

**Before the
OFFICE OF MANAGEMENT AND BUDGET
Washington, DC 20503**

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

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**COMMENTS OF THE NAMED STATE BROADCASTERS ASSOCIATIONS
ON THE PUBLIC INFORMATION COLLECTION SUBMISSION OF THE FEDERAL
COMMUNICATIONS COMMISSION REGARDING
“THE OWNERSHIP REPORT FOR COMMERCIAL BROADCAST STATIONS”
ON FCC FORM 323**

The forty-seven (47) Named State Broadcasters Associations listed in Exhibit 1 attached hereto (collectively, the “State Associations”) respectfully request that the Office of Management and Budget (“OMB”) disapprove and continue the above-referenced public information collection of the Federal Communications Commission (“FCC” or “Commission”) seeking OMB approval of the revised ownership report for commercial broadcast stations, FCC Form 323 (the collection, “Revised FCC Form 323”).¹ Given that the State Associations fully support the FCC’s goal of improving the quality and reliability of data on minority and female ownership of media, the State Associations urge that OMB’s action disapproving Revised FCC Form 323 be without prejudice to the FCC returning to OMB at a later date with a “collection” that is fully responsive to the concerns set forth herein.

¹ See *Public Information Collection Requirement Submitted to OMB for Review and Approval, Comments Requested*, 74 Fed. Reg. 40188 (Aug. 11, 2009) (“PRA Notice”).

If OMB were to approve Revised FCC Form 323, for the first time ever almost 3,000 Class A and low-power television stations would be joining more than 12,000 commercial AM, FM, and full-power television broadcast stations in the filing of biennial ownership reports.² Thus, more than 15,000 stations would be required to complete and electronically file the Revised Form 323 by the fast approaching national deadline of November 1 (with information current as of October 1) and by November 1 every two years thereafter.³ As shown below, OMB consideration of the FCC's request for approval is premature at best and unacceptable at a minimum. Under either conclusion, OMB should disapprove Revised FCC Form 323.

I. OMB CONSIDERATION OF REVISED FCC FORM 323 IS PREMATURE.

The Paperwork Reduction Act of 1995 (the "PRA")⁴ is intended to place a meaningful check on the propensity of the Federal government to burden American businesses and the public with more and more paperwork burdens. The statutory objective of the PRA, and the fulfillment of OMB's responsibilities under the PRA, are particularly important where, as here, the FCC is proposing to increase the paperwork burden on broadcasters notwithstanding that the Nation has been in one of the most serious recessions in its history and the broadcast industry continues to suffer under double digit declines in advertising which, in turn, are resulting in stations going dark, bankruptcies, restructurings, job layoffs and furloughs, reductions in news programming, etc.

² See *Report and Order and Fourth Further Notice of Proposed Rulemaking*, MB Docket No. 07-294, FCC 09-33 (rel. May 5, 2009) ("Report and Order").

³ *Id.* at ¶12.

⁴ 44 U.S.C. §§ 3501-3520.

OMB's evaluation of public information collection submissions under the PRA requires careful, searching, "the devil-is-in-the-details" types of analyses, focusing heavily on the purported need for the specific "collection" as well as on all of the burdens imposed in connection with the "collection." As a consequence, important due process and docket management considerations dictate that OMB disapprove public information collections where the governmental entity seeking such approval has not timely solicited, received or considered input from the public on the specific collection, or otherwise adequately addressed the issues of "need" and "burdens" on a full, public record.

Timely public input to the governmental entity proposing a "collection" is necessary as a matter of fundamental fairness for those who may be required to respond to the "collection." Due consideration of such public input by the submitting governmental entity is also necessary to insure reasoned decision making and efficiency between, on the one hand, the governmental entity seeking to craft the "collection" in full compliance with the PRA, and OMB, on the other hand, which through its approval/disapproval process, is responsible for assuring that the "collection" does indeed fully comply with the PRA. For that reason, if the governmental entity submitting the collection for approval did not make adequate findings and conclusions, based on a full record, on the issue of "need" and/or on the issue of "burdens" in the context of a specific "collection," the State Associations submit that it would be inappropriate for OMB to be asked to evaluate, on its own, full compliance of a "collection" with the PRA. In that case, OMB would reasonably be expected to disapprove the submission as premature. This is the situation confronting OMB with the Revised FCC Form 323.

