

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE FLETCHER, HEALD &)
HILDRETH, P.L.C., *et al.*,) No. 10-1117
)
Petitioners.)

**OPPOSITION OF THE FEDERAL COMMUNICATIONS
COMMISSION TO PETITION FOR A WRIT OF MANDAMUS**

Petitioners, a group of broadcasting associations, radio and television broadcasters, and a law firm that represents them, ask the Court to prohibit the FCC from using an amended agency form that petitioners claim will require them to submit the Social Security Numbers of individuals who hold ownership stakes in the broadcaster petitioners' companies. The completed forms are due to be filed by July 8, 2010. Petitioners argue that the procedures used by the FCC to implement the revised form were defective and that the agency may not lawfully require individuals to reveal their Social Security Numbers, even with extensive privacy protections.

The Court should deny the petition for a writ of mandamus because the FCC has modified its procedures so that it will no longer require the use of Social Security Numbers to complete the July 8 filing. With respect to the July 8 filing, the issue therefore is moot, and for that reason alone petitioners cannot show a "clear and indisputable" right to mandamus. For related reasons, petitioners also lack standing.

Petitioners are not entitled to extraordinary relief in any event because they have shown neither an irreparable injury nor a likelihood of success on

the merits. Even if petitioners were required to supply their Social Security Numbers, such a requirement would fail to constitute an injury let alone an irreparable one. People routinely submit their Social Security Numbers to government agencies (as well as to banks and merchants), and suffer no injury merely from being required to do so. The injury that petitioners appear genuinely to fear – the accidental release of their data through database hacking – is wholly speculative.

Nor have petitioners shown that the Commission committed any procedural or substantive error. Petitioners had an opportunity to comment on how to revise Form 323 before the Commission and had an additional opportunity to comment on the new form in a proceeding before the Office of Management and Budget, which approved Form 323. Those opportunities satisfied the requirements of the APA. Furthermore, the data collected via Form 323 is directly relevant to the FCC's execution of important federal policies. There is no call here for extraordinary judicial intervention.

BACKGROUND

For decades, the Commission has required broadcast licensees to file periodic reports detailing their ownership structures, including in most instances the identities of any entities or individuals with an attributable ownership interest in the licenses.¹ Those reports, now filed every other

¹ “Attributable” interests are defined in 47 C.F.R. § 73.3555 notes 2-3. The attribution rules are fairly complex but are generally intended to capture

year on FCC Form 323, help the Commission assess whether licensees are in compliance with various ownership restrictions established in federal law and help the public determine the identity of station owners. *See generally Promoting Diversification of Ownership in the Broadcasting Services*, 24 FCC Rcd 5896, 5898 n.9 (2009) (*Form 323 Order*). The next biennial filing date is July 8, 2010.

1. In 1998, the Commission began to use Form 323 to collect data concerning ownership interests in broadcast licensees held by women and members of minority groups. The Commission had long before established policies favoring diversity in media ownership. *See Form 323 Order*, 24 FCC Rcd at 5897 ¶1. In 1996, Congress ratified those policies when it directed the FCC to “promote the policies and purposes of [the Communications] Act favoring diversity of media voices.” 47 U.S.C. § 257(b). Congress also directed the Commission to implement its program of auctioning spectrum licenses so as to “disseminat[e] licenses among a wide variety of applicants, including ... businesses owned by members of minority groups and women.” 47 U.S.C. § 309(j)(3).

The agency accordingly revised Form 323 to ask for information regarding the race and gender of all persons holding attributable interests in broadcast licensees. *1998 Biennial Regulatory Review*, 13 FCC Rcd 23056,

ownership interests that have the potential to influence the decision making of a licensee. *See Time Warner Entertainment Co., L.P. v. FCC*, 240 F.3d 1126, 1140 (D.C. Cir. 2001).

23095-23099 (1998). The Commission stated that such 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 may adopt.” *Id.* at 23095.

