

MAY 28 2010 THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT  
**RECEIVED**

In re )  
)  
Fletcher, Heald & Hildreth, P.L.C., )  
the Alabama Broadcasters Association, )  
the Alaska Broadcasters Association, the )  
Arkansas Broadcasters Association, Hubbard )  
Broadcasting, Inc., the Louisiana Association )  
of Broadcasters, the Mississippi Association )  
of Broadcasters, the New Mexico Broadcasters )  
Association, Salem Communications )  
Corporation, and Spring Arbor University )  
)  
*Petitioners* )

Case No. 10-1112

**PLEASE STAMP  
AND RETURN  
THIS COPY TO DAK  
FLETCHER, HEALD & HILDRETH**

**SECOND PETITION FOR WRIT  
OF MANDAMUS AND/OR PROHIBITION**

HARRY F. COLE  
ANNE GOODWIN CRUMP  
DAN KIRKPATRICK

Fletcher, Heald & Hildreth, P.L.C.  
1300 N. 17th Street – 11th Floor  
Arlington, Virginia 22209  
703-812-0400

May 28, 2010

Pursuant to 28 U.S.C. §§1651(a) (the All Writs Act) and 2342(1), 47 U.S.C. §402(b), Rule 21 of the Federal Rules of Appellate Procedure, and Rule 21 of the Rules of this Court, the law firm of Fletcher, Heald & Hildreth (“FHH”); the Alabama Broadcasters Association, the Alaska Broadcasters Association, the Arkansas Broadcasters Association, the Louisiana Association of Broadcasters, the Mississippi Association of Broadcasters, and the New Mexico Broadcasters Association (the “Association Petitioners”); and Hubbard Broadcasting, Inc., Salem Communications Corporation, and Spring Arbor University (the “Licensee Petitioners”), hereby petition the Court to issue a writ prohibiting the Federal Communications Commission (“Commission” or “FCC”) from implementing its revised biennial ownership report (Form 323) for commercial broadcasters unless and until the FCC demonstrates that that revised form was adopted in conformity with all applicable requirements, including those of the Administrative Procedure Act, 5 U.S.C. §551 *et seq.* (the “APA”) and the Privacy Act, 5 U.S.C. §552a. As set forth below, the need for such a writ is consistent with this Court’s Order of March 4, 2010 (“*March 4 Order*”) denying an earlier Emergency Petition for Writ of Mandamus Staying Administrative Proceedings (“First Mandamus Petition”) filed by FHH, the Alabama Broadcasters Association, the Alaska Broadcasters Association, the Arkansas Broadcasters Association, the Kentucky Broadcasters Association, the Louisiana Broadcasters Association, the Mississippi Association

of Broadcasters, the New Mexico Broadcasters Association, the Puerto Rico Radio Broadcasters Association, the South Carolina Broadcasters Association and the Tennessee Association of Broadcasters on December 23, 2009. *See In re: Fletcher, Heald & Hildreth, P.L.C., et al.*, Case No. 09-1321 (order denying petition filed on March 4, 2010).<sup>1</sup> The *March 4 Order* appears to be based on the erroneous assumption that the agency's processes in this matter are functioning normally. That has heretofore not been the case, however, and it continues not to be the case.

#### **I. Issue Presented**

As described in the First Mandamus Petition, the FCC (through its Media Bureau ("Bureau")) has developed certain revisions to Form 323 in clear violation of the APA and the Privacy Act, 5 U.S.C. §552a. The revised form imposes burdens never subject to notice and comment rulemaking proceedings; its implementation threatens the privacy of thousands by forcing them, without justification, to disclose their social security numbers ("SSNs") to the FCC. In fact, far from providing the public with adequate notice of proposed revisions, the

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<sup>1</sup> A copy of the *March 4 Order* is included as Attachment A hereto. The First Mandamus Petition is on file with this Court and is hereby incorporated by reference.

Commission affirmatively misled the public about those revisions for several months.