In pertinent part, the FCC's Report and Order revised certain requirements for the filing of Revised FCC Form 323 which is designed to provide the FCC and the public with certain

information regarding the ownership of each commercial full-power and certain low-power broadcast stations. The Report and Order contemplated substantial modifications to the Form 323 itself as well as to the intricacies of preparing and filing the Form. The *PRA Notice* states that “The instructions [to Revised FCC Form 323] and questions in all sections of the form have been significantly revised.”⁵ The FCC also enlarged the class of broadcast licensees required to file ownership reports biennially, requiring all commercial full-power AM and FM radio stations, full-power television stations, and LPTV and Class A television stations, as well as persons and entities with attributable or reportable interests in them, to file Revised FCC Form 323 on or before November 1, 2009.

The Report and Order was adopted on April 8, 2009 but did not contain a draft of Revised FCC Form 323. When the Report and Order was released on May 5, 2009, again no copy of the revised form was released. No copy of revised FCC Form 323 was available when a summary of the Report and Order was published in the Federal Register on May 27, 2009.⁶ On June 4, 2009, the FCC published a “Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested” establishing a comment deadline of August 10, 2009.⁷ Again, a copy of Revised FCC Form 323 was not available to the public on either June 4 or by August 10.

The FCC did not make a draft copy of Revised FCC Form 323 available to the public until August 11, 2009, *one-hundred twenty-five days* after the adoption of its Report and Order, *forty-six days* after the deadline for the filing of petitions for reconsideration of the

⁵ 74 Fed. Reg. at 40189.

⁶ See 74 Fed. Reg. 25163 (rel. May 27, 2009).

⁷ See 74 Fed. Reg. 27549 (rel. June 10, 2009) (the “*PRA Comment*”)

Commission's Report and Order,⁸ and *one day after* the deadline for responding to the *PRA Comment*. The National Association of Broadcasters (the "NAB") and Joseph A. Belisle were the only parties that responded to the *PRA Comment*. In its comments, the NAB pointed out that "[U]nfortunately, without a draft Form 323 or additional description of the changes, interested parties cannot realistically assess the burdens associated with this new information collection and, thus, cannot file meaningful comment."⁹ As a result, the public has not been given a meaningful opportunity to provide the FCC with its input on the "collection." For example, commenters could not address critical PRA-related questions regarding the accuracy of the Commission's burden estimates, ways to enhance the quality, utility, and clarity of the information collected, or ways to minimize the collection burdens. In short, the FCC failed to perform its duty to develop a full public record, as well as to consider and address public comments under the PRA before it sent its collection submission to OMB.

The FCC is no less accountable under the PRA than is OMB. However, by delaying the issuance of Revised FCC Form 323 until well after adoption of its Report and Order, after the FCC deadline for petitions for reconsideration of that Report and Order, and even after the deadline for submitting comments to the FCC in response to its *PRA Comment*, the FCC has abdicated *its* duty in a shared responsibility with OMB under the PRA and unfairly and improperly sought to transfer all responsibility to OMB. Consequently, the FCC failed to adhere to the procedural requirements of the PRA and, in doing so, disregarded its obligation to give the

⁸ Section 1.429 of the of the FCC's Rules, 47 C.F.R. § 1.429, requires petitions for reconsideration to be "filed within 30 days from the date of public notice of such action." Section 1.4(b)(1) of the Rules, 47 C.F.R. § 1.4(b)(1), defines the date of public notice for action in notice and comment rulemaking proceedings as the date of publication in the Federal Register.

⁹ August 10, 2009 NAB Comments, OMB Control No. 3060-0010, at 3.

public and OMB a draft of the revised Form 323 before its adoption. The PRA requires an agency to meet the statutory requirements “*in advance* of the adoption or revision of the collection of information.”¹⁰

Under similar circumstances, the OMB recently disapproved an FCC rule requiring cellular and paging service providers to maintain an emergency backup power source for their networks.¹¹ Specifically, the OMB determined that the FCC did not comply with the PRA because it failed to “seek and evaluate public comment on this reporting requirement *in advance* of the adoption of the collection of information.”¹² That is precisely what occurred in this case. The FCC did not seek comment on its new information collection before adopting Revised Form 323 as required by the PRA. Indeed, as noted, the FCC did not even make a copy of a draft revised FCC Form 323 available to the public until well after the deadlines for commenting on the changes had passed. Because the FCC has again adopted requirements without providing the public with an advance opportunity to comment, the State Associations submit that OMB should adhere to its precedent and disapprove and continue Revised FCC Form 323 so that the matter can be returned for further action by the FCC not inconsistent with OMB’s ruling.