2. By 2006, it had become apparent that Form 323 was not fulfilling its role as a source of data that would enable the agency to monitor the participation of minorities and women in broadcasting. Researchers had reported to the Commission that the data were “incomplete, inaccurate, duplicative, and subject to significant measurement error.” *Form 323 Order* at 5900. The lack of a standardized filing date also made data difficult to compare across time. *Ibid.* Most importantly, the format of Form 323 made it difficult to search and cross-reference data on the holders of attributable interests in a given licensee. *Id.* at 5901. Specifically, attributable interests were typically reported not in Form 323 itself, but in an attachment to the Form that could not be entered into the FCC’s database and could not be searched. *Id.* at 5907-5908. It therefore was difficult, if not impossible, to derive an accurate picture of minority- and women-owned broadcasting interests from Form 323.

The data limitations were underscored by a report issued in 2008 by the Government Accountability Office that was highly critical of the utility of Form 323. GAO concluded in part that “because individuals, partnerships

of natural persons,” and some types of stations were exempt entirely from filing Form 323, “it is not possible to identify the full universe of broadcast stations owned by minorities and women.” *Form 323 Order* at 5901, citing GAO Report No. 08-383 (March 2008). GAO also found that ownership data could not be searched electronically, “which renders the database unreliable and unusable” for tracking ownership interests. *Ibid.*

In the *Form 323 Order*, which gave rise to this case, the Commission, after notice and comment, undertook to “modify the ownership reporting requirement in several key respects to address the criticism of our data collection efforts and thus improve the accuracy, reliability, and usefulness of the information we obtain.” *Form 323 Order* at 5903-5904. The Commission took various specific steps, such as creating a uniform filing date, but it also set forth some relatively broad goals regarding the accuracy and utility of the data. The Commission delegated to the agency staff the authority to design and implement a new form “consistent with the discussion” in the order. *Id.* at 5904.

Specifically, the Commission determined that “it is crucial that the data [collected in Form 323] be submitted in a useful manner so the data are electronically searchable and can easily be sorted and aggregated.” *Form 323 Order* at 5908. In addition, to “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 of the entity in which it holds an attributable interest.” *Ibid.* The Commission “direct[ed] the staff to revise Form 323 accordingly” and “delegate[d] authority to the staff ... if additional modifications of the form are determined to be necessary.”

3. The FCC Registration Number, called an “FRN,” is a unique identifier assigned to every person or entity that must file a form with the FCC. *See Adoption of a Mandatory FCC Registration Number*, 16 FCC Rcd 16138 (2001) (*FRN Order*). To obtain an FRN, a filer must submit identifying information, including its “taxpayer identification number,” which for individuals and sole proprietors is the Social Security Number (SSN). The use of the Commission-issued FRN on Form 323 (and other FCC forms) rather than the taxpayer number protects the privacy of the taxpayer number. *Id.* at 16143 ¶21. There is no further collection of taxpayer numbers after the issuance of the FRN. The FCC maintains the database containing the underlying identification numbers in secured locations with strict access controls behind several firewalls and layers of encryption. *See* Letter of October 6, 2009, from Walter Boswell, FCC, to Nicholas Fraser, OMB at 9 (available at <http://www.reginfo.gov/public/do/DownloadDocument?documentID=140535&version=1>) (“OMB Letter”).

The Commission implemented the FRN system in order to improve its financial and records management and to implement the Debt Collection Improvement Act, which in pertinent part requires that “each Federal agency

shall require each person doing business with that agency to furnish to that agency such person's taxpayer identifying number.” 31 U.S.C. § 7701(c)(1); *see FRN Order*, 16 FCC Rcd 16138. A person is “doing business” with an agency if (among other things) it is “an applicant for, or recipient of, a Federal license.” 31 U.S.C. § 7701(c)(2)(B). The DCIA thus applies by its plain terms to FCC licensees. Indeed, the Commission determined years ago that persons with attributable interests in an applicant for or licensee of wireless facilities, such as cellular telephone frequencies, are “doing business with the Commission.” *In re Biennial Regulatory Review*, 14 FCC Rcd 11476, 11488 ¶29 (1999).

