Virginia Association of Broadcasters
Legal Review

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Federal Court Rejects Broadcaster Challenges to FCC Order Implementing Certain Aspects of Spectrum Act

On June 12, 2015, the D.C. Circuit Court of Appeals rejected broadcaster challenges to certain aspects of the FCC's framework for the upcoming broadcast spectrum incentive auction. The Middle Class Tax Relief and Job Creation Act of 2012, known as the Spectrum Act, directs the Commission to undertake a three-phase process to (1) reclaim portions of spectrum from broadcasters who volunteer to sell their spectrum rights, (2) "repack" broadcasters who choose to remain on the air into smaller bands of spectrum, and (3) sell the newly-available spectrum to mobile broadband providers to meet increasing wireless demands, using the proceeds of that "forward" sale to compensate broadcasters who give up their spectrum and to reimburse costs incurred by broadcasters that are reassigned to new channels.

Last fall, the National Association of Broadcasters and Sinclair Broadcast Group filed petitions challenging certain FCC decisions about how to implement the Spectrum Act. The petitions primarily focused on the Commission's plan to implement the channel-reassignment or "repacking" phase of the auction. The Spectrum Act directs the FCC, as it repacks stations into smaller bands of spectrum, to

> make all reasonable efforts to preserve, as of February 22, 2012, the coverage area and population served of each broadcast television licensee, as determined using the methodology described in OET Bulletin 69 of the Office of Engineering and Technology of the Commission.

The "OET Bulletin 69," which is titled the "Longley-Rice Methodology for Evaluating TV Coverage and Interference," refers to the guide developed by the FCC's Office of Engineering and Technology in 1977 (and updated in 2004) for predicting television stations' coverage areas and "populations served"—that is, their audiences. A computer program is necessary to do the calculations described in OET-69.

In a 2014 Order, the Commission announced its intent to use new computer software, called *TVStudy*, along with updated population data from the 2010 Census, new terrain elevation data, and more precise antenna beam tilt data to run the OET-69 calculations in the repacking

process. Broadcasters challenged that decision, claiming that the Spectrum Act requires the FCC to use the specific computer software and data inputs—and not just the "method"—that the Commission would have used to make coverage and interference calculations in 2012. The D.C. Circuit disagreed, finding that the Commission's approach would not change the "methodology" used—the Longley-Rice methodology described in OET-69 would still be used to calculate coverage and interference—but would only *implement* the OET-69 methodology using new, more accurate software and data. Essentially, the court decided that the Spectrum Act does not require the Commission to preserve television station coverage as it would have been *calculated* in 2012, only to use the OET-69 *approach* from 2012. The federal court seemed skeptical of claims that Congress intended to require the FCC to use obsolete or inaccurate data or to forbid the agency from developing improved software, describing broadcasters' arguments as "counterintuitive."

Having approved the Commission's decision to use the *TVStudy* software, the D.C. Circuit easily disposed of the argument that the plan to use *TVStudy* should have been included in a notice published by the full Commission but was only announced by OET itself, a "staff-level Commission Office." According to the court, broadcasters and other interested parties had notice and a full opportunity to comment on the proposal because OET's notice was published in the Federal Register.

The D.C. Circuit also rejected broadcasters' challenge to the Commission's decision not to protect repacked stations against "terrain loss"—that is, "loss of coverage because the station's new frequency interacts in new ways with the terrain in the station's geographic contour." The court approved the Commission's decision to allow for "unavoidable" terrain loss (while ensuring that the *total geographic area* within a repacked station's contour would not change) as essential to the Spectrum Act's "overarching objective of repurposing broadcast spectrum." If the Commission could not accept channel reassignments that carried a risk of terrain loss, the court reasoned, it might be unable to repack stations efficiently, threatening the success of the auction.

For largely the same reasons, the federal court rejected broadcasters' argument that the FCC's decision to preserve *unpopulated* areas within a repacked station's contour only when there is no signal interference in those areas would violate the Spectrum Act's "preservation" mandate. The court found the Commission's decision reasonable—because unpopulated areas would be unprotected from signal interference but no viewers would be affected by the interference—and necessary to give the Commission maximum flexibility to repack stations.

