

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

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

To: Marlene H. Dortch, Secretary

For transmission to: The Commission

**REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION**

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January 13, 2010

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 Petition for Reconsideration (the “Petition”) in this proceeding. The Opposition demonstrates a surprisingly comprehensive misunderstanding of the arguments raised in the Petition, 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”).<sup>1</sup> The Commission should dismiss or deny the Opposition and grant the Petition forthwith.

2. The Opposition Parties initially claim that FHH’s Petition was untimely. In their view, the Petition should have been directed toward the Commission’s May 2009 *Report and Order* initially adopting revisions to the Form 323.<sup>2</sup> That claim, however, is based on misreadings of: (a) the Petition, (b) the *R&O* and (c) the subsequent *Memorandum Opinion and Order*,<sup>3</sup> along with a misunderstanding about the impact of the revisions ultimately implemented in Form 323 by the Bureau (but *not* the Commission). In the sections of the *R&O* to which the Opposition Parties claim the Petition should have been directed, the Commission required that “each *filing entity* must identify by FRN the entity below it in the chain.”<sup>4</sup> But that referred *only* to the submission of FRNs by *entities* that were themselves required to submit ownership reports. The Petition was *not* directed to that requirement. Rather, it was directed to the requirement – as to which the

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<sup>1</sup> Since the Opposition Parties appear unfamiliar with the substantive matters at issue, it is not a shock that they are apparently also unfamiliar with the Commission’s procedural requirements. In particular, the Opposition Parties failed to serve a copy of their Opposition on FHH, as required by Section 1.429(f). While that failure might warrant dismissal of the Opposition, FHH has no objection to consideration of the “substance”, such as it is, of the Opposition. This Reply is being submitted within the time frame permitted by Sections 1.429 and 1.4(h) of the Rules, based on the assumption that, had the Opposition Parties complied with the service rules, they would have done so by mail.

<sup>2</sup> Opposition at 1-2, citing *Promoting Diversification of Ownership in the Broadcasting Services, Report and Order and Fourth Further Notice of Proposed Rulemaking*, 24 FCC Rcd 5896 (2009) (“*R&O*”).

<sup>3</sup> *Promoting Diversification of Ownership in the Broadcasting Services, Memorandum Opinion and Order and Fifth Further Notice of Proposed Rulemaking*, 24 FCC Rcd 13040 (2009) (“*MO&O*”).

<sup>4</sup> Opposition at 2, citing *R&O* at ¶ 21 (emphasis added).

Commission failed to comply with the APA – which incredibly expanded the universe of *individuals* for whom FRNs would be required. That previously narrow universe was suddenly enlarged to include *all* individuals who happen to hold any attributable interest or position.<sup>5</sup> This expansion first appeared when the Media Bureau’s revised version of the form became available. It had never even been suggested in the *R&O*, and the Commission itself had never even alluded to it before publication of the *MO&O*. Indeed, the Opposition appears to recognize this: in attempting to rebut the fact that the FCC has itself never formally adopted the expanded FRN requirement, the Opposition Parties cite *not* the *R&O* but rather the *MO&O*.<sup>6</sup> Although FHH continues to dispute that the *MO&O* constituted a formal action adopting this requirement, if it did, then the Petition was timely. If it did not, then there has been no such action, as the *R&O* clearly did not include this requirement.

3. The Opposition further argues that the Commission’s decision to require the FRN Requirement newly-imposed on all *individual* attributable interest holders was a logical outgrowth of the Commission’s previous statements in this proceeding.<sup>7</sup> The Opposition Parties’ are again confused with respect to the action to which FHH’s Petition is directed. The Opposition first argues that the requirement, imposed in the *R&O*, that “filers of Form 323” obtain an FRN was a logical outgrowth of the Commission’s 2008 request for comment on means by which to make the race, gender, and ethnicity information collected through the Form 323 more accurate and reliable.<sup>8</sup> That claim is of dubious validity but, in any event, it is entirely irrelevant here. As discussed above, the decision to require the submission of FRNs for *entities* actually filing their

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<sup>5</sup> See Petition at 1.

<sup>6</sup> Opposition at 5.

<sup>7</sup> Opposition at 3-4.

<sup>8</sup> Opposition at 4-5, citing *Promoting Diversification of Ownership in the Broadcasting Services, Report and Order and Third Further Notice of Proposed Rulemaking*, 23 FCC Rcd 5922 (2008) (“3rdFNPRM”).

own Form 323s is *not* the action targeted by FHH's Petition. Rather, the Petition is directed to the expansion of that requirement to include FRNs from every *individual* attributable interest holder listed in those reports. The Opposition fails even to argue, much less establish, that that expansion is in *any* way a logical outgrowth of anything in the *3rdFNPRM* or the *R&O*.