4. On June 10, 2009, the FCC’s Media Bureau published in the Federal Register a notice of the new Form 323 that it had developed in response to the Commission’s delegation of authority in the *Form 323 Order*. 74 Fed. Reg. 27,549. That notice was supposed to start a 60-day comment period on the new form, *see* 44 U.S.C. § 3506(c)(2)(A), but the new Form was not yet available at that time. The Form became available to the public in August 2009 when the FCC asked the Office of Management and Budget to approve the revised Form and published a notice in the Federal Register alerting the public to the request.² 74 Fed. Reg. 40188 (Aug. 11, 2009).

² Under the Paperwork Reduction Act, a federal agency may not “conduct or sponsor the collection of information” without prior approval of OMB. 44 U.S.C. § 3507.

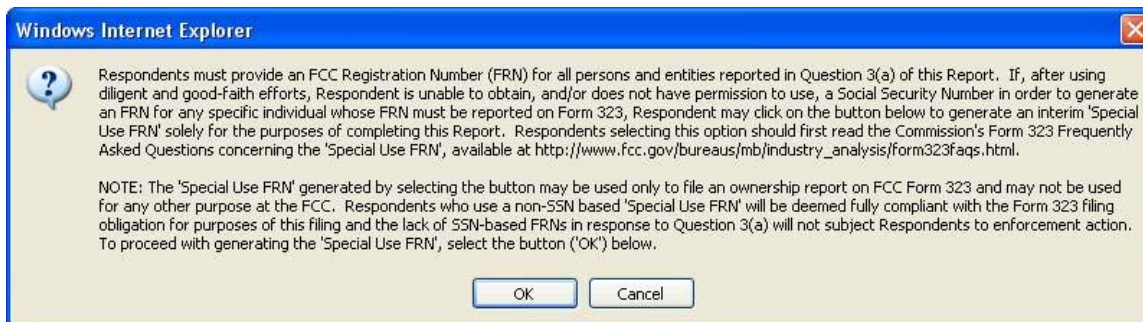
This case focuses on one change in the Form: prior to the 2009 revision, Form 323 did not require any holder of an attributable interest in a licensee to provide an FRN; the new Form requires all holders of an attributable interest in a licensee – individual or corporate – to provide an FRN. That requirement means that an individual holding an attributable interest in a broadcaster must, if he does not already have an FRN, submit his Social Security Number to the FCC in order to receive an FRN, which, in turn, must be reported on the form.

Under the Paperwork Reduction Act, interested parties are entitled to file comments with OMB on a proposed form. The form cannot take effect in the absence of OMB approval. 44 U.S.C. § 3507(b). Dozens of entities commented in 2009 on the proposed Form 323, including all but one of the petitioner state broadcaster organizations now before the Court.³ All but one of the comments opposed OMB approval of the Form, and many focused on the FRN reporting requirement for individuals, arguing that it violated reporting persons' privacy rights. On October 30, 2009, the Commission published a notice in the Federal Register that OMB had approved new Form 323. 74 Fed. Reg. 56135.

³ *See* <http://www.reginfo.gov/public/do/DownloadDocument?documentID=140688&version=1>, which contains joint comments from all petitioner state broadcaster organizations except the Puerto Rico Radio Broadcasters Association. Other comments submitted to OMB are available at http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=200908-3060-001.

5. The filing deadline for broadcasters to file the new Form 323 was originally December 15, 2009, but was extended to January 11, 2010. *See* Public Notice, 24 FCC Rcd 14055 (Media Bureau Nov. 23, 2009). Petitioners filed their first mandamus petition on December 23, 2009. On the same day, the Commission announced that technical implementation difficulties would require suspension of the deadline. Order, 24 FCC Rcd 14628 (Media Bureau Dec. 23, 2009). The Court dismissed the mandamus petition on its own motion on March 4, 2010. Order of March 4, 2010 in Case No. 09-1321. On April 8, 2010, the Media Bureau announced a new Form 323 filing deadline of July 8, 2020. Public Notice, 25 FCC Rcd 3595 (Media Bureau April 8, 2010).