II. IN ANY EVENT, THE FCC HAS NEITHER ADEQUATELY NOR CORRECTLY ASSESSED THE “NEED” OR “BURDENS” ASSOCIATED WITH THE PROPOSED COLLECTION.

The State Associations would have no quarrel with the FCC if all it had done was to change the filing deadline for ownership reports. The Form would have still required

¹⁰ 44 U.S.C. § 3507(a) (emphasis added).

¹¹ See Notice of OMB Action, Request for a new OMB Control Number, ICR Reference No: 200802-3060-019 (Nov. 28, 2008).

¹² *Id.* (emphasis added).

respondents to provide gender, race and ethnicity data. However, in revising FCC Form 323 and the filing requirements the FCC has vastly increased the time, expense, and risks associated with obtaining highly confidential “identity” data from potentially thousands of respondents, storing and safeguarding that highly confidential information, gathering together all necessary data for electronic filing, uploading the data for each filing, and otherwise completing the numerous filings that will be required. The FCC’s proposed modifications do not pass muster as they raise significant privacy concerns and will substantially increase the cost and regulatory burdens on FCC broadcast licensees and permittees in violation of the letter and the spirit of the PRA.

A. The Proposed Public Information Collection (Revised FCC Form 323) Will Vastly Increase the Risk of Identify Theft Among Those Who Invest In Broadcast Stations and Thus Discourage Future Investment in Broadcasting.

In revising FCC Form 323, the FCC has adopted a new requirement that would require *every* natural person and legal entity that has a direct or indirect “attributable interest” in a broadcast station licensee or permittee to register and acquire a distinct FCC Registration Number (“FRN”) from the FCC in order to be included on the revised FCC Form 323. Those persons with “attributable interests” in broadcast station licensees and permittees would include every corporate officer, every director, every shareholder with 5% or more voting shares (even where there is a single majority shareholder), every general partner of a general partnership, every general partner of a limited partnership, every non-insulated limited partner of a limited partnership, every non-insulated member of a limited liability company and individuals or entities holding interests that trigger the FCC’s “equity-debt plus” trigger limits.¹³

¹³ See 47 CFR §73.3555, n.1-3.

Historically, FRNs were generally only required for the station licensee itself and certain parent organizations. However, the FCC is now requiring *all* attributable persons and entities to register with the FCC to obtain individual FRNs for use in connection with the filing of Revised Form 323. If that new burden were not enough, the process of obtaining an FRN requires a party to place itself at “identity theft” risk by forcing the party to share with the FCC highly personal and sensitive information including social security numbers, employer identification numbers and taxpayer identification numbers. The end result is that the FCC will have suddenly become a “virtual” warehouse of sensitive “identity” information collected from parties that were never before required to provide such information. The requirement that “attributable” interest holders register to acquire FRNs will result literally in thousands of new parties filing FRN requests with the FCC that are based on this sensitive information. The FCC’s *PRA Notice* assertion (at p. 40188) “Privacy Act Impact Assessment: No impact(s)” is unsupportable and flatly wrong. The privacy concerns are real and fundamental and the burdens associated with the proposed requirements have been completely overlooked or ignored by the Commission.

Furthermore, given the failure by the FCC to invite public comments on Revised FCC Form 323 before it reached OMB, it is not apparent that the FCC has given any consideration to whether its Commission Registration System (CORES) database is secure enough to fully protect the thousands of new social security numbers, employer identification numbers and taxpayer identification numbers that will be placed in the hands of the FCC as a result of the new requirements, if approved. That the FCC is a federal agency is no comfort given that one of the FCC’s sister agencies earlier this year was the target of hackers who were able to obtain approximately 45,000 social security numbers from the website of the Federal Aviation

Administration.¹⁴ In light of the ever increasing threat of data security online, the FCC's assertion that the revised Form does not raise any confidentiality concerns cannot be supported.