Imposition of the revised form places all commercial broadcast licensees in the position of having to ensure that their “attributable”<sup>2</sup> principals – and the “attributable” principals of any organizations which hold “attributable” ownership interests in the licensee – disclose their SSNs to the FCC, since without such disclosure those licensees will be unable to comply fully with the FCC’s reporting requirements.

On December 23, 2009, the Bureau indefinitely suspended the deadline for filing the revised Form 323. *Order*, DA 09-2618, released December 23, 2009. However, by public notice released on April 8, 2010, the Bureau lifted that suspension and announced that all commercial broadcast licensees would have to

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<sup>2</sup> The FCC treats as “attributable” not only majority (*i.e.*, 50% or greater) ownership interests in licensees, but also, *inter alia*, all general and many limited partnership interests, all members of LLC licensees, holders of five percent or more of a corporate licensee’s stock, and *all* officers and directors of a licensee. *See, e.g.*, 47 C.F.R §73.3555, Note 2 (2008); Revised Form 323 Instructions. The attribution standards also apply to individuals and entities who hold indirect interests in broadcast licensees (*i.e.*, through intermediate holding companies). For example, if a corporation (“Corporation A”) happens to own a 20 percent ownership interest in a corporate licensee, then all of Corporation A’s officers, directors and 25 percent or greater shareholders would be deemed to hold attributable interests in the licensee, and they would all be required, under the revised Form 323, to obtain and report their own SSN-based FCC Registration Numbers (FRNs).

file ownership reports on the revised Form 323 no later than July 8, 2010. *Public Notice*, DA 10-613, released April 8, 2010 (“*April 8 Public Notice*”). That notice, a copy of which is included as Attachment B hereto) did not even mention, much less resolve, any of the substantive issues which had been raised about the revised form. It is therefore clear that the Commission intends to proceed with the imposition of the revised Form 323 without further ado – and without addressing (much less correcting) the substantial shortcomings in the process which led to the revisions to the form.

The FCC should be prohibited from implementing revised Form 323 unless and until the agency can demonstrate compliance with the requirements of the APA and the Privacy Act.

## **II. Jurisdiction**

This court has jurisdiction to review actions of the Commission, *e.g.*, 47 U.S.C. §402, 28 U.S.C. §§2342, 2343. The Court may issue extraordinary writs both in aid of the Court’s jurisdiction and to compel an agency to take, or refrain from taking, action when the agency’s duty to do so is clear. *See Potomac Electric Power Co. v. Interstate Commerce Commission*, 702 F.2d 1026, 1032 (D.C. Cir. 1983). The court’s *March 4 Order* confirms that the subject matter in question – *i.e.*, the revisions to Form 323 – would be subject to judicial review if the matter were the subject of normal administrative proceedings leading to the issuance of a

final agency order. But, as developed more fully below, there have been no normal administrative proceedings here and there is no expectation that a final agency order in this matter will be issued – and certainly not prior to the July 8, 2010 deadline now set for the filing of revised Form 323. In view of these circumstances, this court has jurisdiction to provide the relief sought herein.

### **III. Standing**

The Licensee Petitioners have standing to file this petition as commercial broadcast licensees or entities who hold attributable interests in commercial broadcast licensees subject to the FCC's regulatory authority. The Licensee Petitioners will be obligated to file Ownership Reports – including SSN-based FRNs – on the revised Form 323 and accordingly have standing to seek judicial protection from the Commission's insistence that they file on the revised form.

The Association Petitioners have standing to file this petition on behalf of their members. Each of the Association Petitioners is a trade association comprised of broadcast licensees, all of whom are subject to the FCC's regulatory authority and many of whom are commercial broadcasters obligated to file Ownership Reports – including SSN-based FRNs – on the revised Form 323. Those commercial broadcasters would thus have standing to seek judicial protection from the Commission's insistence that they file on the revised form.