4. The Opposition, in responding to the separate Petition for Reconsideration filed by Koerner & Olender, argues tenuously that the expanded FRN requirement is somehow acceptable because Section 1.8002 of the Commission's rules includes a mechanism by which individuals doing business with the Commission may obtain an FRN.<sup>9</sup> Again, this misses the point. The requirement for submission of FRNs found in the *R&O* applies only to those *entities* who themselves are required to file ownership reports. While this requirement would apply to a small universe of individual sole proprietors who would be required to file the revised Form 323 on their own behalf, nothing in the *R&O* suggested that *all individual* interest holders merely listed in an organization's ownership reports would also be required to obtain and submit their own FRNs.

5. The Opposition claims that the Commission provided ample opportunity for public review and comment on the revisions to the Form 323. Not so. The Opposition takes the initial tack that no public review/comment opportunity at all is required with respect to revision of the agency's forms.<sup>10</sup> Where the changes to a form are merely ministerial or procedural, this is correct. *But* where an agency makes a substantive revision to a form, a revision which has a significant impact on those regulated, notice and comment are required.<sup>11</sup> In this case, the revised Form 323 would require the acquisition of FRNs, and therefore the submission of social security numbers, by thousands of individuals who had never before been subject to such a requirement.

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<sup>9</sup> Opposition at 5-6.

<sup>10</sup> Opposition at 6.

<sup>11</sup> *See* 5 U.S.C. § 553.

Clearly, this substantive change would have a significant impact on those individuals, and the Opposition fails to show that any exemption to the APA applies.

6. Opposition Parties next claim that the Commission's attempts to comply with the Paperwork Reduction Act ("PRA") in relation to the revised Form 323 – and particularly its June 10, 2009 and August 11, 2009 PRA notices – provided interested parties with ample notice of the changes to the Form 323.<sup>12</sup> This is incorrect for at least two reasons, both previously raised by FHH and neither of which is addressed in any way in the Opposition.

7. As FHH explained in detail in its Petition, when the Commission published its June 10, 2009 PRA notice it did *not* provide a copy of the revised form.<sup>13</sup> Although the June 10 notice indicated that a copy of the revised form could be obtained by request from the Media Bureau, when undersigned counsel attempted to do so, we were informed that the form was not in fact available.<sup>14</sup> That status continued until one day after the deadline for filing comments with the Commission pursuant to the PRA. As a result, the only information interested parties had regarding the Form 323 at that time was the text of the PRA notice itself. Such parties thus were effectively denied the opportunity to comment on the revisions to the form, since it was impossible to see what those revisions might be. Moreover, no party reviewing the PRA notice could have anticipated that the revised form would raise any privacy concerns, since that notice *explicitly* assured readers that the revised form had "no impact(s)" under the Privacy Act.<sup>15</sup>

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<sup>12</sup> Opposition at 6-7.

<sup>13</sup> Petition at 6-9. *Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested*, 74 Fed. Reg. 27549 (June 10, 2009)

<sup>14</sup> See also Letter from Walter Boswell, Acting Assoc. Managing Director, PERM, to Nicholas A. Fraser, Office of Information and Regulatory Affairs, Office of Management and Budget, Oct. 6, 2009 ("Boswell Letter"), confirming that no copy was made available until after expiration of the comment period.

<sup>15</sup> 74 Fed Reg. at 27550.

8. When a copy of the revised Form 323 finally became available on August 11, 2009, the Commission continued to assure interested parties that the Form did not raise any privacy issues. Both the PRA notice published that day in the Federal Register, as well as the “Supporting Statement” available through the OMB’s website, again *explicitly* stated that the revised form had no Privacy Act impact and that there was no need for confidentiality.<sup>16</sup> Do the Opposition Parties seriously think that agency notices assuring interested parties that there was no privacy impact could somehow provide the necessary notice that precisely the opposite was true? Whether or not these repeated statements were intended to mislead the public regarding the changes made to the Form 323, they certainly had that effect. Unsurprisingly, the Opposition does not even pretend to explain how FCC’s notices could have alerted anybody to the impact of the proposed changes to the Form 323; indeed, the Opposition does not ever refer to that aspect of the PRA statements.

