to "realistically assess" the burdens of the new information collection. NAB argues that it needs to review a draft Form in order to comment on "the accuracy of the Commission's burden estimate, ways to enhance the quality, utility, and clarity of the information collected, or ways to minimize the collection burden." NAB also incorporates by reference its June 26, 2009 Petition for Reconsideration of the 323 Order, which asks the Commission to reconsider its decision to require sole proprietors and certain non-attributable entities to file biennially. NAB notes in its proposals that "ownership data for sole proprietors be obtained from existing records because it does not change over time; and…if the Commission does not reconsider its decision to require ownership reporting by certain nonattributable investors, such reporting should be limited to race, gender, and ownership percentage of the nonattributable investors, rather than full reporting of the names, addresses, familial relationships, and unrelated media holdings of these investors." The Commission will address NAB's Petition for Reconsideration separately.

In response to NAB's comments, the Commission notes that it is submitting the Form 323 to OMB, and parties will have an opportunity to access the Form on OMB's website. On August 11, 2009, the Commission published in the Federal Register a notice that provides parties with an additional 30 days to submit comments once the form is submitted to OMB. In addition, in the 323 Order, the Commission described the basic substantive changes to the Form that it adopted and that are incorporated in the Form being submitted to OMB. The 323 Order states that the Commission expanded the scope of parties subject to the biennial ownership report filing requirement to low power television and Class A stations, as well as to sole proprietors and partnerships composed of natural persons. The Commission also stated that the revised biennial form would obtain information on certain non-attributable interest holders (minority voting shareholders in a corporation with a single majority shareholder and interests that would be attributable but for a new exemption pertinent to investments in eligible entities). The Commission stated that all filers subject to the revised biennial ownership report filing requirement are required to submit the revised Form 323 no later than November 1, 2009, with information current as of October 1, 2009, in order to provide a snapshot comparison. The Commission also explained that it would modify the Form to make it electronically searchable by adding additional checkbox and menu-type questions, and eliminated the ability to file

ownership information in attachments that could not be incorporated in a database. The Commission explained that it retained the practice of having entities with ownership interests in a licensee file separately. It also explained that the Commission will require entities with attributable interests in licensees to list the FRNs of interest holders below them in the chain of ownership. It explained that each filing entity must identify by FRN the entity below it in the chain.

With respect to NAB's objection to the Commission's inclusion of sole proprietors in the biennial filing requirement, the Commission explained that it expanded the scope of parties that are required to file the ownership report biennially in order to accurately assess the state of minority and female ownership in this country and not overlook a substantial reservoir of minority and female owners of broadcast facilities. NAB's concerns are addressed. Although all filers will be required to file the revised form initially so that the Commission will obtain minority and female ownership information from all filers from the first report, with all information current as of the same date, thereafter, if the information does not change, filers will be able to call up the previously filed form and recertify the information. They will not be required to file a new report.

With respect to NAB's concern about the reporting of certain non-attributable interests, the Commission stated that "in order to measure the extent of minority and female ownership of broadcast outlets and assess the need for and effectiveness of any policies designed to promote minority and female ownership of broadcast outlets, it is important to obtain information on holders of certain nonattributable interests as well as on holders of attributable interests." Obtaining this information will make the data more complete and comprehensive. With respect to minority interest holders in a single majority shareholder corporation, it could help determine whether nonattributable interests could be a source of attributable interest holders in the future. With respect to EDP investors, the Commission's attribution exemption is not based on a finding that these investors are unable to exert significant influence in the licensee but rather on a policy decision that relaxing the rule is necessary to facilitate access to capital by eligible entities, including minority-and female-owned businesses. Thus including these interests is necessary to ensure that the information collection is comprehensive. As noted above, the Commission will separately address the substance of NAB's Petition for Reconsideration of the 323 Order.

In 1998, the Commission began collecting data on minority and female broadcast ownership to fulfill the Commission's statutory mandate under Section 257 of the Telecommunications Act of 1996 ("1996 Act") and Section 309(j) of the Communications Act of 1934 to promote opportunities for small businesses and businesses owned by women and minorities in the broadcasting industry. *See* 47 U.S.C. §§ 257, 309(j). At that time, the Commission revised Form 323 to require filers to identify the gender and race or ethnicity of individuals with attributable interests in the licensee. The Commission concluded that the information was necessary to determine accurately the current state of minority and female ownership of broadcast facilities, to determine the need for measures designed to promote ownership by minorities and women, and to chart the success of any such measures that the Commission might adopt.

In addition, Section 202(h) of the 1996 Act requires the Commission to review its ownership rules (except the national television ownership limit) every four years and "determine whether any of such rules are necessary in the public interest as the result of competition." *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-112, and Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3 (2004) (codified at 47 U.S.C. § 303 note (2006)). Under Section 202(h), the Commission "shall repeal or modify any regulation it determines to be no longer in the public interest," 1996 Act, 110 Stat. at 111-12. Accordingly, the Commission conducts a quadrennial review of its media ownership regulations. The quadrennial review process includes review from Commission staff of the existing regulations and also invites comment from members of the public to provide feedback, criticism and data about the effect of the Commission's ownership rules. Vital to the Commission's process is its review of studies prepared by economists, academics, and researchers, who provide the Commission with crucial information about the state of media ownership, trends in ownership, and potential effects of existing regulations and proposed regulations on the media marketplace. Some studies are commissioned by the FCC specifically, while others are submitted to the FCC by members of the public who choose to participate in the quadrennial review process.