A Report of the House Government Reform Committee makes clear that the risk of a security breach is not an isolated occurrence as hundreds of data breaches involving sensitive personal information kept by government agencies have occurred since 2003 alone, involving the Department of Defense, the Commerce Department, and the Department of Education, to name a few.¹⁵ According to the Committee's Report:

Data held by Federal agencies remains at risk. In many cases, agencies do not know what information they have, who has access to the information, and what devices containing information have been lost, stolen, or misplaced. In addition, in almost all of the reported cases, Congress and the public would not have learned of each event unless the Committee had requested this information.¹⁶

Notwithstanding the fact of the constant threat of such identity theft breaches at federal agencies, the record in this proceeding is completely bare on this issue. The FCC has failed to truly evaluate and justify the risks associated with the new requirement for broadcasters to file large quantities of sensitive and proprietary data in order to file the Revised FCC Form 323.

There is an associated "burden" problem that the FCC has also failed to recognize or account for. It is proving to be increasingly difficult for licensees to track and monitor the FRNs (and associated passwords) of the multiple entities in their ownership chains. This problem will grow exponentially under the new requirement that potentially thousands of additional attributable interest holders obtain FRNs and associated passwords. The thousands of licensees

¹⁴ See <http://www.informationweek.com/news/security/attacks/showArticle.jhtml?articleID=213900025>.

¹⁵ Staff Report, Agency Data Breaches Since January 1, 2003, Tom Davis, Chairman, Haney A. Waxman, Ranking Member, U.S. House of Representatives, 109th Congress (Oct. 13, 2006).

¹⁶ *Id.* at 15.

will be required to expend enormous amount of time and money to ensure the confidentiality of all these social security numbers, FRNs and passwords as well as to monitor the accuracy of substantially more data submitted to the Commission.

Most perplexing is the absence of any evaluation by the FCC of the deterrent effect that the required submission of potentially thousands of social security numbers to the FCC will have on the willingness of persons to invest or to continue to invest in broadcasting, and the potential adverse effect of such reluctance on the health and diversity of the broadcast industry. As mentioned, the new requirement will force potentially thousands of individual investors to divulge their social security numbers to the FCC in order to obtain FRNs. This, in turn, will undoubtedly result in discouraging new investors from investing in the broadcasting industry, and may even result in the refusal of existing investors to provide such information. At bottom, the FCC has neither evaluated nor recognized the deterrent effects that its “collection” is likely to have created.

B. The FCC Failed to Fully Account For Other “Burdens” of its New Collection.

The FCC’s projections of the total cost of compliance are grossly understated and conclusory. The *PRA Notice* estimates that it will take between 1.5 and 2.5 hours for an entity to complete the revised Form 323.¹⁷ Yet the Commission does not explain how it arrived at its figures. Nor is it clear that the time estimate even includes the effort to obtain numerous FRNs for all attributable investors. Accordingly, the FCC has not complied with the PRA and with the

¹⁷ *PRA Notice* at 40188.

OMB rule requirement that the submitting governmental entity provide a “specific, objectively supported estimate of burden.”¹⁸

The *State Associations* estimate that nearly 15,000 separate Form 323s will be required to be filed by broadcast stations nationally.¹⁹ While the FCC’s own figures represent a considerable new burden on broadcasters, it has been the State Associations’ experience that the FCC’s time estimates are unreasonably low for completing even the pre-revised Form 323 for all of but the most basic of ownership structures. In reality, any Form 323 other than the most basic of ownership chains would take much longer to prepare than the FCC estimates. The Commission appears to have grossly miscalculated the time and resource burden that the completing the revised 323 will have on broadcast licensees.

As noted, completing the new Form 323 will also require thousands of new parties to register for FRNs and to file reports. Aside from the obvious information collection burdens associated with this new requirement, the FCC has not taken into account the many additional practical hardships associated with completing and filing the new Form 323 that are apparent to those parties who regularly file ownership reports. For example, the FCC’s modifications to the Form 323 will now require filers to spend time keying-in duplicative data on each report up the ownership chain for multiple reports, including repeatedly describing other broadcast and familial interests, even though historically the FCC permitted licensees to provide that information in a single “universal” exhibit that was uploaded with each report. In addition, prior to the revisions to the Form 323, an ownership structure involving more than one parent

¹⁸ 5 C.F.R. 1320.8(a)(4).