9. Instead, the Opposition argues that any concerns regarding the expansion of the 323/FRN Requirement to encompass all attributable interest holders were addressed by the Boswell Letter.<sup>17</sup> As FHH has explained in its filings with the Commission and with the U.S. Court of Appeals for the District of Columbia Circuit, the Boswell letter, which has never been released publicly by the Commission, is of dubious legal significance.<sup>18</sup> That letter articulated, and sought to defend, a significant change in Commission policy regarding the uses of FRNs – a policy change which the Commission itself had neither articulated nor explained. But the Managing Director’s office lacks the delegated authority to establish and defend new agency policy. Moreover, the letter was written after the fact and serves only as a *post hoc* rationalization

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<sup>16</sup> *Public Information Collection Requirement Submitted to OMB for Review and Approval, Comments Requested*, 74 Fed. Reg. 40188. The “Supporting Statement” filed in August has since been removed from the OMB website; a copy of that statement downloaded before its removal was submitted as Attachment A to the Petition.

<sup>17</sup> Opposition at 6.

<sup>18</sup> See Petition at 10-11.

of a requirement already put in place. It is responsive only to the comments of the few parties that managed to obtain a copy of the form from OMB and only then discovered the new FRN requirement. As a result, whatever the substance of that letter, it cannot cure the fact that the expansion of the FRN requirement embodied in the revised Form 323 has never been the subject of the notice and comment required by the APA, or the full comment procedure specified by the PRA, or any considered explanation by the Commission.

10. According to the Opposition, any procedural problems infecting the expansion of the FRN requirement should be ignored because the requirement complies with the Privacy Act.<sup>19</sup> This claim is also incorrect. The Opposition goes to great length to explain how the Commission's CORES database protects the information it collects from individuals. Even if the Commission could ensure that the information stored in the CORES system could never be accessed or used inappropriately – and, frankly, the FCC cannot credibly assert such an ability – 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. Absent a demonstrated need, such a collection by itself violates the Privacy Act, which 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 purpose of the agency.”<sup>20</sup> As previously explained, the FCC 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.<sup>21</sup>

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<sup>19</sup> Opposition at 7-11.

<sup>20</sup> 5 U.S.C. Sec. 552a(e)(1).

<sup>21</sup> See Reply to Opposition to Motion for Stay at 6-7.

11. The Commission’s December 30 public notice regarding the CORES system cited by Opposition Parties doesn’t help them. That notice does not address the Privacy Act implications of the expanded 323/FRN requirement and the new uses to which the FRN apparently will be put.<sup>22</sup> As explained in the Petition, the CORES System of Records Notice (“SORN”) identifies the purpose of the system as providing a “method of recognizing and interacting with those individuals who are doing business with the Commission...*and who incur application or regulatory fee obligations.*”<sup>23</sup> Even if individuals who merely hold attributable interests in licensees could be described as “doing business with” the Commission – and that would be stretch – they do not ordinarily incur application fees.<sup>24</sup> To be sure, the FCC does charge a fee for the filing of ownership reports. But that fee is imposed *only* on the licensee itself in connection with the filing of the licensee’s Form 323. *No* fee is imposed on parties who merely hold attributable interests in licensees or their parent entities. The December 30 Federal Register notice regarding the CORES system makes no reference to this substantive change; instead, it simply estimates how many people will now be required to register for FRNs.

12. Even more importantly, the December 30 notice omits any mention whatsoever of how FRN’s might be used in connection with ownership reports or to ensure the usefulness of the information contained in the reports. The Privacy Act explicitly requires, however, that SORN notices *must* include “each routine use of the records contained in the system....” 5 U.S.C. §552a(e)(4)(D). So if the FRN’s listed on the ownership reports are to be used to assemble

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<sup>22</sup> Opposition at 10, *citing Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested*, 74 Fed. Reg. 69097 (Dec. 30, 2009).

<sup>23</sup> Petition at 20, *citing FCC/OMD-9 9* (emphasis added).

<sup>24</sup> Although The Boswell Letter might be read to say that an individual is “doing business with the Commission” simply by virtue of being an attributable interest holder in a licensee. That position, however, is at odds with longstanding Commission practice, and would represent a drastic change of policy which could not properly be made in a private letter from the Office of Managing Director to OMB. Moreover, such a change would require notice and opportunity for public comment not provided here.

ownership data to determine minority or female ownership levels, to track individuals' attributable interests, to somehow check the accuracy of information included in the ownership reports, or for some other purpose in connection with the ownership report, those purposes must be disclosed in the SORN notice. To date, there has been no such notice. This failure is in and of itself a violation of the Privacy Act.