The purpose of this information collection is to obtain the comprehensive data about broadcast ownership interests that the Commission (and members of the public) require in order to evaluate the effect of the current media ownership rules and the effectiveness of the Commission's efforts to promote ownership by minorities and women. The data are used to prepare these economic and academic studies that the Commission relies upon in order to make informed judgments about its policies. During the most recent quadrennial review proceeding (begun in 2006 and completed in December 2007), the Commission received feedback from a number of parties and researchers, both governmental and private, who concluded that the current Form 323 is inadequate. Specifically, these commenters noted that the data collected is difficult to use and subject to significant error. In addition, in March 2008 the General Accounting Office released a report recommending that the Commission identify processes and procedures to improve the reliability of its data on gender, race and ethnicity so that it can more effectively monitor and report on the status of female and minority broadcast ownership. The proposed changes to Form 323 are designed to fulfill the recommendations of the GAO and commenting parties who have requested that the Commission improve the quality and reliability of the data collected. The collection is necessary, practical, and not duplicated elsewhere.

9. No payment or gift was provided to the respondent.

10. There is no need for confidentiality with this collection of information.

11. This information collection does not address any private matters of a sensitive nature.

12. The following estimates are provided for annual public burden:

Service	No. of Reports	Respondent's Burden	Annual Burden Hours	Hourly In-House Cost	Annual In-House Cost
Biennial Reports/ Certifications[1]	7,500	2.5 hours	18,750 hours	$48.08	$901,500
All Other Reports	1,750	1.5 hours	2,625 hours	$48.08	$126,210
TOTALS:	**9,250 (Responses)**		**21,375 hrs. (Burden Hours)**		**$1,027,710 (In-house cost)**

Total Number of Annual Respondents/Responses: 9,250 respondents and 9,250 responses

Total Annual Burden Hours: 21,375 hours

We assume that the respondent would consult with its attorney to complete and file the FCC Form 323 or certification of no change. We estimate that these respondents would have an average salary of $100,000 ($48.08/hour).

Total Annual "In-house" Cost: $1,027,710

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

13. **ANNUAL COST BURDEN:** We assume that the respondent would use an attorney to complete and file the FCC Form 323. We estimate that this attorney would have an average salary of $200/hour. In addition, licensees must submit a fee ($55/report) for each biennial ownership report. There is no fee for other reports.

7,500 biennial reports / certifications x 8 hours x $200/hour	=	$12,000,000
1,750 other reports x 7 hours x $200/hour	=	$ 2,450,000
4,000[2] biennial reports/certifications x $55	=	$ 220,000
Total Annual Cost Burden	**=**	**$14,670,000**

14. **Cost to the Federal Government:** The Commission will use paraprofessional staff at the GS-11/Step 5 level ($33.12/hour) to process the FCC Form 323 and all other certifications.

[1] Although the biennial reports and certifications are filed every two years, the Commission calculated the 7,500 responses based on an annual basis since OMB requires an annual calculation of filings and burden hours.
[2] Of the approximately 7,500 Biennial Reports, only approximately 4,000 are filed by licensees subject to the Commission's filing fees. The remaining reports are filed by non-licensee entities that hold broadcast ownership interests or by licensees that are exempt from FCC filing fees.

7,500 biennial reports / certifications x 2 hours x $33.12/hour =	$ 496,800	
1,750 other reports x 2 hours x $33.12/hour	=	$ 115,920
Total Cost to the Federal Government	=	**$ 612,720**

15. The Commission has program changes to the annual burden hours of +18,625 hours and +$12,503,200 to the total cost burden which are due to revisions to FCC Form 323. These revisions are a result of the Commission adopting the Diversity Order, FCC 07-217 and the 323 Order, FCC 09-33.

Therefore, the instructions and questions in all sections of FCC Form 323 have been significantly revised. The instructions to Form 323 have been revised to incorporate a definition of "eligible entity," which will apply to the Commission's existing Equity Debt Plus ("EDP") standard, one of the standards used to determine whether interests are attributable. The instructions to Form 323 have also been revised slightly to provide updated citations to the Commission's applicable rules governing media ownership. The instructions for Section I have been revised to state the Commission's revised Biennial filing requirements adopted in the 323 Order. Many questions on the form have been reworked or reordered in order to (1) clarify the information sought in the form; (2) simplify completion of the form by giving respondents menu-style or checkbox-style options to select rather than submit a separate narrative exhibit; and (3) make the data collected on the form more adaptable for use in database programs used to prepare economic and policy studies relating to media ownership.

16. The data will not be published. However, the data collected by the Commission on Form 323 may be used in future economic studies and other analyses conducted by the Commission for the purposes of analyzing trends in media ownership, and those studies may be published. In addition, the data collected on Form 323 will be available to members of the public via the search functions of the Commission's electronic filing systems for Form 323 and other FCC forms. We anticipate that outside economists, academics, and members of the public may use the data in future economic or other academic studies relating to media ownership issues, and that those studies may be published or made publicly available by their respective authors.

17. An extension of the waiver not to publish the expiration date on the form is requested. This will obviate the need for the Commission to update electronic files upon the expiration of the collection. OMB approval of the expiration date of the information collection will be displayed at 47 C.F.R. Section 0.408.

18. There are no exceptions to the Certification Statement.

B. Collections of Information Employing Statistical Methods

No statistical methods are employed.

CERTIFICATE OF SERVICE

I, Emily Borkholder, a secretary in the law firm of Fletcher Heald & Hildreth, P.L.C., hereby certify that on December 4, 2009, I caused a copy of the foregoing "Reply to Opposition to Motion for Stay" to be served via U.S. Mail, postage prepaid, upon the following:

Adrienne Biddings, Esq.
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, DC 20001

/s/ Emily Borkholder
Emily Borkholder