6. Since the initial release of Form 323 in 2009, the Bureau has made important changes to the Form 323 filing regime. For the July 8, 2010, biennial filing, and other non-biennial filings, the FCC now permits the filer to obtain a “Special Use FRN,” which is an FRN issued on-the-spot during the process of filling out Form 323 that does not require the submission of a Social Security Number. The electronic form includes a “pop up” – a box that appears when the filer clicks in the FRN reporting field – that appears as follows:



In light of the explanations on Form 323 that filers are eligible to use Special Use FRNs if they do not “have permission to use a Social Security Number,” that users of a Special Use FRN “will be deemed fully compliant with the Form 323 filing obligation” and that use of the non-SSN-based FRN “will not subject [the filer] to enforcement action,” it is clear that users are not required to provide SSN-based FRNs for the July 8 filing if they object to the submission of their Social Security Numbers. For the time being, the Special Use FRN may also be employed for non-biennial filings, such as applications to transfer control of a license. *See* FCC Website Form 323 FAQ http://www.fcc.gov/bureaus/mb/industry_analysis/form323faqs.html.

7. Two parties, including petitioner Fletcher, Heald & Hildreth, have filed petitions for reconsideration asking the Commission to reverse the Bureau’s design of new Form 323. The agency is currently considering the matters raised in those petitions.

ARGUMENT

Mandamus is a “drastic” form of relief that is available only in “extraordinary situations.” *In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005); *accord Northern States Power Co. v. Dep’t of Energy*, 128 F.3d 754,

758 (D.C. Cir. 1997). To justify mandamus, a petitioner must demonstrate that its right to relief is “clear and indisputable.” *Ibid.*; accord *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988).

Mandamus is proper only if “(1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to plaintiff.” *Council of and for the Blind of Delaware County Valley v. Regan*, 709 F.2d 1521, 1533 (D.C.Cir.1983) (en banc).

Petitioners do not meet that test here for multiple reasons.

1. Petitioners Lack Standing.

Petitioners have failed to show that they have a concrete personal interest at stake that could be redressed by a decision in their favor. They therefore lack Article III standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). The alleged injury from which petitioners seek redress is the obligation to provide the agency with Social Security Numbers. Pet. at 5-6. But nothing in the petition suggests that petitioners are other than corporations and associations of corporations – entities that do not have Social Security Numbers. Thus, petitioners themselves can suffer no personal injury from a requirement to submit Social Security Numbers. *See Powers v. Ohio*, 499 U.S. 400, 410 (1991) (“In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties.”). Petitioners have not shown that any individual holder of a reportable attributable

interest who objects to providing a Social Security Number is unable to protect his or her own interests. *See ibid.*

Although petitioners do not make the argument, they might fear that they could be the target of an enforcement action for failing to provide the Social Security Number of an attributable interest holder who refuses to provide that information. But the FCC has made clear in the Special Use FRN provision and the pop-up box that will appear in Form 323 that using a Special Use FRN “will be deemed fully compliant with the Form 323 filing obligation” and that use of the non-SSN-based FRN “will not subject [the filer] to enforcement action.” In the absence of a possible enforcement action, petitioners will suffer no constitutionally cognizable injury.

2. The Mandamus Petition Is Moot.

Petitioners’ request for mandamus also fails because, with respect to the July 8 filing, the request is moot. The FCC will not require anyone who objects to doing so to provide a Social Security Number in connection with the July 8 filing. As explained above, the agency has changed the requirements of Form 323 for the upcoming filing window to authorize the use of “Special Use FRNs” that are issued without the submission of a Social Security Number. The Commission has made clear that no filer will be subject to enforcement action due to the absence of an SSN-based FRN from its filing. In those circumstances, petitioners will suffer no injury at all. That is a sufficient ground on which to deny the petition entirely.

