

**BEFORE THE
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503**

Notice of Public Information Collection) OMB Control No. 3060-0010
Requirement Submitted to OMB for Review)
and Approval, Comments Requested)

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**JOINT COMMENTS ON INFORMATION COLLECTION REQUIREMENTS
FOR OWNERSHIP REPORT FOR COMMERCIAL BROADCAST STATIONS
(FCC FORM 323)**

 ABC, Inc.; Americom Las Vegas Limited Partnership; Americom, L.P.;

Broadcasting Licenses, Limited Partnership; CBS Corporation; Eagle Creek Broadcasting
of Corpus Christi, LLC; Eagle Creek Broadcasting of Laredo, LLC; Educational
Broadcasting Corporation; Fallen Timbers Communications, LLC; Fox Television
Stations, Inc.; Galaxy Communications, L.P.; Great Scott Broadcasting; Greater Media,
Inc.; HJV Limited Partnership; Journal Broadcast Corporation; LIN Television
Corporation; Lincoln Financial Media Company; M. Belmont VerStandig, Inc.; Mountain
Licenses, L.P.; NBC Telemundo License Co.; NBC Universal, Inc.; Sarkes Tarzian, Inc.;

Spanish Broadcasting System, Inc.; Stainless Broadcasting, L.P.; Talking Stick

Communications, LLC; The Walt Disney Company (the “Joint Commenters”)¹ by their attorneys, hereby submit these comments in response to the Federal Communications Commission’s Notice of Public Information Collection Requirement Submitted to OMB for Review and Approval, pertaining to the information collection mandated by the proposed revisions to the Ownership Report for Commercial Broadcast Stations Form (“FCC Form 323”).² For the reasons set forth below, the Joint Commenters respectfully submit that the collection of information as proposed is not “necessary for the proper performance of the functions” of the Federal Communications Commission (the “Commission” or “FCC”), that the collection of information as proposed does not have “practical utility” when weighing the costs and benefits, and that the Commission vastly understates the regulatory burden imposed by the new FCC Form 323 and the associated reporting procedures.³

A. The Commission Vastly Understates The Regulatory Burden Imposed By The New FCC Form 323 And Associated Reporting Procedures.

The Commission has vastly understated the additional regulatory burden that would be imposed if the new form is approved. The estimate that the FCC Form 323 can

¹ Joint Commenters and their affiliated companies are collectively the licensees of more than 320 radio broadcast stations and more than 170 full power and low power/translator television broadcast stations. The Joint Commenters also support the Comments that are being filed in this proceeding by The National Association of Broadcasters. *See* Comments of the National Association of Broadcasters, OMB Control No. 3060-0010 (Sept. 10, 2009).

² *See* Notice of Public Information Collection Requirement Submitted to OMB for Review and Approval, 74 Fed. Reg. 40,188 (Fed. Commc’ns Comm’n Aug. 11, 2009) (requesting comments) (“*Notice*”); Promoting Diversification of Ownership in the Broadcasting Services, *Report and Order and Fourth Further Notice of Proposed Rulemaking*, 24 FCC Rcd 5896 (rel. May 5, 2009) (“*323 Order*”).

³ *See Notice* at 40,188.

be completed in 1.5 to 2.5 hours per report⁴ is a wholly unrealistic, “best case” scenario. Preparing, reviewing, and filing complete and accurate ownership reports using the proposed FCC Form 323 will now involve referencing FCC Registration Numbers (“FRNs”) for licensees and permittees, parent entities and their officers and directors across multiple reports⁵ and manually entering significantly more data in multiple electronic fields⁶ (in lieu of preparation of a single, uniform, comprehensive exhibit to clearly depict corporate structures). Accordingly, as explained below, the Commission’s average per-report time estimate is significantly understated.⁷

1. Manual Data Entry Of The New Information Required By The Proposed FCC Form 323 Will Significantly Increase The Time Required To Complete Each Report.

The Commission claims it has reduced the burden of completing FCC Form 323 by incorporating “new text boxes, check boxes, and other menu-style options” that allow respondents to “quickly” respond to questions, “remov[ing] the need for preparation of separate exhibits.”⁸ As a general proposition, however, preparing and editing a single, comprehensive exhibit is easier and less time consuming than entering data manually into

⁴ *See id.*

⁵ *See* U.S. FEDERAL COMM’NS COMM’N, OMB CONTROL NO. 3060-0010, FCC 323 INSTRUCTIONS FOR OWNERSHIP REPORT 14 (2009), *available at* <http://www.reginfo.gov/public/do/DownloadDocument?documentID=130751&version=0> (“323 Instructions”) (not approved by OMB).

⁶ *See* U.S. FEDERAL COMM’NS COMM’N, OMB CONTROL NO. 3060-0010, OWNERSHIP REPORT FOR COMMERCIAL BROADCAST STATION, FCC FORM 323: SUPPORTING STATEMENT 4-5 (2009) (“*Supporting Statement*”).

⁷ *See Notice* at 40,188 (seeking comments on “the accuracy of the Commission’s burden estimate”).

⁸ *Supporting Statement* at 4-5.

multiple electronic fields using the Commission’s online consolidated database system (“CDBS”).⁹ The Commission’s statement also ignores the fact that a comprehensive exhibit, prepared once to report *identical* information required by multiple, related FCC Form 323s, places less burden on respondents than the proposed requirement of repeatedly, manually entering *identical* responsive information into live data fields in multiple online reports.