FHH is a law firm representing broadcast licensees who are required to file Form 323. The Association Petitioners represent the interests of their members, and FHH represents the interests of its broadcast clients, with respect to governmental policy issues.<sup>3</sup>

As long as they are required to file the revised Form 323, Licensee Petitioners, Association Petitioners' members, and FHH's clients will continue to suffer immediate injury-in-fact, directly caused by the failure of the FCC to fulfill its statutory duties. That injury is redressable by this Court: an order from the Court directing the agency to stay implementation of the revised form would provide appropriate relief to affected broadcasters. *See Sierra Club v. E.P.A.*, 292 F.3d 895, 898 (D.C. Cir. 2002); *American Library Ass'n v. FCC*, 401 F.3d 489, 492-93 (D.C. Cir. 2005).

#### **IV. Facts Necessary To Understanding Issue Presented**

The factual predicate underlying this petition is essentially the same as the predicate underlying the First Mandamus Petition. As such, it is a matter of recent

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<sup>3</sup> If the Licensee Petitioners were not parties to this case, in view of the nature of the claim being asserted and the relief being sought, it does not appear that the participation of any individual member of any of the Association Petitioners would be necessary here. *See, e.g., Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 344 (1977) (associational standing recognized where request for declaratory and injunctive relief did not "require individualized proof" and was "thus properly resolved in a group context")

record before the Court and will not be revisited in detail. In brief, the relevant facts are as follows.

Commission licensees have long been required to submit periodic reports disclosing their ownership structures and identifying all “attributable” interest holders. As indicated in Footnote 2, *supra*, the FCC’s definition of “attributable” is expansive and extends to individuals with minimal actual interest in (let alone control of) the reporting licensee.

Since 2001, each licensee has been required to obtain and report an FCC Registration Number (“FRN”) when doing business with the Commission. In order to obtain an FRN, an individual who is a licensee must provide the FCC his/her social security number (“SSN”); business entities must provide their taxpayer or employer identification numbers, *i.e.*, the organizational equivalent of SSNs. For purposes of previous versions of Form 323, licensees have been required to disclose only *their own* FRNs. The FCC has not previously required non-licensee individuals to obtain their own FRNs simply because they happen to hold some “attributable” position(s) in a licensee.

In March 2008, the Commission proposed revising Form 323 to “increase the accuracy of the data collected and the potential uses for the form.” *See Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Third Further Notice of Proposed Rulemaking, 23 F.C.C.R. 5922 (2008)

(“3rd FNPRM”). The 3rd FNPRM included no proposals – explicit or implicit, vague or specific – that even hinted at any requirement that *all* attributable principals might be required to obtain SSN-based FRNs in order to comply with any revised Form 323 requirements.

After receiving public comment on the limited revisions which *were* proposed in the 3rd FNPRM, the Commission released the *Report and Order and Fourth Further Notice of Proposed Rulemaking*, 24 F.C.C.R. 5896 (2009) (“4th FNPRM”). The Commission there adopted certain changes to its ownership reporting requirements, and delegated authority to the Bureau to create a new Form 323 incorporating those changes. Although the 4th FNPRM adopted a requirement that every *entity* holding an attributable interest obtain and report an FRN, it made no mention of expanding the FRN reporting requirement to include all attributable individuals in all reporting entities.

On June 10, 2009, the Bureau published a notice in the Federal Register announcing that, pursuant to the delegation of authority in the 4th FNPRM, the Bureau had made a number of changes to the Form 323; that notice affirmatively stated the changes had no impact on privacy, and that, consequently, there was no need for confidentiality with the revised requirements. *Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested*, 74 Fed. Reg. 27549 (June 10, 2009). The

notice invited public comment on the revised Form 323 – but undermining that invitation was the fact that the notice did *not* include a copy of the revised form for review. Similarly, the notice expressly invited interested members of the public to contact the Commission to obtain a copy of the proposed form – but despite repeated requests made pursuant to the terms of the invitation, the Commission declined to make available the revised form for review.

On August 11, 2009, the revised Form 323 finally became available for public review after the Bureau submitted it to the Office of Management and Budget (“OMB”) for approval and the OMB posted a copy to its website. As revised, the form requires that *all* individuals holding attributable interests obtain and report an FRN on Form 323 (the “323/FRN Requirement”).

