

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

In re Fletcher, Heald & Hildreth, P.L.C., *et al.*, ) Case No. 10-1117  
*Petitioners* )

**REPLY TO OPPOSITION TO PETITION FOR A WRIT OF MANDAMUS**

Supposedly rebutting Petitioners' Petition for a Writ of Mandamus ("Petition"), the FCC's Opposition in fact concedes all material facts necessary to establish that the FCC's efforts to impose the revised Form 323 have not conformed to basic procedural requirements. Moreover, the Opposition further demonstrates the agency's consistently misleading conduct in this matter – conduct which suggests agency bad faith not only to the public, but now also to this Court.

At issue here is the FCC's revised Form 323, used to report the ownership of commercial broadcast stations.<sup>1</sup> Although the Opposition concedes that revision of the form was subject to the notice-and-comment rulemaking requirements of the Administrative Procedure Act ("APA")<sup>2</sup>, the FCC plainly failed to comply with those requirements. As a result, the form – including, but not limited to, the

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<sup>1</sup> Form 323 is required to be filed: (a) biennially by all commercial broadcast licensees and entities holding "attributable interests" in such licensees; and (b) in connection with the issuance of a new construction permit, the submission of a new license application, or consummation of any change in ownership or control of a commercial broadcast licensee.

<sup>2</sup> *See, e.g.*, Opposition at 2 (asserting, inaccurately, that the process leading up to adoption of the Form 323 "satisfied the requirements of the APA").

submission of FCC Registration Numbers (“FRNs”) for all “attributable” interest holders, a requirement newly imposed by the revised form – cannot be implemented now, or at any time until the FCC can demonstrate compliance.

The FCC asserts (at pages 11-12) that Petitioners lack standing. As noted above, all commercial broadcast licensees are required to file Form 323 at least biennially, and at other times in certain circumstances. If Form 323 is invalid, the burden of filing the invalid form falls directly on such licensees. Petitioners include multiple trade associations whose members include commercial broadcast licensees, as well as a number of commercial broadcast licensees themselves. Petitioners unquestionably have a concrete interest at stake here.

The Opposition next asserts (at pages 12-15) that the Petition is moot and that no irreparable harm has been shown. In so doing, it focuses narrowly on what the Petitioners have referred to as the “323/FRN Requirement” (*see Petition at, e.g., 9*) included in the revised Form 323. While the 323/FRN Requirement was a primary aggravating element which motivated Petitioners’ objections, the *Petition* is directed not merely to that particular element, but to the entirety of Form 323. Still, the FCC’s focus on the 323/FRN Requirement warrants response because that effort illustrates the FCC’s maltreatment of the public and the Court here.

The FCC’s mootness and irreparable harm arguments are based largely, if not exclusively, on the claim that 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” Form 323. Opposition at 12. That claim is in turn based on language in a “pop-up” instruction box which appears when Form 323 is being completed (a process which occurs exclusively on-line through the FCC’s electronic filing process). *Id.* An image of that pop-up is included at page 10 of the Opposition.

As an initial matter, the language of the pop-up does *not* eliminate the 323/FRN Requirement. To the contrary, the pop-up text opens with the unequivocal admonition that “[r]espondents must provide an [FRN] for all persons and entities” referenced in the report. The form still requires respondents to “us[e] diligent and good-faith efforts” to obtain SSN-based FRNs.

As quoted in the Opposition, the pop-up now specifies that the submission of such FRNs is not required if the respondent “does not have permission” to use them. But that language first appeared on June 17, 2010 – *three days after the Court ordered the Commission to respond to the Petition* – as a proposed revision to the form in a submission to OMB. (Relevant materials obtained from the OMB website are included in the Addendum hereto.) That submission was *not* publicly announced<sup>3</sup> nor, as far as the public record indicates, was it formally approved by

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<sup>3</sup> Precisely when the revised pop-up language was actually included in the currently available on-line version of Form 323 is not clear. Presumably that did not happen until June 21 at the earliest, *i.e.*, the date on which OMB approved the revision. June 21 also happens to be the date on which the FCC’s response was  
(Footnote continued on next page)

the FCC. The timing of this new language’s arrival on the scene (and its sudden applicability to non-biennial reports – as to which the FCC had previously insisted on SSN-based FRNs exclusively) suggests that the revision was concocted to provide the FCC’s representatives in this case with something to say to the Court. Surprisingly, the Opposition fails to disclose that the pop-up language so crucial to the Opposition materialized only after the Court ordered a response to the *Petition*.

Further, in view of the apparent ease with which Form 323 can be revised – with no notice to anyone other than OMB – the permanence of the pop-up language relied on in the Opposition is dubious, particularly since, as we now know, the FCC is willing and able to effect such changes without explaining, or even announcing, the change before or after it is made.