The use of such comprehensive exhibits also permits filers to clearly and more concisely detail complex ownership structures that involve multiple respondents by including charts and other graphical and textual information that cannot be inserted into the standardized data fields contained in the proposed FCC Form 323. The Commission has indeed recognized the utility of these charts through its new requirement that *all* broadcast licensees and permittees attach a comprehensive organizational chart to their FCC Form 323 detailing the licensee’s or permittee’s complete ownership structure, including “all persons/entities that have attributable or reportable interests in the Licensee.”¹⁰ The Commission, in other words, is not *relieving* broadcasters of the burden of preparing such exhibits. Rather, the Commission is requiring the preparation of just this type of exhibit for each licensee’s or permittee’s biennial report, while at the same

⁹ Furthermore, such exhibits can be prepared in advance and maintained outside of CDBS, whereas the FCC Form 323 is not *yet* “live” and it must be completed *within* CDBS and filed by November 1. Exhibits prepared outside of CDBS would be less susceptible to possible problems of degraded performance resulting from the anticipated higher than normal volume of usage in the CDBS system. Indeed, given the one month window between the October 1 date as of which the reported information must be accurate, and the November 1 filing deadline, there is significant probability that CDBS will be subject to severely degraded performance from the vast number of licensees, permittees, and other interest holders that will be required to prepare and finalize their reports in the online system.

¹⁰ Proposed FCC Form 323, Section II-B, Question 5.

time requiring the manual entry of significantly more data into individual, live, electronic fields.¹¹

In addition, the new FCC Form 323 requires *each individual and entity* with an attributable *or reportable* interest to include an FRN in all reports.¹² FRNs must be consistent across each report on which that individual or entity is listed, whether on reports related to a single broadcast entity or on reports for unrelated broadcasters.¹³ The Commission has given no indication in its submission to OMB that it considered in its burden calculations the *significant* burden of requiring multiple licensees, permittees, and respondents to track, maintain, and coordinate standardized use of all attributable and reportable interest holders' FRNs across multiple FCC Form 323 reports. The impact of this unconsidered burden and the impact of requiring manual data entry to describe information detailed in a comprehensive exhibit expand exponentially as a licensee's or permittee's ownership structure becomes more complex.

¹¹ See *id.*; *323 Instructions* at 15; see also U.S. OFFICE OF MGMT & BUDGET, ICR REFERENCE NO. 200908-3060-001, OWNERSHIP REPORT FOR COMMERCIAL BROADCAST STATION, FCC FORM 323: INFORMATION COLLECTION REQUEST - AGENCY SUBMISSION, http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=200908-3060-001#section0_anchor (last visited Sept. 2, 2009) (“*ICR Submission*”) (where the agency certified that the collection of information encompassed by this request complies with 5 CFR 1320.9 and is “*not unnecessarily duplicative of information otherwise reasonably accessible to the agency*”) (emphasis added).

¹² See Proposed FCC Form 323, Section II-B, Question 3(a); *323 Instructions* at 14 (“For Biennial Ownership Reports, each Respondent that holds an attributable or reportable interest in the Licensee must list in [Section II-B,] Question 3(a) the FCC FRN of any person or entity which holds a direct attributable or reportable interest in the Respondent that is also attributable to the Licensee.”).

¹³ See *323 Instructions* at 14 (“For any listing that includes the name of a person or entity reported on multiple Ownership Reports, Respondents must ensure that the FRN information is consistent among all such Ownership Reports. Respondents should coordinate with each other to ensure such consistency.”).

2. The New FCC Form 323 Imposes Heavy, Undue Burdens On A New Pool Of Reporting Entities and Reportable Interest Holders.

The revised filing requirements and proposed FCC Form 323 greatly expand the pool of entities and individuals that must report and be reported to the Commission. Specifically, entities that must file the new FCC Form 323 include licensees and permittees of Class A and low power television stations, stations that are not even deemed “cognizable” for purposes of application of the Commission’s multiple ownership rules.

Similarly, the revised filing requirements and FCC Form 323 add a new class of individuals who must be reported. For the first time, licensees and permittees must include in their reports certain individuals who are otherwise not attributable under the Commission’s ownership rules. For example, minority-voting shareholders in a corporation with a single majority shareholder – individuals who the Commission has recognized, “even acting collaboratively, would be unable to direct the affairs or activities of the licensee”¹⁴ – must now be reported.

The expansion of reportable interest holders will be particularly burdensome on publicly traded companies, which have no ability to compel reportable shareholders to provide them with the information requested by the FCC.

Requiring the inclusion of these nonattributable entities and individuals on the new FCC Form 323 further burdens regulatees and interest holders without the promise of the collection of additional information that matters under the Commission’s own multiple ownership rules, let alone the Commission’s diversity-of-ownership policies.

¹⁴ *Reexamination of Commission’s Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities*, Report and Order, 97 F.C.C. 2d 997, 1008-1009 (1984).

The requirement is particularly onerous for nonattributable individuals who, as discussed *infra*, will be required to disclose significant amounts of personally identifiable information (“Personal Information”), all subject to increased public searching and tracking.

3. The Burdens Imposed By The Proposed FCC Form 323 Greatly Outweigh The Supposed Benefits Of The Information Collection.

The Commission’s stated goal for the new FCC Form 323 – to collect sufficient information to “gain a better understanding of the current state of minority and female ownership” to promote the diversity of broadcast station ownership – can be fulfilled in a significantly less burdensome manner than the Commission has proposed.¹⁵ Indeed, basic ownership information (relating to minority ownership and control, including voting interests, equity interests, and/or the entity’s officers and directors) could be collected through *direct and less intrusive questions* soliciting, for example, information on percentages of minority and female ownership, without mandating repetitive manual entry of all of the information the Commission proposes to obtain through the new FCC Form 323. Information gathered in response to such targeted questions would allow the Commission and interested third parties to analyze the data and develop an accurate “snapshot” of the current state of minority and female ownership in the broadcast industry. There is no indication that the Commission considered this alternate, significantly less burdensome, data collection methodology in revising FCC Form 323.¹⁶

¹⁵ *323 Order* at 5902, ¶ 11; *see also Notice* at 40,188 (seeking comments on “ways to minimize the burden of the collection of information on the respondents . . .”).

