ORIGINAL

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

In the Matter of	)	
	)	
Promoting Diversification in the	)	
Broadcasting Services	)	MB Docket No. 07-294

FILED/ACCEPTED

SEP 14 2011

Federal Communications Commission
Office of the Secretary

To: Marlene H. Dortch, Secretary

For transmission to the Commission

EMERGENCY PETITION FOR IMMEDIATE REVISION OF INSTRUCTIONAL/INFORMATIONAL MATERIALS RELATIVE TO FORM 323

1. Fletcher, Heald & Hildreth, P.L.C. ("Fletcher Heald") hereby petitions the Commission to take immediate steps to revise and correct instructional and informational materials provided by the Commission relative to the Commercial Broadcast Ownership Report (FCC Form 323). The information currently available from the Commission does not reflect representations made by the Commission to the U.S. Court of Appeals for the District of Columbia Circuit in June, 2010. *See* "Opposition of the Federal Communications Commission to Petition for a Writ of Mandamus", filed June 23, 2010, in *In re Fletcher, Heald & Hildreth, P.L.C.*, No. 10-1117 (D.C. Cir.). In its disposition of that case, the Court expressly relied on the Commission's representations. Order, *In re Fletcher, Heald & Hildreth, P.L.C.*, No. 10-1117 (D.C. Cir.), filed July 7, 2010. The validity of Form 323 thus depends on conformity with the Commission's representations to the Court, and it is essential that those representations be accurately reflected in the instructional materials issued by the Commission with respect to that form. Because the Commission's current Form 323 instructional materials, taken collectively,

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do not clearly and unequivocally conform to the agency's express representations to the Court last summer, the Commission must now issue new guidance to ensure that its regulatees are fully and accurately informed of their obligations.

2. The unfortunate history of the current version of Form 323 has been related previously and need not be recounted here in detail. [1] Suffice it to say that the Commission's efforts to develop a revised version of Form 323, beginning in early 2009, were dramatically flawed both procedurally and substantively. The most prominent flaw(s) involved the new requirement that *all* attributable interest holders in a reporting entity would have to provide a personal FCC Registration Number ("FRN"). As we have done previously, we will refer to that herein as the "323/FRN Requirement". In order to obtain an FRN, a person is required to provide the Commission with his/her Social Security Number ("SSN"). Thus, in order to comply with the 323/FRN Requirement, thousands of attributable interest holders were expected to submit their SSNs to the Commission.

3. The revised Form 323 was initially developed without public participation. [2] It is clear from the Commission's initial submission to the Office of Management and Budget ("OMB") that the Bureau had given no thought to the important procedural, privacy and confidentiality considerations inherent in the 323/FRN Requirement. When those considerations

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[1] *See, e.g.*, Fletcher Heald's Second Petition for Writ of Mandamus and/or Prohibition, filed May 28, 2010 in *In re Fletcher, Heald & Hildreth, P.L.C., supra*; Fletcher Heald's "Petition for Reconsideration or Such Alternative Relief as May Be Appropriate", filed November 30, 2009 in MB Docket No. 07-294. In the interest of a complete record, Fletcher Heald incorporates herein by reference all of its previous submissions in the instant docket and in its two D.C. Circuit mandamus proceedings (*i.e.*, Nos. 09-1321 and 10-1117).

[2] In June, 2009, the Media Bureau did solicit public comment on the draft form – but it refused to provide a copy of the draft form for anyone to review. As a result, the "comment period" was a totally pointless exercise. How, after all, is a party supposed to comment on something that it has had no opportunity to review?

were brought to the Commission's attention through the OMB process in August-October, 2009, the Commission insisted that its planned use of SSN-based FRNs was "vital", and the Commission held fast to its original 323/FRN Requirement. [3] OMB approved the form on that basis.

4. In the August, 2009 version of the revised Form 323, the 323/FRN Requirement was absolute – ***all*** attributable individual interest holders were required to provide SSN-based FRNs. Confronted by strident objections to the serious infirmities in the manner in which that requirement was adopted (as well as to the requirement itself), the Commission re-revised the form. *See* Public Notice ("*December 2009 Public Notice*"), DA 09-2539, released December 4, 2009. The December, 2009 iteration of the form permitted respondents to use "Special Use FRNs" unrelated to SSNs – but only

> [i]f, after using diligent and good-faith efforts, Respondent is unable to obtain a Social Security Number in order to generate an FRN for any specific individual whose FRN must be reported on Form 323.