Oddly, a “Supporting Statement” submitted by the FCC to OMB with the form (and posted on the OMB website) asserted that “there is no need for confidentiality with this collection of information” and “[t]his information collection does not address any private matters of a sensitive nature.”<sup>4</sup> As indicated above, in order to obtain an FRN, a person must first submit his/her SSN to the FCC. It is beyond dispute that SSNs constitute private, personal information

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<sup>4</sup> As explained in the First Mandamus Petition, the Supporting Statement described above has since been removed from the OMB website (First Mandamus Petition at 16, n.12). A copy of that Supporting Statement was included as Attachment F to the First Mandamus Petition.

of the most sensitive nature, as to which confidentiality is paramount. Since the required submission of individuals' FRNs requires, as a threshold matter, the submission of SSNs, the FCC's claims were plainly wrong.

In response to the clearly inaccurate representations in the FCC's "Supporting Statement", a number of parties filed comments with OMB. On October 8, 2009, Walter Boswell, the "Acting Associate Managing Director, PERM", submitted a letter to OMB defending the 323/FRN Requirement.<sup>5</sup> This letter, the legal significance of which is, at best, dubious, marked the first formal acknowledgement of the 323/FRN Requirement, and the first attempt to advance any explanation or justification for that requirement.

On October 16, 2009, the Commission released a *Memorandum Opinion and Order and Fifth Further Notice of Proposed Rulemaking*, 24 F.C.C.R. 13040 (2009) ("*5th FNPRM*") in which it (a) rescinded one change it had expressly adopted to the Form 323, and (b) invited comment on other possible changes. The Commission did not expressly mention the 323/FRN Requirement at all. The only arguable, indirect reference to that requirement appeared in Footnote 20, which read in its entirety as follows:

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<sup>5</sup> A copy of Boswell letter is included as Attachment G to the First Mandamus Petition.

In the [4th FNPRM], the Commission stated that each filing entity must identify by FRN the entity below it in the chain. 323 Order, 24 FCC Rcd at 5908 ¶ 21. It also delegated authority to the staff to revisit this issue to determine whether additional modifications of the form are necessary. In the process of modifying Form 323 on delegated authority, the Bureau determined that it was necessary to expand the class of FRNs to be included to ensure the usefulness of the data.

To the extent the Commission's reference to "expand[ing] the class of FRNs to be included" might be generously interpreted as a reference to the 323/FRN Requirement, the reference establishes conclusively that that requirement had not previously been addressed by the Commission. Rather, the requirement was a product of the Bureau's "determin[ation]" made during the "process of modifying Form 323", a process which occurred only *after* the issuance of the 4th FNPRM.

Simultaneously with the release of the *MO&O/5thFNPRM*, a "Revised Supporting Statement" appeared on the OMB website. That unsigned, unattributed statement acknowledged that the revised Form 323 *would* require the submission of personally identifiable information, thereby triggering requirements under federal rules and regulations regarding privacy.

On October 19, 2009, OMB approved the revised Form 323; the Bureau then set a filing deadline of December 15, 2009. On November 16, 2009, FHH filed a motion for stay of the deadline with the FCC. On November 23, without reference to FHH's motion, the Bureau extended the deadline to January 11, 2010. *Media Bureau Extends the Biennial Filing Deadline for the Commercial Broadcast*

*Ownership Report, Public Notice*, 24 F.C.C.R. 14055 (2009). On November 30, 2009, out of an abundance of caution, FHH filed a “Petition for Reconsideration or Such Alternative Relief As May Be Appropriate” with the FCC.<sup>6</sup>

With the January 11, 2010 deadline looming and no indication that the FCC intended to act on either FHH’s motion or petition, the First Mandamus Petition was filed on December 23. Later the same day, the Bureau released an Order indefinitely suspending the January 11 filing deadline for biennial ownership reports due to technical issues with the electronic filing system through which the Form 323 must be filed. *Order*, 24 F.C.C.R. 14628 (2009). That Order did not address, or even acknowledge the existence of, the serious legal flaws underlying the adoption of the 323/FRN Requirement, although the Order did summarily dismiss FHH’s motion for stay as moot.