¹⁶ *See Notice* at 40,188 (seeking comments on “the accuracy of the Commission’s burden estimate”).

Furthermore, the Commission's estimation of the burden associated with securing the assistance of outside counsel to complete these reports is unsupported by concrete data in the *Supporting Statement* and appears to be similarly understated. While the Commission assumes that respondents will utilize outside counsel to prepare and file the new FCC Form 323s, the Commission provides no support for its estimation that it will take an average of 8 hours to prepare, review, and file each report and that such outside counsel will have an average hourly fee of \$200.¹⁷ Joint Commenters respectfully submit that the burdens imposed by the proposed FCC Form 323 – many of which the Commission failed to accurately assess or assess at all – greatly outweigh the supposed benefits of the information collection.

4. The Commission's Failure To Make Available For Review A "Live" Version Of FCC Form 323 Prevents Commenters From Evaluating The Full Burden Of Completion, Validation, And Filing Of The Form.

To date, the Commission has made only a fixed-layout, static .pdf version of the new FCC Form 323 available for review and comment rather than a "live," interactive version of the form. Without access to a dynamic version of the form, neither the Joint Parties nor any other third party can effectively determine the full burden of the new FCC Form 323 and its filing procedures.

The released version of the new FCC Form 323 appears to require holding companies and other respondents with interests in multiple licensees or permittees to file separate reports for each licensee and permittee in which it has an interest, significantly increasing the number of FCC Form 323s that will need to be filed pursuant to the new

¹⁷ See *Supporting Statement* at 9. Additionally, the Commission's calculation of the Total Annual Cost Burden (on the *Supporting Statement* and the *ICR Submission*) understates the current filing fee of \$60 per station (the *ICR Submission* to OMB assumed the fee would be \$55 per station).

procedures.¹⁸ By way of example, under prior versions of the FCC Form 323, if a holding company held attributable interests in ten broadcast licensees, a single report could be filed for that holding company, reporting its interest in each of its ten subsidiary licensees. Although it cannot be confirmed until an interactive version of the proposed FCC Form 323 becomes available or until the Commission provides clarification on the technical capabilities of the new form, Question 7 of Section I of the new form appears to require the holding company to file ten separate reports, one specifically for each “licensee.” To the extent this is the case, not only will the proposed FCC Form 323 significantly increase the existing ownership report burden by requiring manual entry of significantly more data into specific fields in its ownership report, but the burden will be *multiplied* to the extent that an entity will be required to file separate, nearly identical, reports for each of its licensee and permittee subsidiaries. To the extent this is the case, the Commission’s estimation that 15,000¹⁹ biennial ownership reports for a total of 15,196 stations²⁰ will be filed every other year would be a sizable underestimation of the true burden.

The Commission’s failure to make a “live” prototype of FCC Form 323 available for comment also prevents OMB and commenting parties from determining whether the Commission has incorporated the data “auto-fill” capabilities in the new FCC Form 323

¹⁸ A parent or holding company often controls multiple “licensees.” Each licensee may in turn own one or more stations.

¹⁹ *See Supporting Statement* at 9 n.1 (noting that the Commission calculated the 7,500 biennial reports based on an *annual basis* since OMB requires an annual calculation of filings and burden hours).

²⁰ *See id.*

which are available for the preparation of many other applications filed through CDBS.²¹ The absence of any discussion by the FCC in its *Supporting Statement* submitted to OMB suggesting that it has in fact adopted such burden-reducing capabilities leaves Joint Commenters without any basis to conclude that the Commission has chosen to adopt them. In their absence, the amount of data that must be manually entered into each ownership report will significantly increase.²²

Historically, in preparing ownership reports, respondents have been required to manually enter the call sign, unique facility ID number, city of license, state of license, and service (AM, FM, TV, etc.), for each broadcast station being reported on the form. As the Commission's electronic database already assigns each broadcast station a unique facility ID number, and that facility ID number can be used to search the Commission's records to retrieve information about that station's call sign, city and state of license, and service, there is no need for the Commission to require each respondent to manually enter all of this data. Rather, the Commission could utilize the auto-fill function to automatically populate a significant portion of each ownership report's station information based upon manual entry of only the relevant stations' unique facility ID numbers.

²¹ By way of example, when initiating an FCC Form 314 Application for Consent to Assignment of Broadcast Station, the applicant need only enter the call sign of one of the stations for which the application is being created and the Commission's electronic filing system then automatically fills the application with the applicant's name, mailing address, telephone number, e-mail address, Facility ID Number, and legal contact name, mailing address, telephone number, and e-mail address.

²² See *Notice* at 40,188 (seeking comments on "ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology").