Even if, *arguendo*, the 323/FRN Requirement *had* been eliminated by the new pop-up language, the Opposition is incorrect to state that it was the “*FCC*” that “made [that] clear”, Opposition at 12 – because the precise source of the pop-up language is a mystery: the Opposition cites to no formal agency action adopting, explaining or even announcing the new language, and Petitioners are unaware of any such action.

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(Footnote continued from preceding page)

originally due to be filed with this Court. (The Commission requested and was granted a two-day extension of that original deadline.)

The lack of any formal agency action – with respect to the new pop-up language or any other aspect of the revised Form 323, including the form itself – is fatal to the FCC’s position here. It is well-established that “courts may not accept appellate counsel’s *post hoc* rationalizations for agency action; . . . an agency’s discretionary order [must] be upheld, if at all, on the same basis articulated in the order by the agency itself.” *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-169 (1962). *See also, e.g., Communications & Control, Inc. v. FCC*, 374 F.3d 1329, 1336-1337 (D.C. Cir. 2004) (courts “cannot evaluate the reasonableness of an interpretation the Commission did not set forth”). Absent any formal agency adoption of the revised Form 323 (or the brand-spanking new pop-up language the Opposition relies on), all claims in the Opposition constitute nothing more than appellate counsel’s unacceptable *post hoc* rationalizations.

As a result, little time need be spent with respect to the Opposition’s arguments about procedural and substantive considerations. *See* Opposition at 15-18. The Opposition does claim that the 323/FRN Requirement “stem[s] directly from the Commission’s instruction to the [Media] Bureau.” *See* Opposition at 16, citing *Form 323 Order*, 24 F.C.C.R. 5896, 5908 (2009) (quoting a snippet referring to inadequacy of ownership data relative to “individuals [and] partnerships”). That citation is, at best, disingenuous. The language quoted in the Opposition referred to certain licensees – individuals, partnerships and the like – which had previously

not been required to file their own biennial ownership reports. Nothing in the cited decision suggested that the FCC contemplated that all non-licensee individuals with any “attributable” interest would be required to provide SSN-based FRNs.<sup>4</sup>

The Opposition also cites *In re Biennial Regulatory Review*, 14 F.C.C.R. 11476 (1999), to suggest that the Commission has previously held that all attributable interest holders are “doing business with” the Commission and thus subject to mandatory disclosure of their SSNs. Opposition at, *e.g.*, 7. That, too, is more than a little disingenuous because the cited agency action involved licensees in the *wireless* service, a service completely separate and distinct from the broadcast service. The definition of “attributable” interest in the wireless service was and remains different from the definition of that term applied to broadcasters. Compare 14 F.C.C.R. at 1148, ¶30, and 47 C.F.R. §73.3555, Note 2 (defining “attributable” interests in the broadcast service).<sup>5</sup> More than a decade ago, the Commission did impose the FRN requirement on all attributable interest holders *in*

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<sup>4</sup> The Opposition’s reliance on that citation is odd because Petitioners, in their initial mandamus petition (No. 09-1321, filed December 23, 2009, denied March 4, 2010), demonstrated that the FCC’s 2009 decision gave no hint of any 323/FRN Requirement. See *Petition* in No. 09-1321 at 9-12.

<sup>5</sup> As set out in *Biennial Regulatory Review*, “attributable” for wireless purposes means 10% or greater *owners*, as well as officers/directors who “personally exercise[ ] control over the licensee”. 14 F.C.C.R. at 11488, ¶30. By contrast, “attributable” for broadcast purposes includes owners of as little as 5% of the voting stock and *all* officers and directors. 47 C.F.R. §73.3555, note 2.

*the wireless service, see Biennial Regulatory Review, supra* – but only after a full notice-and-comment rulemaking. In the intervening decade the Commission has never even proposed, much less adopted, any similar requirement for broadcasters. Under these circumstances, broadcast licensees could not have guessed that attributable broadcast interest holders might be subject to SSN disclosure requirements without any notice or opportunity to comment.

The Opposition also confirms that the FCC failed to comply with the APA’s notice-and-comment rulemaking procedures relative to the revised Form 323. The *Petition* suggested that the FCC be invited to produce the notice of proposed rulemaking formally propounding the revised form, as well as the report and order adopting it. The Opposition offers no such document(s) – because none exists – and expressly concedes that the public “did not have an opportunity to submit comments to the Commission” about the revised Form 323. Opposition at 17. But the Opposition claims that commenters did have “a full chance” to comment before the OMB, giving them an opportunity “functionally equivalent to another round of notice and comment.” Opposition at 17. This, too, is a disingenuous claim.