To be sure, the FCC's authorization of the Special Use FRNs applies only to the July 8 filing, and not to subsequent biennial filings. Before the next filing in 2011, however, the agency will have sufficient time to consider the two pending petitions for reconsideration – one of which was filed by petitioner Fletcher, Heald & Hildreth – that ask the full Commission to review the Bureau's changes to Form 323. At the present time, petitioners cannot show that they have a clear and indisputable right to relief.

3. Petitioners Have Shown No Irreparable Harm.

Because petitioners request a stay of an agency practice, they “must also satisfy the normal requirements ... for all extraordinary relief – *i.e.*, the well established requirements that [the Court] routinely appl[ies] to motions for stay pending appeal, among which is the likelihood of irreparable harm.” *Reynolds Metals Co. v. FERC*, 777 F.2d 760, 763 (D.C. Cir. 1985).

Petitioners' allegation of harm is not entirely clear, but they appear to claim both that they will be harmed by the mere submission of Social Security Numbers to the FCC to obtain an FRN and that the FCC's possession of the numbers will place petitioners at risk of identity theft. *See* Pet. at 20 (“Once their SSNs have been submitted, those individuals will be subject to the risks inherent in the inclusion of such person information in potentially hackable databases.”). Petitioners have failed to show irreparable harm.

First, petitioners will not be harmed by the July 8 filing for the same reason that this matter is moot. The FCC will not require submission of

Social Security Numbers on July 8, and there is thus no harm at all at this time.

Even if petitioners were required to submit Social Security Numbers to the FCC, they still could not show irreparable harm from the mere submission of Social Security Numbers to the agency. Individuals routinely submit such data to government and private entities: when they open a bank account, apply for a credit card, sign up for cell phone service, buy a car, or get a passport, among many other ordinary activities. *See, e.g., Cassano v. Carb*, 436 F.3d 74 (2d Cir. 2006) (employer can reasonably refuse a job to applicant who refuses to provide Social Security Number); *In re Crawford*, 194 F.3d 954, 960 (9th Cir. 1999) (Social Security Number “is not inherently sensitive or intimate information, and its disclosure does not lead directly to injury, embarrassment or stigma”). Indeed, Congress *required* every person who “does business with” the FCC or any other federal agency – which includes applying for or receiving a license – to submit a Social Security Number to the agency. 31 U.S.C. § 7701(c). Under the terms of that statute, the submission of required data by itself causes no irreparable harm. Indeed, licensees and others holding attributable interests in wireless licensees (such as cell phone providers), have been submitting Social Security Numbers to the FCC for many years. *See In re Biennial Regulatory Review*, 14 FCC Rcd 11476.

The hypothetical possibility of identity theft does not constitute irreparable injury. To justify mandamus, a petitioner must show that harm is

“likely,” to occur, and the Court has emphasized the “stringency” of that requirement. *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). Thus, the Court imposes a “requirement of showing more than a mere possibility of irreparable injury” to justify mandamus. *Reynolds Metals Co. v. FERC*, 777 F.2d 760, 763 (D.C. Cir. 1985).

Petitioners’ claim is that Social Security Numbers submitted to the FCC will be at risk of identity theft by hackers who will somehow steal them from the FCC’s computer system. Pet. at 20. The theft of a filer’s private data could well constitute irreparable harm. But the hacking of the FCC’s database, which is kept in secured locations with strict access controls behind several firewalls and layers of encryption, *see* OMB Letter at 9, is nothing more than a speculative possibility of harm that is insufficient to satisfy the Court’s strict test.

4. Petitioners Have Failed To Show Any Legal Error By The FCC.

Petitioners claim that the FCC committed both procedural and substantive error by failing to provide notice and an opportunity for comment on the revisions to Form 323 and by requiring the collection of Social Security Numbers for no purpose. Pet. 14-15. Those supposed legal errors, petitioners contend, give them a clear right to relief. Those arguments fail.

a. Petitioners Have Shown No Procedural Error.

The Commission conducted a full-fledged notice-and-comment rulemaking proceeding focused on the shortcomings of former Form 323

and the need to change the form to generate useable data about the ownership of broadcast licensees. The Media Bureau's revisions to Form 323 stem directly from the Commission's instructions to the Bureau.