Recognizing that no “live” version of the proposed FCC Form 323 can be consulted, it also appears that the Commission’s use of “radio buttons” would triple the burden imposed on certain entities. Question 3 in Section I of the proposed FCC Form 323 requires respondents to “select the appropriate button [singular] to indicate the nature of the Respondent, *e.g.*, a Licensee, Permittee, or an entity required to file a FCC Form 323 because it holds a reportable interests in the Licensee or Permittee.”²³ To the extent that a single respondent is simultaneously a licensee, a permittee, *and* a reportable interest holder in another licensee or permittee, it appears that the FCC Form 323 instructions will require that respondent to file three separate reports, which will be identical, except for the licenses and permits it directly holds and the licenses or permits in which it has a reportable interest. This is simply one of numerous examples of how the Commission’s development and adoption of the proposed FCC Form 323 can significantly, and unnecessarily, increase the reporting burden on multiple respondents with no counterbalancing public interest benefit.²⁴

B. The Commission’s Proposed Revisions To FCC Form 323 Raise Major Privacy Issues.

Adoption of the Commission’s proposed revisions to FCC Form 323 would generate serious negative unintended consequences – requiring officers, directors, shareholders, and other attributable and newly reportable interest holders to disclose to broadcasters and their attorneys significant amounts of Personal Information; creating major privacy and data security issues for broadcasters; and improperly facilitating public

²³ *323 Instructions* at 4.

²⁴ *See Notice* at 40,188 (seeking comments on “the accuracy of the Commission’s burden estimate” and “ways to minimize the burden of the collection of information on the respondents . . .”).

searching and tracking of Personal Information, including name, address, race, ethnicity, and gender. Joint Commenters respectfully assert that this proposed collection of information (which is neither acknowledged in the FCC’s submission to OMB, the Notice, or the Report and Order) is not “necessary for the proper performance of the functions of the Commission” and that there is no “practical utility” to the additional data collection when balanced against the excessive burden this creates on broadcasters.²⁵

1. The Required Data Submission Is Intrusive To Individuals With Attributable And Reportable Interests; The Commission Failed To Follow Procedures Which Would Permit Lawful Collection Of This Additional Information.

- a. The Commission Failed To Disclose To OMB That The New FCC Form 323 Effectively Requires Broadcasters To Collect Social Security Numbers Of Individuals With Attributable And Reportable Interests As A Prerequisite To Filing.

The new FCC Form 323 is intrusive: It requires officers, directors, shareholders, and other attributable and reportable interest holders of broadcast licensees and permittees, and their parent companies to provide sensitive Personal Information to broadcast licensees and permittees as a prerequisite to filing the new FCC Form 323. In its *Supporting Statement* the FCC stated that the Privacy Act of 1974 as amended (“Privacy Act”) was not implicated because “[t]his information collection does not affect individuals or households; thus, there are no impacts under the Privacy Act,”²⁶ that “[t]here is no need for confidentiality with this collection of information,”²⁷ and that “[t]his information collection does not address any private matters of a sensitive

²⁵ *See id.*

²⁶ *Supporting Statement* at 2.

²⁷ *Id.* at 8.

nature.”²⁸ Although proposed FCC Form 323 does not directly request a Social Security Number (“SSN”), the form would require that each officer, director, attributable shareholder, and other attributable and reportable interest holder obtain an FRN.²⁹ The need for an FRN would require these individuals to provide their SSNs to broadcast licensees and permittees or their agents who would then provide them to the FCC to obtain an FRN for each of them through the FCC’s Commission Registration System (“CORES”) system via FCC Form 160.³⁰ This new procedure is highly invasive,³¹ and

²⁸ *Id.*

²⁹ An FRN is “a ten-digit unique entity identifier for anyone doing business with the Commission.” *323 Instructions* at 3 (“The FRN can be obtained through the FCC Registration System, CORES, which is listed among the FCC E-Filing systems (<http://www.fcc.gov/e-file/>).”); *id.* (“To comply with the Debt Collection Improvement Act of 1996, the Respondent must enter its FRN number”); *id.* at 1 (“A Respondent is any person or entity that is required to file Form 323.”); *id.* at 3 (“File a separate Form 323 for each entity that holds a reportable interest in a Licensee of a station for which the Form 323 must be filed biennially. In the case of organizational structures that include holding companies or other forms of indirect ownership, a separate Form 323 must be filed for each entity in the organizational structure that has a reportable interest in the Licensee”); *id.* at 4; *see also id.* at 14 (“[E]ach Respondent that holds an attributable or reportable interest in the Licensee must list in Question 3(a) the FCC FRN of any person or entity which holds a direct attributable or reportable interest in the Respondent that is also attributable in the Licensee.”); *ICR Submission*.

³⁰ It is the licensee or permittee that must comply and file FCC Form 323 – with no way to compel each individual interest holder to secure and provide an FRN. Although an Employer Identification Number (“EIN”) may also be used to secure an FRN, *securing* an EIN raises a welter of separate issues, including the fact that an individual must provide an SSN to the Internal Revenue Service (“IRS”) to obtain the EIN and must make certain representations to the IRS as to his or her present and future intentions as an individual employer. Using an EIN to obtain an FRN, even where it can be accomplished, does not resolve the issues raised herein. A Tax Identification Number (“TIN”) may also be used, but for individuals, the TIN is an SSN.

³¹ As a practical matter, our experience suggests that many of these individuals are highly reluctant to disclose sensitive Personal Information about themselves and their family members.

the Commission has failed to acknowledge or address this in any manner in its submission to OMB.

It is intrusive to require officers, directors, shareholders, and other attributable and reportable interest holders to provide their SSNs to broadcaster licensees and permittees, to in turn be provided to the Commission merely for the creation of a searchable FCC database. An SSN is not generally needed to create or retrieve a unique, personally identifiable number. Simply stated, the Commission failed to disclose this additional information collection in its submission to OMB and Joint Commenters respectfully submit that this proposed collection of information is not “necessary for the proper performance of the functions of the Commission” and that there is no “practical utility” in requiring these interest holders to disclose their SSNs in order to assign them FRNs.³²

b. The Commission Failed To Comply With The Privacy Act And OMB Privacy Guidelines For Modifying The Categories Of People Required To Provide Their SSNs To CORES.