¹⁹ These figures include the new FCC requirement that all low-power and Class A television stations now file Form 323s.

company would allow for cross-referencing of a single report filed by each parent, but Revised FCC Form 323 will require individual reports to be prepared and filed for licensees with multiple parent companies in their ownership chain. And for the first time, the revised Form will require filers to prepare and file a schematic depicting their ownership structure.²⁰

Under these circumstances, recent OMB precedent dictates the disapproval of Revised FCC Form 323 and its return to the FCC for further review. For example, in a collection submission dealing with the FCC's proposed rules regarding Leased Access to cable channels, OMB held that the new rule violated the PRA and returned the collection submission to the FCC for further consideration.²¹ In its decision, the OMB repeatedly faulted the FCC for failing to take into full account the costs and burdens on FCC licensees and the risks to their proprietary information.²² Those same types of concerns, albeit raised to a much higher proprietary and security level due to the collection of social security numbers, apply to the OMB's review of Revised FCC Form 323 and, as a consequence, dictate that OMB should disapprove the FCC's collection submission in this case.

²⁰ The State Associations submit that even if OMB were to act on the "collection," there is simply not enough time remaining between OMB action and November 1 for respondents to collect the necessary data, prepare all of the necessary FRN registrations and reports, and file all that is needed to be filed by the November 1 deadline.

²¹ See Notice of OMB Action, OMB Control No: 3060-0568, ICR Reference No: 200804-3060-012 (July 9, 2008).

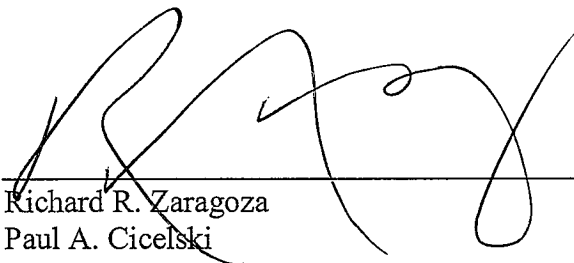
²² *Id.*

Conclusion

Based on the foregoing, OMB should disapprove and continue Revised FCC Form 323 so that the FCC may solicit, consider and address public input on a full record, and make adequate findings and conclusions consistent with the letter and spirit of the PRA.

Respectfully submitted,

**THE NAMED STATE BROADCASTERS
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EXHIBIT 1

Alabama Broadcasters Association, Alaska Broadcasters Association, Arizona Broadcasters Association, Arkansas Broadcasters Association, California Broadcasters Association, Colorado Broadcasters Association, Connecticut Broadcasters Association, Florida Association of Broadcasters, Georgia Association of Broadcasters, Hawaii Association of Broadcasters, Idaho State Broadcasters Association, Illinois Broadcasters Association, Indiana Broadcasters Association, Iowa Broadcasters Association, Kansas Association of Broadcasters, Kentucky Broadcasters Association, Louisiana Association of Broadcasters, Maine Association of Broadcasters, MD/DC/DE Broadcasters Association, Massachusetts Broadcasters Association, Michigan Association of Broadcasters, Minnesota Broadcasters Association, Mississippi Association of Broadcasters, Missouri Broadcasters Association, Montana Broadcasters Association, Nebraska Broadcasters Association, Nevada Broadcasters Association, New Hampshire Association of Broadcasters, New Jersey Broadcasters Association, New Mexico Broadcasters Association, The New York State Broadcasters Association, Inc., North Dakota Broadcasters Association, Ohio Association of Broadcasters, Oklahoma Association of Broadcasters, Oregon Association of Broadcasters, Pennsylvania Association of Broadcasters, Rhode Island Broadcasters Association, South Carolina Broadcasters Association, South Dakota Broadcasters Association, Tennessee Association of Broadcasters, Texas Association of Broadcasters, Utah Broadcasters Association, Vermont Association of Broadcasters, Virginia Association of Broadcasters, Washington State Association of Broadcasters, Wisconsin Broadcasters Association, and Wyoming Association of Broadcasters.