



**October 2009**

## **Revised 323 Approved By OMB**

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Surprising many oddsmakers, the Office of Management and Budget has approved the FCC's revised Ownership Report (FCC Form 323) for commercial broadcast licensees – but not before the Commission performed a last-minute two-step to clean up one loose end. The new form still isn't ready for prime time: the FCC first has to issue a public notice (a) announcing OMB's approval and (b) cluing us in as to when we'll all be due to file our next 323. The public notice could come any day now, but the deadline for filing will be at least 30 days after that notice. Still, if you're a commercial AM, FM, TV, LPTV or Class A licensee, you might want to get ahead of the curve by taking a look at the form and penciling in your answers now. We expect that CDBS's resources will be, um, strained as the deadline approaches, so early filers may avoid some headaches.

We have chronicled the FCC's efforts to overhaul its ownership reporting process in previous issues of the *Memo to Clients*, as well on our blog ([www.commlawblog.com](http://www.commlawblog.com)). Here's the abridged edition.

The FCC would like to take steps to increase minority and female broadcast ownership, but government agencies are very limited (by the Equal Protection Clause of the Constitution, for openers) from engaging in race/gender-based decision-making. A 1995 Supreme Court case (*Adarand v. Peña*) gives agencies some very limited leeway on that score, but the agency must have a solid evidentiary justification. The Commission has decided that the ownership information which it has historically collected won't do the trick. The solution? Upgrade the FCC's ownership database by changing Form 323 (and its noncommercial sibling, Form 323-E) and the underlying reporting process.

But rather than get its own hands all dirty in the form revision process, the Commission dumped that chore onto the Media Bureau. The Bureau duly closed the doors, pulled the shades and threw together a revised form without bothering to let anybody out in the real world know exactly what changes the Bureau had in mind. The form the Bureau ultimately cooked up was then shipped over to OMB for its review in August, before anyone in the public could take a peek. When OMB quietly posted the form on its website, lo and behold – the form contained a number of surprises. (The NAB, which had also filed a petition for reconsideration with the Commission, thereupon did an admirable

job letting OMB know about the problems with the new form, as did a handful of other groups.)

A central element of the revised reporting requirement was the shift to a single filing deadline for all commercial broadcasters. Traditionally, biennial ownership reports have been due on the anniversary of each station's renewal application. No longer. As announced by the Commission last May, the new drill called for everybody to file their respective reports on November 1 (reflecting data accurate as of the previous October) . . . starting this November 1. As that magical date approached, however, the Commission had a problem. It couldn't use the new form until OMB approved it, and as we rounded the turn and headed into October, that approval was still MIA. So earlier this month the Commission announced that the November 1 deadline was no longer operative this year (although November 1 will be the deadline in future years). Instead, the FCC would wait for OMB approval and then let us all know when to file.

But then, on October 16, the Commission released its decision on the NAB petition for reconsideration. While it denied that petition in part, it also purported to grant the petition in part. The NAB had objected to the new requirement that sole proprietorships file biennially. The Commission rejected that argument. But the NAB had also pointed out that another new provision – requiring the reporting of certain non-attributable interests previously not subject to the reporting requirement – had not even been hinted at in any notice of proposed rulemaking or responsive comments. Under the Administrative Procedure Act, agencies aren't supposed to surprise us all like that, a point which the NAB made convincingly. And sure enough, the FCC had to agree. So the Commission said that it was deleting that aspect of the new form.

Score one for the NAB, right?

Not exactly. Having “granted” the NAB's petition in one breath, in the very next breath the Commission decided that it would invite public comment on the proposed reporting requirement for certain non-attributable interests, thereby effectively side-stepping the basis for the NAB's objection. In other words, any victory the NAB may have enjoyed is likely to be short-lived: we can reasonably expect that, when the dust finally settles on this latest detour, that particular reporting requirement will have been re-inserted into the form.

Still, didn't this last-minute shift in gears – which would require further revision of the draft form sitting over at OMB – mean that any OMB approval would likely be postponed further? You might have thought that, but then, on October 19, OMB went ahead and approved the form anyway. The Commission had slipped OMB the word that the requirement to report non-attributable interests was being deleted, and OMB

proceeded to approve the form with that stipulation.

So here's where things seem to stand, at least for the moment. The Media Bureau's draft form has been approved by OMB, minus the provision for reporting non-attributable interests. You can find a copy of the revised and (we think) approved form here on the OMB website:

<http://www.reginfo.gov/public/do/DownloadDocument?documentID=140558&version=1>  
- yes, we know that it says "not approved by OMB" in the upper-right hand corner, but the file name as it appears on the OMB website is "FCC Form 323 Post-Reconsideration Version (Final).doc". (But don't forget that the FCC is considering reinserting the requirement to report non-attributables, and it seems pretty clear that we'll be seeing that provision back in the form before long.) The requirement that everyone with an attributable interest be identified in Form 323 with his/her/its FCC Registration Number (FRN) is still in there – which means that the FCC will likely be seeing a long line forming on CORES as previous FRN-less folks queue up, SSNs and TINs in hand, to lay claim to their own new FRNs so that they can duly report them in Form 323.

When will the new Form 323 be required to be filed? That's the big question, and it won't be answered until the FCC issues a public notice. A number of observers are guessing that December 15 is a likely pick, but who knows? (Anyone who would like to join in a pool to guess the 323 deadline should feel free to submit their guesses in comments to our blog.) We'll let you know when the notice comes out – check back with [www.commlawblog.com](http://www.commlawblog.com) for up-to-the-minute updates.