CORES was designed to track “those individuals who are doing business with the Commission as defined in 31 U.S.C. § 7701(c)(2) and who incur application or regulatory fee obligations.”³³ Merely being an officer, director, shareholder, or attributable or reportable interest holder does not mean that the individual is “doing business” with the

³² See Notice at 40,188 (seeking comments on “[w]hether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility”).

³³ U.S. FED. COMM’NS COMM’N, FCC/OMD-9, COMMISSION REGISTRATION SYSTEM (CORES), <http://www.fcc.gov/omd/privacyact/documents/records/FCC-OMD-9.doc> (last visited Sept. 10, 2009) (“CORES FCC/OMD-9”).

Commission or incurs regulatory fee obligations.³⁴ In other words, these individuals are not among the class of people that CORES was designed to track and CORES (along with its FRN system) should not be the vehicle that the Commission uses to standardize ownership reporting. Federal agencies are required to publish in the Federal Register any revision of the categories of individuals whose records are maintained in systems of records such as CORES and the privacy impact of such charges.³⁵ The use of an FRN to search for and track individuals with attributable or reportable interests in FCC Form 323 is a new and radical use of the FRN. The Commission has not complied with the Privacy Act before attempting to expand the categories of people required to submit their information to CORES to include individuals who have (and had, when their association

³⁴ See 31 U.S.C. § 7701(c)(2) (“[A] person shall be considered to be doing business with a Federal agency if the person is – (A) a lender or servicer in a Federal guaranteed or insured loan program administered by the agency; (B) an applicant for, or recipient of, a Federal license, permit, right-of-way, grant, or benefit payment administered by the agency or insurance administered by the agency; (C) a contractor of the agency; (D) assessed a fine, fee, royalty or penalty by the agency; and (E) in a relationship with the agency that may give rise to a receivable due to that agency, such as a partner of a borrower in or a guarantor of a Federal direct or insured loan administered by the agency.”).

³⁵ See 5 U.S.C. § 552a(e)(4)(B) (requiring Federal agencies maintaining a system of records “to publish in the Federal Register upon establishment or revision a notice of the existence and character of the system of records, which notice shall include . . . the categories of individuals on whom records are maintained in the system”); see also 5 U.S.C. § 552a(e)(4)(D) (requiring agencies to state each routine use of records including the categories of users and purpose of such use); OFFICE OF MGMT. & BUDGET, M-07-16, MEMORANDUM: SAFEGUARDING AGAINST AND RESPONDING TO THE BREACH OF PERSONALLY IDENTIFIABLE INFORMATION 5 n.14 (May 22, 2007). Note that the “Categories of Individuals Covered by the System” section in *CORES FCC/OMD-9* has not been revised to expressly note that individuals who are officers, directors, shareholders, or attributable or reportable interest holders are required to obtain an FRN using CORES – rather it generically states that individuals covered by the system include “individuals who have requested [an FRN] from [CORES].”

with a regulated business first arose, perhaps many years ago) a reasonable expectation that they would not be required to submit their SSNs to the FCC.³⁶

The Commission also failed to comply with OMB's guidelines for implementation of the E-Government Act of 2002, 44 U.S.C. § 208, and the requirement to conduct and publish an updated privacy impact assessment ("PIA") for new uses and changes in electronic information systems such as CORES that create privacy risks.³⁷

- c. The Commission Failed To Comply With The Privacy Act And OMB Privacy Guidelines For Modification Of The Functionality Of FCC Form 323, Which Creates A New System Of Records.

Assuming that a respondent's name and/or FRN number are included in the ownership interest information that the FCC Form 323's new database functionality was

³⁶ See 5 U.S.C. § 552a(e)(11) (requiring "at least 30 days prior to publication of information under paragraph (4)(D) of this subsection, [publication] in the Federal Register notice of any new use or intended use of the information in the system, and . . . an opportunity for interested persons to submit written data, views, or arguments to the agency"). The Commission also failed to comply with the following additional requirements: stating what "routine" uses it will make of the individuals' SSNs (5 U.S.C. § 552a(e)(3)(C)), informing individuals whether disclosing their SSNs is mandatory or voluntary (5 U.S.C. § 552a(e)(3)(A)), and stating under what legal authority they are collecting SSNs for ownership reporting purposes (5 U.S.C. § 552a(e)(3)(A)).

³⁷ OFFICE OF MGMT. & BUDGET, M-03-22, MEMORANDUM: OMB GUIDANCE FOR IMPLEMENTING THE PRIVACY PROVISIONS OF THE E-GOVERNMENT ACT OF 2002 at Attachment A, § II(B)(2), (4) (Sept. 26, 2003), *available at* http://www.whitehouse.gov/omb/memoranda_m03-22/ (last visited Sept. 10, 2009) ("*OMB Privacy Guidelines*") (requiring a PIA to be conducted or updated as necessary by executive agencies for electronic information systems and collections and to reflect changed information collection authorities, business processes or other factors affecting the collection and handling of information in identifiable form).

designed to capture,³⁸ the FCC Form 323 itself has become a “system of records” as defined under the Privacy Act.³⁹ The previous FCC Form 323 did not request an FRN nor did it have retrieval or search functionalities for an individual’s name.⁴⁰ Ownership information maintained by the FCC regarding an individual with attributable or reportable interests is a “record”⁴¹ and the ability of the FCC and/or the public to retrieve, search, and track such records is subject to the full disclosure, privacy assessment, and security requirements mandated by the Privacy Act. The FCC was required to conduct specific requirements upon its establishment of a new system of records.⁴² For example,