This caveat was included in a "pop-up box" on the form.[4] That box also warned that "use of the 'Special Use FRN' does not relieve Respondent of its ultimate duty to obtain a fully compliant FRN." *Id.*

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[3] *See* Response Letter to OMB On Comments Received (101609).pdf , posted at http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=200912-3060-002 (visited September 14, 2011).

[4] *See* FRN Pop-up Box Text (2010).doc , posted at http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201003-3060-025 (visited September 14, 2011). The text quoted above appears in the "Current Text" portion of that document, reflecting the "pop-up box" text as of December, 2009. It is not clear from records available at the OMB website that this particular language change was ever formally presented to, or approved by, OMB.

5. The *December 2009 Public Notice* separately emphasized that the Special Use FRN was merely a temporary stopgap to facilitate the filing of Form 323s by the then-operative January, 2010 deadline:

> Special Use FRNs are an interim measure to ease the transition to use of the revised form. Use of the Special Use FRN does not relieve a filer of its ultimate duty to obtain a fully compliant FRN. We expect filers using Special Use FRNs to update their filed ownership reports with fully compliant FRNs when these are obtained.

December 2009 Public Notice at 2. The December, 2009 re-revision thus provided only a slight relaxation of the requirement that ***all*** attributable interest holders provide SSN-based FRNs in the Form 323: such FRNs were still required, but they could be submitted after the initial filing.

6. The "ultimate duty" language was dropped in revisions submitted to OMB in March, 2010, replaced by a statement that use of a Special Use FRN would constitute compliance and that lack of an SSN-based FRN would not subject anyone to "enforcement action". [5] No public explanation was provided; the Commission's April, 2010 public notice did not even mention that particular change. *See* Public Notice, DA 10-613, released April 8, 2010. According to the Commission's March, 2010 statement to OMB, the revision merely "clarif[ied] necessary information to the public". This plainly implied that the revision did not in fact change the basic requirement initially imposed on the form's respondents – *i.e.*, that "fully compliant" FRNs for all attributable interest holders were required to be filed as part of Form 323, whether as filed initially or later by way of updating amendment. That is particularly so in view of the fact that, according to the Commission, the revision was "non-substantive". [6]

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[5] *See* Note 4, *supra*.

[6] *See* Nonsubstantive change request for 3060-0010 (Form 323).doc , posted at http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201003-3060-025 (visited September 14, 2011).

7. None of these various tweaks cured the more fundamental problems with the form, including particularly the 323/FRN Requirement. Accordingly, in May, 2010, Fletcher Heald (joined by a number of representatives of the broadcast industry) filed its second mandamus petition (No. 10-1117). On June 14, 2010, the Court ordered the Commission to respond to that petition. Three days later, the Commission submitted yet another "nonsubstantive change request" to OMB, proposing yet another revision to the Special Use FRN "pop-up box". The June 2010 revision inserted a new phrase (italicized and bold type in the quote below) into the sentence explaining when a Special Use FRN could be used:

> [i]f, after using diligent and good-faith efforts, Respondent is unable to obtain, ***and/or does not have permission to use***, a Social Security Number in order to generate an FRN for any specific individual whose FRN must be reported on Form 323, Respondent may click on the button below to generate an interim 'Special Use FRN' solely for the purposes of completing this Report. [(emphasis added) [7]]

OMB approved the change on June 21, based on the Commission's representation that the change was "basically word edits to clarify previously approved language". [8] No public explanation – or announcement – of the change was made by the Commission. [9] On June 23 the Commission advised the Court that, as a result of this change, "it is clear that users are not required to provide SSN-based FRNs for the [then-imminent filing of Form 323] if they object to

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[7] *See* FRN Pop-up Box Text (6-17-2010).doc , posted at http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201006-3060-006 (visited September 14, 2011) (emphasis added). The Commission did not explain to OMB how the added language could be deemed a "non-substantive" change.