On March 4, 2010, this Court denied the First Mandamus Petition.

In the *April 8 Public Notice*, the Bureau lifted the suspension of the filing requirement and made only “technical” revisions to the Form 323. *April 8 Public Notice* at 1. No change has been made to the 323/FRN Requirement, nor have its

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<sup>6</sup> As set out in that Petition (a copy of which was included as Attachment C to the First Mandamus Petition), FHH recognized that, up to that point, the agency had taken no formal action adopting the 323/FRN Requirement that might be properly subject to reconsideration or review. The Petition for Reconsideration was filed to avoid any possible claim by the FCC that it had not been given a timely opportunity to address the issues raised therein.

infirmities been acknowledged or discussed. Although minor changes to the form were uploaded to the OMB website on March 25, 2010 – including revision of the form’s instructions regarding the use of “Special Use FRNs” – the Commission stated in that OMB submission that the change was designed merely to “clarify” the instructions and that the change was “non-substantive.” See Nonsubstantive change request for 3060-0010 (Form 323).doc, posted at

[http://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=201003-3060-025](http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201003-3060-025).

Notwithstanding that “clarif[ication]”, the form continues to require the submission of SSN-based FRNs for all individuals holding attributable positions or interests in a licensee.<sup>7</sup>

In short, the Commission has done nothing to address any of the issues raised by FHH regarding the Commission’s failure to comply with the procedural and substantive protections established by the APA and the Privacy Act in connection with the imposition of the 323/FRN Requirement. What the

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<sup>7</sup> As revised, the form does permit the use of “Special Use FRNs” not involving SSNs, but *only* 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.” See Nonsubstantive change request for 3060-0010 (Form 323).doc, posted at [http://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=201003-3060-025](http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201003-3060-025) (viewed May 13, 2010). In other words, the “Special Use FRN” may not be used by those whose SSNs are available but who are reluctant to provide them to the FCC.

Commission has done, however, is set a date-certain (July 8, 2010) by which any resolution of those issues would be moot. By that date, affected individuals will have had to face the choice of either (a) submitting their SSNs to the Commission or (b) facing potential enforcement action for failure to comply with the 323/FRN Requirement. Moreover, many licensees are *already* facing that choice now, as certain triggering events, such as an assignment of licenses or transfer of control of a licensee, require the filing of non-biennial ownership reports. Such non-biennial reports require the provision of SSN-based FRN's for all attributable interest holders, without exception.

#### **V. Reasons for Issuance of the Writ**

Mandamus relief is warranted 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.” *E.g., Northern States Power Co. v. U.S. Dep’t of Energy*, 128 F.3d 754, 758 (D.C. Cir. 1997) (“*Northern States*”).

The petitioners here are asserting a right to procedural regularity, in compliance with the APA and the Privacy Act. Petitioners are clearly entitled to such relief. Similarly, the FCC is plainly subject to the procedural duties imposed by the APA as well as the Privacy Act’s mandate to collect individuals’ private information only when “relevant and necessary” to accomplish a legitimate purpose. Nowhere in this proceeding has the Commission shown that the

collection of highly confidential information from thousands of individuals, including directors and minor officers of indirect attributable interest holders unlikely to be involved in the day-to-day operations of a licensee, is “relevant and necessary” to any purpose.

The question, then, is whether the petitioners have any other adequate remedy available. In denying the First Mandamus Petition, the court addressed this in an order which read, *in toto*, as follows:

Petitioners have failed to demonstrate that they have no other adequate means to obtain the relief requested. Northern States Power Co. v. U.S. Dep’t of Energy, 128 F.3d 754, 758 (D.C. Cir. 1997). After the completion of the pending administrative proceedings, petitioners may seek judicial review of the Federal Communications Commission’s final order. See 28 U.S.C. §2342; Association of Flight Attendants, CWA v. Chao, 493 F.3d 155, 159-60 (D.C. Cir. 2007).