³⁸ *323 Order* at 5907-09, ¶¶ 20, 23 (“[S]taff is directed to modify the form to ensure that *all ownership data* will be filed in a format that can be electronically searched, aggregated, and cross-referenced.”) (emphasis added); *see also* Proposed FCC Form 323, Section II-B, Question 3(a); *323 Instructions* at 14 (“For Biennial Ownership Reports, each Respondent that holds an attributable or reportable interest in the Licensee must list in Question 3(a) the FCC FRN of any person or entity which holds a direct attributable or reportable interest in the Respondent that is also attributable to the Licensee.”), and *Supporting Statement* at 10 (FCC Form 323 has been revised to “make the data collected on the [F]orm more adaptable for use in database programs used to prepare economic and policy studies relating to media ownership.”).

³⁹ 5 U.S.C. § 552a(a)(5) (“the term ‘system of records’ means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual”). An FRN is an identifying number.

⁴⁰ *See* U.S. GEN. ACCOUNTABILITY OFFICE, GAO-08-383, MEDIA OWNERSHIP: ECONOMIC FACTORS INFLUENCE THE NUMBER OF MEDIA OUTLETS IN LOCAL MARKETS, WHILE OWNERSHIP BY MINORITIES AND WOMEN APPEARS LIMITED AND IS DIFFICULT TO ASSESS 22-23 (2008) (“GAO REPORT”).

⁴¹ 5 U.S.C. § 552a(a)(4) (“the term ‘record’ means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or photograph”).

⁴² 5 U.S.C. § 552a(e)(4).

the Privacy Act mandates that the FCC inform each individual who is required to supply ownership interest information, either on the FCC Form 323 or via a separate form that can be retained by the individual, “the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary; the principal purposes or purpose for which the information is intended to be used; [and] the routine uses which may be made of the information.”⁴³ No such statements regarding the FRN (or underlying requirement to submit an SSN to secure an FRN) or a person’s name are found in the proposed FCC Form 323 or on a separate form that will accompany FCC Form 323 or in the *Supporting Statement*. Therefore, the FCC’s statement in its *Supporting Statement* that “there are no impacts under the Privacy Act”⁴⁴ is inconsistent with the Privacy Act.

In addition to updating the PIA for CORES given the FCC’s expansion of the use of FRNs, the FCC was also required, *inter alia*, to conduct a PIA for the proposed FCC

⁴³ 5 U.S.C. § 552a(e)(3). None of the statutory authority provided by the FCC expressly mandates that the FCC collect an individual’s SSN or any other unique indentifying Personal Information such as an FRN for reporting general, minority or women ownership interests. *See Supporting Statement* at 2.

⁴⁴ *Supporting Statement* at 2.

Form 323 given the changes in the system management and the ability to merge and manipulate the ownership interests database.⁴⁵

- d. The Commission Has Not Demonstrated Why Personal Information (And Tracking) Is Necessary In Lieu Of Aggregate Or Anonymous Data.

Moreover, it is intrusive to require individuals to submit to being searched and tracked by any unique *personally identifiable number at all*, particularly given the additional information required and made available (name, address, race, ethnicity, gender). The FCC has attempted to justify doing so based on a report from the General Accountability Office (“GAO”) suggesting that a more complete dataset would yield an optimal “snapshot” of all minority and female ownership. However, the GAO Report was highlighting the “weaknesses that limit the usefulness of the Form 323 data.”⁴⁶ The GAO Report did not address critical issues such as balancing: the government’s interest in collecting information about media ownership; the public interest in transparency; the individual interest in privacy among officers, directors, shareholders, and attributable and reportable interest holders; and the public interest in continued investment in broadcast

⁴⁵ *OMB Privacy Guidelines* at Attachment A, § II(B)(2)(c)-(d) (requiring PIAs “when new uses of an existing IT system, including application of new technologies, significantly change how information in identifiable form is managed in the system . . . [and] when agencies adopt or alter business processes so that government databases holding information in identifiable form are merged, centralized, matched with other databases or otherwise significantly manipulated”); *id.* at Attachment A, § II(E); *see also* FED. COMM’NS COMM’N, PRIVACY IMPACT ASSESSMENT FOR THE ELECTRONIC COMMENT FILING SYSTEM (ECFS) 2 (2009) (“The Privacy Impact Assessment template’s purpose is to help the bureau/office to evaluate the changes in the information in the system and to make the appropriate determination(s) about how to treat this information, as required by the Privacy Act’s regulations.”).

⁴⁶ GAO REPORT at 22.

media.⁴⁷ While the optimal solution from the data collection perspective is to collect as much data as possible about media ownership, the optimal solution from the privacy perspective is quite different.⁴⁸ As a result the Commission needs to balance its need for data with its obligation to protect privacy interests.⁴⁹ Although the Commission based its recommendations on the GAO Report, the Commission has not made clear why it needs to track individuals using unique Personal Information or why it needs to make that information publicly searchable and trackable. Aggregate data (or data collected on the basis of direct questions about media ownership) without unique Personal Information could provide a sufficient “snapshot” of minority and female ownership without subjecting individuals to personal identification in CDBS, which is publicly accessible on the Internet.