In the course of the proceeding, the Commission directed the staff to modify Form 323 to ensure that ownership data, including data pertaining to the holders of attributable ownership interests, "is incorporated into the database, is searchable, and can be aggregated and cross-referenced electronically." *Form 323 Order*, 24 FCC Rcd at 5908. It issued that direction in part to respond to the GAO's criticisms of the prior version of the Form. By expanding the scope of the filing requirement, the Commission also addressed GAO's concern that the data were inadequate "because individuals [and] partnerships of natural persons" were excluded. *Id.* at 5901.

The *Form 323 Order* thus identified and addressed the problem of an inability to allow aggregation of data concerning individuals holding ownership interests in broadcast licensees. In that light, the Commission's directive to the staff necessarily implied that the staff take steps to ensure that individual ownership holdings would be ascertainable and searchable. The simplest way to execute that directive was to employ FRNs to track ownership. *See Form 323 Order* at 5908 ("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 ... to list on Form 323 the [FRN] of the entity in

which it holds an attributable interest”). Because FRNs are unique numbers specific to a single person or entity, they are the obvious mechanism for electronically matching up Form 323 ownership data with specific owners, a critical functionality that the prior Form 323 lacked.

Moreover, although petitioners did not have an opportunity to submit comments to the Commission regarding the specific changes to Form 323 that the staff adopted under its delegated authority, they did have a full chance to do so before the Office of Management and Budget. In fact, all but one of the petitioners raised before OMB the very concerns they now raise before this Court. Other commenters raised the same concerns. OMB rejected the complaints and approved the form. The OMB comment process was functionally equivalent to another round of notice and comment, and adequately fulfilled any procedural requirements that may have applied. *See United States Telecom Ass’n v. FCC*, 400 F.3d 29, 40-41 (D.C. Cir. 2005) (harmless error where agency procedure did not comply with APA, but parties had an alternative opportunity for notice and comment).

b. Petitioners Have Shown No Substantive Error.

Petitioners claim in passing that Social Security Numbers are not “relevant and necessary” to any legitimate regulatory purpose. Pet. 14-15. They do not elaborate on that claim, which is wrong.

The *Form 323 Order* demonstrates at length why FRNs are necessary for the Commission to fulfill its statutory duties under the Communications Act and the Debt Collection Improvement Act. As explained at pages 7-8

above, the DCIA requires that the agency collect Social Security Numbers for any individuals holding an FCC license, and the Commission already applies that requirement to the holders of attributable interests in wireless licensees. *In re Biennial Regulatory Review*, 14 FCC Rcd at 11488 ¶29. Collecting the information at issue here would be justified by the DCIA alone.

Moreover, as explained at pages 3-4 above, longstanding Commission policy as well as sections 257(b) and 309(j)(3) of the Communications Act favor the issuance of licenses to minorities and women. Collecting data on the attributable holders of FCC licenses is necessary to the fulfillment of those policies and a reasonable exercise of the Commission's statutory authority to "make such rules and regulations ... as may be necessary to carry out the provisions of" the Communications Act. As the Commission explained in the *Form 323 Order*, FRNs are integral to its efforts to compile a meaningful database. Collecting the Social Security Numbers necessary to issue FRNs is thus directly material to the Commission's execution of important federal policy.

CONCLUSION

For the foregoing reasons, the petition for a writ of mandamus should be denied.

Respectfully submitted,

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June 23, 2010

10-1117

**IN THE UNITED STATES COURT OF APPEALS
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In re Fletcher, Heald & Hildreth, P.L.C., *et al.*, Petitioners

CERTIFICATE OF SERVICE

I, Joel Marcus, hereby certify that on June 23, 2010, I electronically filed the foregoing Opposition of the Federal Communications Commission to Petition for a Writ of Mandamus with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Counsel for petitioner, listed below, who is a registered CM/ECF user, will receive service through the CM/ECF system.

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