It is fair to conclude from this that the court believed that there are “pending administrative proceedings” relative to the 323/FRN Requirement that will lead to issuance of a final order of which judicial review could then be sought. And to be sure, regular agency proceedings would ordinarily warrant precisely that result.

But the “proceedings” relative to the 323/FRN Requirement have been anything but regular.

As discussed above, the 323/FRN Requirement was never proposed in any form by the Commission, nor was it ever formally adopted by the Commission, nor did the Commission provide any explanation of its basis or purpose – despite the

fact that the 323/FRN Requirement constituted, in effect, a new rule subject to the rulemaking requirements of the APA, 5 U.S.C. §553.<sup>8</sup>

The Bureau withheld the revised form from public review even though it wrongly claimed, in the June 10, 2009 Federal Register public notice, that the public could review the form. The Federal Register notice also wrongly asserted that the revised form did not entail disclosure of any confidential or private information. And months later, when the form was finally revealed (by OMB, not the Commission), it was accompanied by a statement from the Commission which again wrongly asserted that no confidentiality or privacy interests were implicated by the revised form. That initial statement was later replaced – without notice or explanation – by a revised “supporting statement” which conceded that, in fact, substantial confidential/privacy concerns are implicated by the revised form.

To date the only venue where the 323/FRN Requirement has been substantively addressed by anyone<sup>9</sup> from the Commission has been the OMB.

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<sup>8</sup> Starkly illustrating the wholesale lack of notice, one Commissioner, upon learning of the 323/FRN Requirement in November, 2009, was quoted in the trade press as saying “[h]ad I known when I voted [in the 4th FNPRM] in favor of collecting more data about the race and gender of broadcast owners that the process also would involve collection of Social Security numbers, I would not have endorsed using that means to what remains a worthwhile end.” “McDowell ‘Very Troubled’ By Social Security Number Collection”, *Broadcasting and Cable*, November 24, 2009.

<sup>9</sup> Neither of the two “supporting statements” filed with OMB by the FCC was  
(Footnote continued on next page)

The Commission itself has thus far declined even to acknowledge, much less resolve, the infirmities in the 323/FRN Requirement.

Despite all this, the Bureau is insisting that all commercial broadcast licensees must submit ownership reports on the revised Form 323, containing the 323/FRN Requirement, by July 8.

If the court doubts the accuracy of the foregoing description of the nonexistent agency “proceedings” below, we urge the court to order the FCC to produce copies of the following: (a) the notice of proposed rulemaking in which the 323/FRN Requirement was supposedly proposed; and (b) the report and order (or other formal action by the Commission) in which the 323/FRN Requirement was supposedly adopted and explained by the Commission. If those documents exist, then the court’s assumption that administrative regularity prevails here may be valid.

But if those documents do not exist – as petitioners believe to be the case <sup>10</sup> - then any reliance on notions of administrative regularity are sorely misplaced here.

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*(Footnote continued from preceding page)*

attributed to any particular author or office within the Commission, so it’s impossible to determine whether they reflect the position of a majority of Commissioners or simply the views of the unidentified author.

<sup>10</sup> As indicated above, the lack of any notice of proposed rulemaking describing and inviting comment on the 323/FRN Requirement appears to have been effectively conceded by the Commission. *See text, supra* at 10-11, addressing the  
*(Footnote continued on next page)*

The two cases cited in the court's order (quoted above) are not to the contrary. In *Northern States*, the court declined to grant broad mandamus relief against the Department of Energy because the petitioners had a valid contract claim that they could independently assert against the Department. That claim would, in the court's view, afford those petitioners their desired relief without the need for a broad writ of mandamus. (It should be noted, though, that notwithstanding the availability of that contract claim, the court did provide the petitioners some narrow mandamus relief.)

*Northern States* is plainly distinguishable from the instant case. Here the petitioners have no alternate means of securing relief from the unlawful 323/FRN Requirement. Unlike *Northern States*, there is no separate contract claim or other mechanism that petitioners might invoke here.