⁴⁷ The fact that the system will also make name, address, race, ethnicity, and gender publicly available along with this new tracking number raises additional privacy concerns and may dissuade individuals from investing in broadcasting. *See Promoting Diversification of Ownership in the Broadcasting Services, Report and Order and Fourth Further Notice of Proposed Rulemaking*, 24 FCC Rcd 5896, 5930 (rel. May 5, 2009) (Statement of Commissioner Robert M. McDowell) (“As I continue to advocate for a regulatory environment that is more attractive to private investment, I am interested in hearing from commenters as to whether the changes to Form 323 would impose any inadvertent negative effects.”); *see also 323 Order* at 5905-06, ¶ 17. Individuals are also dissuaded from serving on a licensee’s or permittee’s Board of Directors.

⁴⁸ *See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-586T, SOCIAL SECURITY NUMBERS: MORE COULD BE DONE TO PROTECT SSNs 1-2 (2006)* (“Congress and some states have recognized the importance of restricting the use and display of SSNs by both public and private sectors. . . . Although some action has been taken at the federal and state level to protect SSNs, more could be done.”).

⁴⁹ *See U.S.C. § 552a(e)(1)*.

- e. It Is Not Feasible For The Commission To Claim That Individuals Can Simply Apply For Their Own FRNs Privately.

Additionally, it is not feasible for the Commission to put the onus of obtaining and maintaining FRNs through CORES on the individual officers, directors, shareholders, or other attributable and reportable interest holders.⁵⁰ To the extent that the Commission assumes that broadcasters can comply by merely asking their officers, directors, shareholders, and other attributable and reportable interest holders to individually obtain their own FRNs using the CORES system, such an assumption is flawed. As a practical matter, not all individuals will obtain an FRN even when asked to do so. The Commission should understand that a broadcaster's ability to file its FCC Form 323 can be significantly delayed by one individual who is slow to acquire an FRN or who is otherwise not inclined to acquire one, particularly where such an individual was not previously required to report his or her interests, is not computer savvy and needs assistance, or is sensitive about disclosing his or her SSN at all. Logistically, requiring individuals to file for FRNs themselves would likely be highly problematic. The failure of a respondent to obtain all necessary FRNs may result in a licensee or permittee being penalized for filing an incomplete and/or untimely form.⁵¹ Moreover, depending on how the filing system is actually designed, the licensee or permittee may not be able to validate a form that does not list each relevant individual's or entity's FRN, leaving it with the "Hobson's choice" of either not filing a report, or omitting some relevant individuals and entities on its reports. Both carry significant penalties.

⁵⁰ The Commission's CORES database requires both the FRN and a confidential FRN password, plus a security question, to edit or revise an FRN holder's information.

⁵¹ See, e.g., *323 Order* at 5909-10, ¶ 25-26.

Although the FCC Form 323 does not itself collect SSNs, this proposed collection of *additional* information beyond the information requested on the face of FCC Form 323 is not “necessary for the proper performance of the functions of the Commission.”⁵² Furthermore, in weighing the costs and benefits of this *additional* data collection – a prerequisite for approval of the new form – there is no “practical utility” to collecting this information.⁵³ CORES and FRNs are inappropriate vehicles to police ownership reporting for individuals not doing business with the Commission.⁵⁴ It is not necessary for the Commission to collect SSNs or make the ownership report information retrievable, searchable *and* trackable by individual or unique identifier for ownership reporting purposes.

2. The Data Filing Requirement Creates Privacy Compliance Issues For Licensees And Permittees.

a. The Type Of Data Requested Triggers Privacy Compliance Issues For Licensees And Permittees.

Privacy and data security concerns also arise to the extent that broadcasters coordinate the collection and storage of sensitive Personal Information, including the SSNs of officers, directors, shareholders and attributable and reportable interest holders. The application of numerous federal and state privacy laws will be triggered by licensee or permittee acquisition and disclosure of the sensitive Personal Information of

⁵² *Notice* at 40,188.

⁵³ *Id.*

⁵⁴ Due to occasional data input errors, FRNs have been transcribed incorrectly and wrongly attributed to another licensee or individual by the FCC. This can cause unintended delays and problems with respect to processing of applications filed with the FCC and the completion of transactions. Inputting thousands of new FRNs into CORES could compound this problem and cause additional issues to arise.

attributable and reportable interest holders. Under the proposed FCC Form 323, licensees, permittees, and/or their agents will now have to collect, use, maintain, disclose and store SSNs from individuals that are not employees, officers or directors and are likely located outside of the respondent's geographic area (*i.e.*, residents of other states). Individuals with attributable and reportable interests include shareholders and investors. The SSNs of shareholders for licensees and permittees (especially publicly-traded entities) are traditionally collected, used, and maintained by the licensee's or permittee's ultimate parent company for IRS reporting purposes. SSNs are not readily available and cannot readily be disclosed to the licensee or permittee unless the requirements of various federal and state laws are met. Licensees and permittees are frequently separate legal entities and are, therefore, third parties to their parent companies. Numerous state laws prohibit the disclosure and use of an SSN unless comprehensive security measures have been implemented to safeguard the SSN from misuse by third parties⁵⁵ or written consent from the owner of the SSN has been secured.⁵⁶ Other states prohibit the collection and use of an SSN unless *required* by federal or state statute.⁵⁷ This means that an SSN lawfully collected and used for one purpose cannot be used for another purpose unless expressly mandated by law.

⁵⁵ *See, e.g.*, CONN. GEN. STAT. § 42-471(a) (2009).

⁵⁶ *See, e.g.*, N.C. GEN. STAT. § 75-62(a)(6) (2008).

⁵⁷ *See, e.g.*, ALASKA STAT. § 45.48.410(b)(1) (2009) (prohibiting a person from requesting and collecting an SSN from an individual or submitting an SSN to any government entity unless the person is authorized by local, state, or federal law); *see also* CAL. CIV. CODE § 1798.85(b) (2008) (prohibiting the collection, use, or release of an SSN unless required by state or federal law or, use for internal verification or administrative purposes).