13. Finally, Opposition Parties argue that the FRN requirement is necessary to ensure that the information on minority and female ownership obtained from Form 323 filings is accurate and reliable.<sup>25</sup> Even if that fanciful claim were correct – which it is not – that would not justify or legitimize the Commission's failure to comply with the APA. 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.”<sup>26</sup> The Commission has not publicly explained why it believes use of social security number-based FRNs will ensure the usefulness or accuracy of its data on ownership, and in particular on minority and female ownership, of broadcast stations. It necessarily has therefore not provided the public with any opportunity to evaluate and comment on those rationales nor to propose less invasive means of achieving the same goals.

14. In fact, FRNs simply are not terribly useful as unique identifiers, nor do they provide any way to ensure the accuracy of race or gender information. FRN's are unique identifiers only in the sense that any one particular FRN is associated with only one person; but

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<sup>25</sup> Opposition at 12-13.

<sup>26</sup> *MO&O* at n. 20. Although the rationale for the 323/FRN Requirement was explained to some extent in the Boswell Letter, 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 Boswell 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).

one person may have more than one FRN.<sup>27</sup> Moreover, there is no logical connection between (a) the provision of a number on a form and (b) whether the form is completed with accurate race and gender information. Even absent any intentional misrepresentation, the lack of sufficient mechanisms in CORES or the Form 323 for checking the validity or consistency of the information provided across forms severely undercuts its usefulness. 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: as FHH and others have explained in this proceeding, less intrusive and more effective means of accomplishing the same objective exist. Even the Commission has recognized that provision of an actual FRN is not entirely necessary, as it has provided for at least the temporary use of a special FRN that does *not* require submission of a social security number. *See Public Notice*, “Media Bureau Announces Online Availability of Revised Biennial Form 323, an Instructional Workshop on the Revised Form, and the Possibility of Obtaining a Special Use FRN for the Form,” DA 09-2539, released December 4, 2009. Accordingly, it is clear that alternatives that have thus far remained unexplored do exist.

15. Even were FRN’s useful in ensuring the accuracy of the race and gender information provided in the Form 323, application of the FRN requirement to all individual attributable interest holders without exploring less invasive methods runs contrary to the protection of individuals’ privacy interests that certain Opposition Parties have previously argued

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<sup>27</sup> The Opposition disputes this, positing that it is “inconsistent with the FCC’s description” and “not supported by any evidence” to say that one person (or entity) may have more than one FRN. Opposition at n.12. While Opposition Parties may dispute FHH’s position on this point, no knowledgeable party could do so, *nor could the FCC*. The Commission’s own page of Frequently Asked Questions regarding the FRN clearly indicates that multiple FRNs may be held by a single individual. [http://www.fcc.gov/bureaus/mb/industry\\_analysis/form323faqs.html](http://www.fcc.gov/bureaus/mb/industry_analysis/form323faqs.html). (Question: “What if I have more than one FRN on file? Can I use any of them?” Answer: “Yes. You can use any FRN you would like.”)

are extremely important. As part of the Electronic Frontier Foundation, for example, Common Cause has opposed the government's collection and use of personally identifiable information without a clear demonstration of need.<sup>28</sup> The same arguments pertain here, where the Commission is requesting the submission of highly sensitive information from thousands of individuals without demonstrating how that collection will serve any legitimate agency purpose.

### CONCLUSION

The arguments raised in the Opposition rely on a misunderstanding of the arguments presented in the Petition, as well as the requirements of the APA and the Privacy Act. In view of the foregoing and the entire record herein, it is respectfully requested that the Commission dismiss or deny the Opposition and grant FHH's Petition for Reconsideration.

Respectfully submitted,

/s/ Harry F. Cole  
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<sup>28</sup> See "EFF Coalition letter asking for Congressional hearings on travel privacy," available at [http://w2.eff.org/Privacy/cappsii/coalition\\_letter.php](http://w2.eff.org/Privacy/cappsii/coalition_letter.php). ("Private information initially gathered for one purpose should not be used for other, completely unrelated purposes.")

**CERTIFICATE OF SERVICE**

I, Emily Borkholder, a secretary in the law firm of Fletcher Heald & Hildreth, P.L.C., hereby certify that on January 13, 2010, I caused a copy of the foregoing “Reply to Opposition to Petition for Reconsideration” to be served via U.S. Mail, postage prepaid, upon the following:

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