[8] In offering that explanation, the Commission did not indicate what "previously approved language" was being "clarif[ied]" by the newly-added language. *See* Note 7, *supra*.

[9] The Commission's failure to publicly announce that language change is odd because on June 23, 2010 – the day on which the Commission advised the Court of the new language – the Media Bureau issued a Public Notice, DA 10-1108, clarifying other issues relating to Form 323. That notice made no reference to the revised "pop-up box" language or the interpretation of that language being tendered simultaneously to the Court.

the submission of their Social Security Numbers." Commission Opposition, filed June 23, 2010 in No. 10-1117.

8. On July 7, 2010, the Court dismissed the petition for mandamus "[i]n light of the FCC's representation that ***no individual attributable interest holder will be required to submit a Social Security number to obtain an FRN*** for the July 8, 2010 biennial filing deadline or for any imminent non-biennial filing of Form 323." Order, *In re Fletcher, Heald & Hildreth, P.L.C.*, No. 10-1117 (D.C. Cir.), filed July 7, 2010 (emphasis added).

9. On August 23, 2011, the Chief of the Media Bureau announced that Form 323 is due to be filed by all commercial broadcasters between October 1-December 1, 2011. Order, DA 11-1445, released August 23, 2011. In that Order, prospective filers seeking advice concerning the completion of the form are referred to (a) the instructions to the form (available on CDBS and on the Commission's website) and (b) the Bureau's Form 323 website and, in particular, the "Frequently Asked Questions" compiled there. *Id.* None of the materials to which prospective filers are directed contain any reference to the dispositive gloss which both the Commission and the Court placed on the use of Special Use FRNs.

10. As Fletcher Heald has repeatedly demonstrated in previous pleadings to the Commission and the Court, the development of revised Form 323 which began in 2009 was unquestionably flawed in multiple serious respects. To date the Commission has not even addressed, much less sought to cure, those flaws. [10]

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[10] In its June 23, 2010 Opposition filed with the Court in response to the second mandamus petition, the Commission acknowledged Fletcher Heald's pending petition for reconsideration (filed November 30, 2009), and advised that the Commission was then "currently considering the matters raised" there. FCC Opposition at 10. That petition remains pending today, nearly 15 months later (and nearly two years after the petition was filed).

11. At most the Commission, focusing on particularly egregious problems with the 323/FRN Requirement, has engaged in a series of supposedly "nonsubstantive" revisions of that particular requirement. As described above:

> SSN-based FRNs were first required from ***all*** attributable interest holders.
>
> Within months, non-SSN-based Special Use FRNs were permitted – but the respondent still remained under a continuing "ultimate" duty to obtain and submit "fully compliant" FRNs eventually.
>
> A couple of months later, the admonition about the continuing duty to submit "fully compliant" FRNs was deleted although, in announcing this version of the form, the Commission did not even mention that deletion; the respondent still had to make "diligent and good-faith efforts" to obtain such "fully compliant" FRNs. Public Notice, DA 10-613, released April 8, 2010.
>
> A couple of months later, without public notice or explanation, the Commission inserted more language (*i.e.*, "and/or does not have permission to use") into the "pop-up box". The Commission then advised the Court that, as so revised, the form did not require anybody to provide an SSN-based FRN "if they object" to doing so.
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> The Court then effectively endorsed a slightly modified version of that interpretation, *i.e.*, that "no individual attributable interest holder will be required to submit" an SSN to obtain an FRN.

This dizzying series of revisions has taken the 323/FRN Requirement through a complete U-turn: initially, ***all*** attributable interest holders ***had*** to provide SSN-based FRNs in the Form 323 as originally filed; then ***all*** such interest holders ***had*** to provide such FRNs, but only eventually; now, according to the Court, ***none*** of them do, ever.

12. Unfortunately, the informational materials currently available from the Commission with respect to the completion of Form 323 have not kept up with all these changes. For example, the instructions to Form 323 make no reference at all to Special Use FRNs. While the FAQs on the Commission's website do refer generally to Special Use FRNs, none of those references mentions the Court's Order or the agency's interpretation on which that order was based. As a result, a respondent seeking information about possible reliance on Special Use

FRNs would, thanks to the Commission's silence, be unaware of the fact that no SSN-based FRN is required if the attributable interest holder objects.