First, the Opposition cites no authority for the unusual proposition that the FCC might delegate its APA responsibilities to another agency. The OMB, of course, has neither expertise nor authority to craft FCC rules, regulations, policies or forms. By the time a new/revised form is sent to OMB for its review (pursuant

to the Paperwork Reduction Act), the originating agency is supposed to have complied with its own APA obligations. In this case, that did not happen. The revised Form 323 was developed by the Media Bureau, in secrecy, with no notice or opportunity to comment at all.<sup>6</sup>

Moreover, when the revised form was finally unveiled on the OMB website, it was accompanied by an affirmatively misleading “supporting statement” from the FCC which again incorrectly stated that the proposed revisions raised no privacy or confidentiality concerns. That “supporting statement” was removed from the OMB website, and a substitute statement appeared in its place, in October, 2009, a month *after* the close of the OMB comment period. The latter statement acknowledged that privacy and confidentiality issues *were* presented by the revisions. Given these circumstances, how can the Opposition seriously

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<sup>6</sup> To be sure, a notice about the revisions was published in the Federal Register, 74 Fed. Reg. 27549 (June 10, 2009). But that notice failed to describe the proposed revisions and affirmatively misled potential commenters by flatly – and wrongly – stating that the revisions did not raise any privacy or confidentiality concerns. And while the notice specifically advised that a copy of the proposed form would be provided upon request, that, too, was wrong: the revised form was *not* made publicly available prior to its submission to OMB, even in response to multiple specific requests therefor.

suggest to this Court that the OMB comment period was “functionally equivalent” to a full notice-and-comment proceeding at the FCC?<sup>7</sup>

The Opposition also makes various claims about why the FCC supposedly believed SSN-based FRNs to be an “obvious”, “simple”, “necessary” mechanism for tracking the interests of all “attributable” interest holders. Opposition at 16-17. Since the FCC itself has not made those claims, the Court cannot accept them here. *See, e.g., Burlington Truck Lines, supra.* But Petitioners are constrained to point out that the FCC’s latter-day embrace of a *non*-SSN-based “special use FRN” – as evidenced by the pop-up language described above at 3-4 – establishes that that alternative is not only available, but apparently sufficient for the FCC’s purposes. And if it isn’t sufficient for those purposes, then any filings already submitted or to be submitted using the “special use FRN” can serve no useful purpose. The FCC can’t have it both ways.

In sum, the Opposition conclusively establishes that the revised Form 323 was developed and imposed on FCC regulatees in gross violation of the procedural requirements of the APA. Not only did the agency fail to provide adequate

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<sup>7</sup> In an effort to bolster this surprising claim, the Opposition (at 17) cites *United States Telecom Ass’n v. FCC*, 400 F.3d 29, 40-41 (D.C. Cir. 2005). In that case, the FCC itself had provided “crystal clear”, *id.*, notice of the proposal and ample opportunity for comment on that proposal. The rejected appellant complained merely that the invitation for comments had not been titled a “notice of proposed rulemaking”. That case is dramatically distinguishable from the instant matter.

opportunity for notice and comment, it repeatedly and affirmatively misled the public about the proposed revisions. And it left no record of the basis for the revisions which might be susceptible to effective judicial review. Under these circumstances, the revised form is nothing more than a nullity and broadcasters cannot legitimately be required to submit the form.<sup>8</sup>

In view of the foregoing, Petitioners renew their request for issuance of a writ of mandamus compelling the FCC to stay the implementation of revised Form 323 unless and until the agency can demonstrate that it has complied with its statutory obligations.

Respectfully submitted,

/s/ Harry F. Cole  
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June 25, 2010

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<sup>8</sup> Since the revised form cannot lawfully be imposed on broadcasters, it is not their burden to show any irreparable harm here. Having established the form's threshold invalidity, Petitioners need show nothing more.

**Addendum to  
Reply to Opposition to Petition for a Writ of Mandamus  
No. 10-1117**

The accompanying materials were obtained from the website of the Office of Management and Budget, Office of Information and Regulatory Affairs, on June 25, 2010.

The page immediately following this explanatory page shows the initial screen displayed when OMB's system is queried about recently completed reviews relating to FCC Form 323.

The second page following this explanatory page shows the screen displayed when the link to [View Supporting Statement and Other Documents](#) on the initial screen is clicked.

The third and fourth pages following this explanatory page show the screen displayed when the link to [FRN Pop-up Box Text \(6-17-2010\).doc](#) on the second screen is clicked.

View Information Collection Request (ICR) Package - Mozilla Firefox

http://www.reginfo.gov/public/do/PRAViewICR?ref\_nbr=201006-3060-006

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Please note that the OMB number and expiration date may not have been determined when this Information Collection Request and associated Information Collection forms were submitted to OMB. The approved OMB number and expiration date may be found by clicking on the Notice of Action link below.