Licensees and permittees are likely to be knowledgeable about privacy and security laws that govern the collection, use, maintenance, disclosure, storage and disposal of SSNs in the states where they conduct business, and have incorporated compliance requirements into internal operations for sensitive Personal Information collected from employees, officers and directors, but they are likely ignorant of the requirements of other state laws where they do not ordinarily conduct business. Depending on the complexity of its ownership structure, a licensee or permittee would have to significantly modify internal operations to be in compliance with newly applicable laws that pertain to SSNs. For example, several states require the development and distribution of a privacy policy upon the collection of an individual's SSN;⁵⁸ numerous states require the development and implementation of comprehensive security practices and procedures⁵⁹ and that special protections be taken upon the disposal of an SSN;⁶⁰ at least one state restricts the use of SSNs and "any number derived from such number,"⁶¹ and 45 states, plus the District of Columbia, the Virgin Islands, and

⁵⁸ See, e.g., TEX. BUS. & COM. CODE § 501.052 (2009) (mandating that an entity must first make available its privacy policy before it collects an individual's SSN); MICH. COMP. LAWS § 445.84 (2009) (requiring publication of the privacy policy in an employee handbook, procedures manual, or similar document); and CONN. GEN. STAT. § 42-471 (only state to require privacy policy to be published or publicly displayed).

⁵⁹ See, e.g., ARK. CODE ANN. § 4-110-104(b) (2009).

⁶⁰ See, e.g., COL. REV. STAT. § 6-1-712 (2009); CAL. CIV. CODE § 1798.85(3).

⁶¹ See N.Y. GEN. BUS. LAW § 399-dd(1) (2009).

Puerto Rico, have varying security breach notification laws and regulations.⁶² Moreover, there can be significant penalties for violations of applicable security and privacy laws.⁶³

- b. The Commission Gives No Indication That It Considered The Costly Privacy Compliance Burdens For Licensees And Permittees In Its Burden Calculations As Submitted To OMB.

Collecting SSNs from individuals and maintaining records containing Personal Information requires broadcasters to comply with the additional federal and state privacy laws such as those discussed above in Section B.2, and such compliance would be burdensome and time consuming. Furthermore, it would delay and hamper the broadcaster's ability to file if individuals are slow or never provide their SSN or apply for an FRN themselves. This process is very burdensome and time consuming for broadcasters. For instance, licensees and permittees that are required to comply with such privacy laws would not be able to solicit SSNs from attributable or reportable interest holders via email unless the connection is secured or the SSN is encrypted.⁶⁴ The

⁶² See National Conference of State Legislatures, State Security Breach Notification Laws, As of July 27, 2009, <http://www.ncsl.org/Default.aspx?TabID=13489> (last visited Sept. 10, 2009). States have varying requirements, including, but not limited to different definitions of "security breach," deadlines to provide notice to aggrieved individuals, notice of breach to government officials and/or consumer reporting agencies, and requirements for content of notice to the public. It is not practicable to have a universal response to a security breach, increasing the burden of legal compliance with any entity that collects or stores an SSN from residents of various states.

⁶³ See, e.g., CONN. GEN. STAT. § 42-471(e) (imposing penalties of up to \$500,000 for willful and knowing violations for any single event); N.Y. GEN. BUS. CODE § 399-dd(7) (imposing penalties of up to \$100,000 for a first time violations resulting from a single act or incident and up to \$250,000 for subsequent multiple violations); *In re BJ's Wholesale Club, Inc., Agreement Containing Consent Order*, FTC File No. 0423160 (May 17, 2005) (imposing 20 year reporting conditions to the FTC for failure to implement and maintain reasonable security practices and procedures) ("*FTC BJ's Wholesale Club Consent Agreement*").

⁶⁴ See, e.g., N.Y. GEN. BUS. CODE § 399-dd(2)(c); N.C. GEN. STAT. § 75-62(a)(3); MINN. STAT. § 325E.59(3) (2008).

cost of encryption software would be an additional expense. Unsecured fax transmissions could also violate other laws.⁶⁵

3. The Increased Searchability And Tracking Of Media Ownership Data – Including FRN, Name, Race, Ethnicity, And Gender – Raise Additional Privacy Issues.

And finally, in addition to the data collection and privacy issues raised during the process of *preparing, completing and filing* the FCC Form 323, there are additional privacy issues raised by the creation of a fully functional, *publicly searchable database* that permits members of the public to acquire sensitive and Personal Information about individuals. Although it is already possible to find much of this information on CDBS, making sensitive Personal Information even *more* searchable and trackable by the public via the Internet under the guise of transparency or improving data collection is unnecessary for the purported purpose of making it easier for the FCC to collect the data for media ownership statistical analysis,⁶⁶ poses privacy issues, and has the potential to discourage investment in broadcasters, a concern raised by Commissioner McDowell.⁶⁷

⁶⁵ See *FTC BJ's Wholesale Club Consent Agreement*, Analysis of Proposed Consent Order to Aid Public Comment (settling allegation of unfair trade practice under Section 5 of the FTC Act for failure to implement and maintain “reasonable and appropriate security measures” similar to the standards established in the FTC’s GLB Safeguards Rule, 16 C.F.R. Part 314).

⁶⁶ See *Notice* at 40,188 (seeking comments on “[w]hether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility”).

⁶⁷ See n.47 *supra*.

C. Conclusion.

For the reasons set forth above, Joint Commenters respectfully request that OMB deny approval of the FCC's plan to implement this new information collection.

Respectfully submitted,
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