13. This situation is further aggravated by the fact that, to the limited extent that they have addressed the Special Use FRN, the Commission's public notices issued over the course of the form's revisions reflect that respondents are expected to obtain "fully compliant" FRNs for all attributable interest holders. *See December 2009 Public Notice*. While the language reflecting that expectation – language that was inserted in the "pop-up box" as part of the December, 2009 revision – was deleted, without notice, in March-April, 2010, that deletion was not explained or highlighted by the Commission. To the contrary, the Commission advised OMB that that deletion was a "nonsubstantive" change, which would ordinarily suggest that the requirement to obtain "fully compliant" FRNs remained, and remains, in full force and effect. Even the final revision to the form, effected *after* the Court had ordered the Commission to respond to the second mandamus petition, was characterized by the Commission as "basically word edits to clarify previously approved language".

14. The Court's order was issued only one day prior to the July 8, 2010 deadline for filing biennial Ownership Reports. The Commission thus had virtually no time in which to notify affected broadcasters of the Court's decision prior to that deadline. Fletcher Heald anticipated that, in the ensuing months, the Commission would take appropriate steps to alert the broadcast industry generally to the agency's last re-re-interpretation of the filing requirement, *i.e.*, that no individual attributable interest holder would have to file an SSN-based FRN for the Form 323. To date, however, no such clarifying alert has been issued by the Commission.

15. As a result of the Commission's repeated revisions – and the lack of announcement or explanation of those revisions – broadcast licensees obligated to complete and

submit Form 323 have been left in the dark relative to precisely what is required of them with respect to the reporting of FRNs. Fundamental due process mandates that those licensees are entitled to know what is expected of them. It is imperative that the Commission formally, publicly and immediately acknowledge the definitive gloss placed on the 323/FRN Requirement by the Commission, and expressly relied on by the Court, in connection with the second mandamus proceeding. Such acknowledgement should include, at a minimum, a general public notice together with comprehensive revision of any and all information included on the Commission's website and in the form's instructions. With the deadline for the next biennial submission of Form 323 less than three months away, broadcast licensees (and their attributable interest holders) are entitled to know how those forms are to be completed.

16. The Commission can and should immediately issue a public notice advising that: (a) no individual attributable interest holder will be required to submit an SSN to obtain an FRN (as the Court characterized the obligation); and (b) respondents are not required to provide SSN-based FRNs if they choose not to (as the Commission characterized it before the Court). This information should also be incorporated in clear and unmistakable terms in the instructions to Form 323 and any other materials distributed by the Commission with respect to Form 323 (including, but not limited to, materials available at the Commission's website). To the extent that this information might be deemed inconsistent with information previously provided by the Commission relative to the Form 323 obligation, the Commission should also specifically address and resolve such inconsistencies. [11]

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[11] For example, as discussed above, in its *December 2009 Public Notice* the Commission emphasized that "fully compliant" FRNs would have to be submitted eventually, even if Special Use FRNs were used as an interim measure. The Commission has not expressly countermanded that advisory and, since the Commission characterized each subsequent revision of Form 323 as "nonsubstantive", respondents could reasonably understand that those revisions did not alter the

(Footnote continued on next page)

17. In view of the fact that the deadline for filing biennial commercial Ownership Reports is December 1, 2011 (and the window for such filings opens on October 1), it is imperative that the Commission address this matter immediately.

Respectfully submitted,

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obligation as announced in December, 2009. But the interpretation of the 323/FRN Requirement as articulated by the Commission (in June, 2010) and the Court (in July, 2010) does not contemplate any requirement that "fully compliant" FRNs be filed at any time. The Commission should clearly and explicitly announce that "fully compliant" FRNs are simply ***not*** required for all attributable interest holders in reporting entities.

Of course, if the Commission is unable or unwilling to embrace and apply the standard that it assured the Court it would apply – and upon which the Court relied – the Commission should so advise the Court promptly, so that any misunderstanding can be resolved well in advance of the current December 1, 2011 deadline.