The second case cited in the court's order – *Association of Flight Attendants CWA v. Chao*, 493 F.3d 155 (D.C. Cir. 207) (“*Chao*”) – actually supports petitioners' position here. In *Chao*, petitioners sought mandamus relief against the Department of Labor and the FAA. The court rejected that effort, noting that the petitioners had failed to seek action from the agencies through standard administrative processes before invoking the mandamus option. The court

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(Footnote continued from preceding page)  
Commission's footnote reference to FRNs in the 5th FNPRM.

concluded that the petitioners had failed to exhaust their administrative remedies and therefore denied mandamus relief.

In the instant case, the FCC has engaged in an administrative shell game which has prevented effective participation by anyone with respect to the 323/FRN Requirement. No notice of proposed rulemaking, no formal adoption, no explanation, no opportunity to review the revised draft form – without these rudiments, the result was a travesty of the administrative process. The petitioners here would have happily participated in proper administrative proceedings with respect to the 323/FRN Requirement – but the FCC made that impossible.

And despite the irregularity of the FCC's approach below, the petitioners have nonetheless given the FCC the opportunity to address the issues – first in the context of FHH's motion for stay, later in the context of its petition for reconsideration, both filed more than five months ago. The Commission has not availed itself of that opportunity since FHH's filings. To the contrary, the agency is plowing ahead with the imminent imposition of the 323/FRN Requirement. Even the *Chao* court recognized that futility may justify judicial intervention through mandamus. *See Chao*, 493 F.3d at 159.

Another factor that *Chao* recognized as a potential basis for mandamus relief was the presence of irreparable harm. *Id.* In the instant case the risk of such harm is undeniable. In order to comply with the 323/FRN Requirement, thousands of

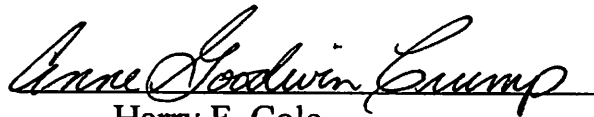
individual “attributable principals” will have to submit their SSNs to the FCC.

Once their SSNs have been submitted, those individuals will be subject to the risks inherent in the inclusion of such personal information in potentially hackable databases. The damage will be done, and will be largely irreversible, even if the FCC eventually issues an appealable order formally adopting the 323/FRN Requirement and, on appeal, that order is reversed. Under these circumstances, it is important for the court to act now, before the adverse effects of the 323/FRN Requirement arise.

**VI. Conclusion**

In view of the unusual circumstances in this case, the need exists for immediate judicial action and there is no other adequate remedy available. This Court should issue a writ of mandamus compelling the FCC to stay the implementation of the revised Form 323 unless and until the agency can demonstrate that it has complied with its statutory obligations.

Respectfully submitted,



Harry F. Cole  
Anne Goodwin Crump  
Dan Kirkpatrick

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Counsel for Petitioners

May 28, 2010

# **ATTACHMENT A**

**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

**No. 09-1321**

**September Term 2009**

**FCC-DA09-2475**

**Filed On: March 4, 2010**

In re: Fletcher, Heald & Hildreth, P.L.C., et al.,

Petitioners

**BEFORE:** Henderson, Tatel, and Garland, Circuit Judges

**ORDER**

Upon consideration of the petition for writ of mandamus and the supplement thereto, it is

**ORDERED** that the petition be denied. Petitioners have failed to demonstrate that they have no other adequate means to obtain the relief requested. Northern States Power Co. v. U.S. Dep't of Energy, 128 F.3d 754, 758 (D.C. Cir. 1997). After the completion of the pending administrative proceedings, petitioners may seek judicial review of the Federal Communications Commission's final order. See 28 U.S.C. § 2342; Association of Flight Attendants, CWA v. Chao, 493 F.3d 155, 159-60 (D.C. Cir. 2007).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

**Per Curiam**

# **ATTACHMENT B**



# PUBLIC NOTICE

Federal Communications Commission  
445 12<sup>th</sup> St., S.W.  
Washington, D.C. 20554

News Media Information 202 / 418-0500  
Internet: <http://www.fcc.gov>  
TTY: 1-888-835-5322

DA 10-613

Released: April 8, 2010

## MEDIA BUREAU ANNOUNCES REVISED FORM 323 WILL BE AVAILABLE ONLINE ON APRIL 9, 2010, AND SETS NEW FILING DEADLINE OF JULY 8, 2010

MB Docket No. 07-294, et al.