### View ICR - OIRA Conclusion

OMB Control No: 3060-0010 ICR Reference No: 201006-3060-006  
 Status: Active Previous ICR Reference No: [201003-3060-025](#)  
 Agency/Subagency: FCC Agency Tracking No: MB  
 Title: Ownership Report for Commercial Broadcast Station, FCC Form 323  
 Type of Information Collection: No material or nonsubstantive change to a currently approved collection  
 Type of Review Request: Regular  
 OIRA Conclusion Action: Approved without change Conclusion Date: 06/21/2010  
[Retrieve Notice of Action \(NOA\)](#) Date Received in OIRA: 06/17/2010

Terms of Clearance:

	Inventory as of this Action	Requested	Previously Approved
Expiration Date	10/31/2012	10/31/2012	10/31/2012
Responses	9,250	9,250	9,250
Time Burden (Hours)	38,125	38,125	38,125
Cost Burden (Dollars)	26,940,000	26,940,000	26,940,000

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### ICR Documents

**Supporting Statement A**

Document	Date Uploaded
<a href="#">Supporting Statement MB 3060-0010 (Amended)(October 2009)(Final).doc</a>	10/16/2009

**Supporting Statement B**

Document	Date Uploaded

**Supplementary Documents**

Title	Document	Document Type	Date Uploaded
Nonsubstantive Change Request	<a href="#">FRN Pop-up Box Text (6-17-2010).doc</a>	Justification for No Material/Nonsubstantive Change	06/17/2010

**Public Comments**

Author Name	Comment Document	Author Affiliation	Sponsoring Org.	Type	Category	Date of Comment	Date Comment Received

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**FCC Form 323—OMB Control No. 3060-0010**  
**Changes to Pop-up Box Text, Section II-A and Section II-B**

The Commission is requesting a non-substantive change request to collection 3060-0010, FCC Form 323. The changes are basically word edits to clarify previously approved language that was used in Form 323. The edited language makes it clear that if a filer has a social security number for a person listed on the form but does not have permission to use it to obtain an FRN that the filer can use the Special Use FRN feature. Also, the Commission added the Special Use FRN feature to the non-biennial section (it used to be on the biennial section only). The ultimate result will possibly lessen the burden on the public - this feature makes it easier to file non-biennial reports.

**Current Text (Currently appears in Section II-B Only):**

Respondents must provide an FCC Registration Number (FRN) for all persons and entities reported in Question 3(a) of this Report. If, 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, Respondent may click on the button below to generate an interim ‘Special Use FRN’ solely for the purposes of completing this Report. Respondents selecting this option should first read the Commission’s Form 323 Frequently Asked Questions concerning the ‘Special Use FRN’, available at [http://www.fcc.gov/bureaus/mb/industry\\_analysis/form323faqs.html](http://www.fcc.gov/bureaus/mb/industry_analysis/form323faqs.html).

NOTE: The ‘Special Use FRN’ generated by selecting the button may be used only to file this biennial ownership report on FCC Form 323 and may not be used for any other purpose at the FCC. Respondents who use a non-SSN based ‘Special Use FRN’ will be deemed fully compliant with the Form 323 filing obligation for purposes of this initial filing and the lack of SSN-based FRNs in response to Question 3(a) will not subject Respondents to enforcement action. To proceed with generating the ‘Special Use FRN’, select the button (‘OK’) below.

**Proposed Text (Would appear in both Sections II-A and II-B):**

Respondents must provide an FCC Registration Number (FRN) for all persons and entities reported in Question 3(a) of this Report. If, 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. Respondents selecting this option should first read the Commission’s Form 323

Frequently Asked Questions concerning the 'Special Use FRN', available at [http://www.fcc.gov/bureaus/mb/industry\\_analysis/form323faqs.html](http://www.fcc.gov/bureaus/mb/industry_analysis/form323faqs.html).

NOTE: The 'Special Use FRN' generated by selecting the button may be used only to file an ownership report on FCC Form 323 and may not be used for any other purpose at the FCC. Respondents who use a non-SSN based 'Special Use FRN' will be deemed fully compliant with the Form 323 filing obligation for purposes of this filing and the lack of SSN-based FRNs in response to Question 3(a) will not subject Respondents to enforcement action. To proceed with generating the 'Special Use FRN', select the button ('OK') below.

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

In re Fletcher, Heald & Hildreth, P.L.C., *et al.*  
Case No. 10-1117

**CERTIFICATE OF SERVICE**

I, Harry F. Cole, hereby certify that on June 25, 2010, I electronically filed the foregoing “Reply to Opposition to Petition for a Writ of Mandamus” with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. Counsel for the Federal Communications Commission, who is a registered CM/ECF user, will receive service through the CM/ECF system.

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