The Media Bureau announces that the revised Ownership Report for Commercial Broadcast Stations, FCC Form 323, will be available for public use on the Commission's electronic filing system on **April 9, 2010**. Filers required to complete a biennial ownership report may create and file new electronic copies of the form on the Bureau's Consolidated Database System (CDBS) on and after that date. In addition, the new deadline for filing biennial ownership reports for commercial broadcast stations is **July 8, 2010**.

On December 18, 2009, a number of counsel and legal assistants to various commercial broadcasters and commercial broadcaster organizations (the "Broadcast Counsel") filed an Ex Parte Notice and Request for Relief, asking that the Bureau adopt changes to Form 323, including amending Section II-B Question 3(c) of the form to allow filers to respond by uploading machine-readable data instead of requiring manual data entry of the responses to the question.<sup>1</sup> The Broadcast Counsel also asked that the January 11, 2010 filing date be suspended until improvements to the form were complete. On December 23, 2009, the Bureau suspended the January 11th filing deadline pending completion of technical improvements to the form.<sup>2</sup> The Bureau also announced that it would provide at least 90 days to file the revised form once it was made available again for biennial filings, and that the new deadline would be announced in a Public Notice.

The Bureau has completed its planned technical improvements to the form, including the provision of a machine-readable spreadsheet for use in completing the data entry required in Question 3(c) of Section II-B. By this Notice, Respondents are advised that the revised and improved Form 323 will be available on CDBS for biennial filings on April 9, 2010, and that the new filing deadline for filing biennial ownership reports for commercial broadcast stations<sup>3</sup> is

<sup>1</sup> "MB Docket No. 07-294, Ex Parte Notice and Request for Relief," filed December 18, 2009 (the "Request"). The Request was signed by representatives of 14 law firms and the National Association of Broadcasters. In addition, on December 21, 2009, Simmons Media Group filed a letter in support of the Request.

<sup>2</sup> *In re Promoting Diversification in the Broadcasting Services*, Order, DA 09-2618 (Media Bureau, Rel. Dec. 23, 2009).

<sup>3</sup> The revised Form 323 and new biennial reporting requirements only apply to licensees and entities holding attributable interests in licensees of commercial broadcast stations. The biennial filing schedules and separate form (323-E) for noncommercial educational (NCE) stations remain unchanged.

**July 8, 2010.** Please note that although the filing deadline has been extended, the information required to be listed on the form must reflect ownership interests existing as of November 1, 2009. Filers are strongly encouraged to file as early as possible and to complete their Form 323 filings well in advance of the July 8, 2010 filing deadline.

Filers seeking additional advice on how to complete the form should consult the information contained in the form instructions (available on CDBS and on the Commission's website at <http://www.fcc.gov/formpage.html>) and should review the information on the Bureau's Form 323 website, <http://www.fcc.gov/form323>. The Form 323 website contains links to prior orders and notices and includes "Frequently Asked Questions" (FAQ) about the form and its electronic filing capabilities. If you require additional advice on completing Form 323, please contact the Bureau via email at [Form323@fcc.gov](mailto:Form323@fcc.gov).


For further information, please contact Kristi Thompson, Industry Analysis Division, (202) 418-2330. Press inquiries should be directed to Janice Wise, (202) 418-8165.

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## CERTIFICATE OF SERVICE

I hereby certify that, on this 28th day of May 2010, I caused a copy of the foregoing "Second Petition for Writ of Mandamus and/or Prohibition" to be transmitted electronically and by hand delivery to the following:

Austin Schlick, General Counsel (austin.schlick@fcc.gov)  
Federal Communications Commission  
445 12th Street, S.W. - Room 8-A741  
Washington, DC 20554

  
Anne Goodwin Crump