Broadcasters were no more successful in challenging the Commission's decision not to protect digital replacement translators in the repacking. The D.C. Circuit agreed with the FCC that the Spectrum Act defines the "broadcast television licensees" to be protected in the repacking process as full-power and Class A stations only. Fill-in translators, which are licensed to separate channels from the primary stations whose signals they retransmit, are not among the stations the Commission is *required* to protect, and its decision not to include them was a reasonable step to ensure maximum flexibility in the repacking and, thus, the success of the auction.

Finally, the D.C. Circuit rejected two challenges raised by Sinclair alone. First, the court approved the FCC's decision to require that repacked stations obtain construction permits and complete construction of their new facilities within 39 months. That timetable, said the court, is consistent with the rules for construction of *new* facilities and with the Spectrum Act's requirement that repacked broadcasters' relocation expenses be reimbursed within three years of the forward auction.

Sinclair also challenged the Commission's decision that the auction will go forward as long as two licensees anywhere in the country—and not necessarily in a single market—submit valid applications to participate in the auction, even if the applicants do not ultimately tender a bid. The court found the Commission's two-participant rule to be a "sensible" interpretation of the Spectrum Act requirement that "at least two competing licensees participate in the reverse auction," because, *for purposes of the Spectrum Act*, broadcasters in all markets will compete with each other for the same pool of proceeds from the forward auction. That ruling allows broadcasters in single-bidder markets to participate in the reverse auction.

The take-away from the D.C. Circuit's decision is this: The Commission has broad discretion to decide how best to implement the Spectrum Act's directives and to achieve a successful auction. The federal courts are often leery of wading into highly technical or complex matters (like the spectrum auction) that are delegated to an expert agency (like the Commission), preferring to defer to the agency's "reasonable" judgments. The D.C. Circuit did exactly that in this case. Although some interested parties speculated that this litigation might slow down the Commission's plan to conduct the spectrum auction in early 2016, the D.C. Circuit's ruling leaves the path clear (at least for now) for the Commission to move ahead with its auction plans.

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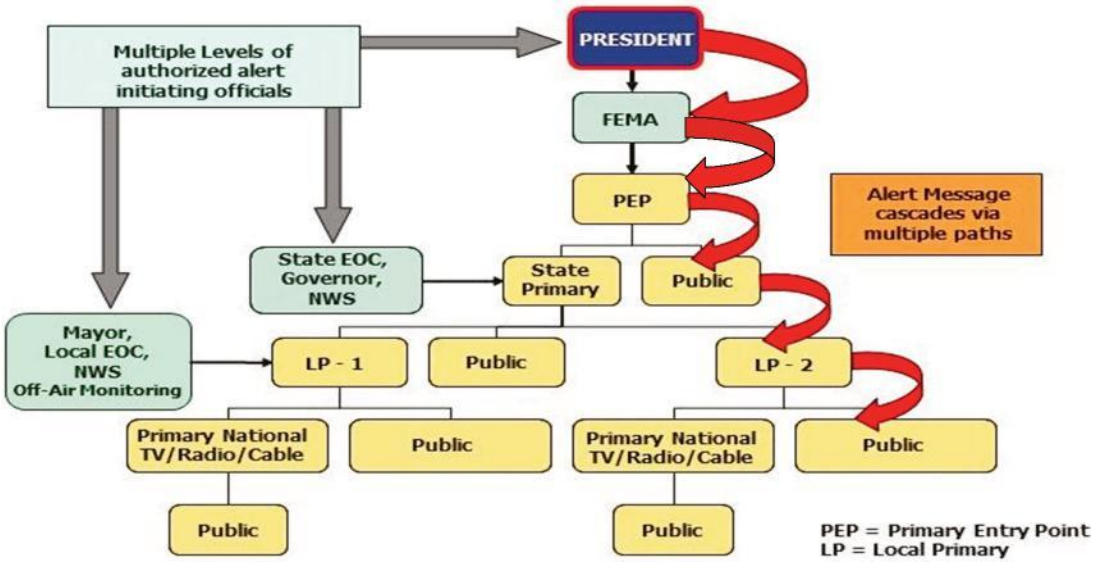
FCC Adopts Order Restructuring EAS

In early June, the Commission released a new Order, which, according to the FCC, is intended to "improve the operation and exercise" of the EAS and "reaffirm the FCC's commitment to ensuring that all Americans have access to timely and accurate emergency alerts." The diagram below, taken from the Order, is a graphic depiction of the "architecture" of the EAS.



The last major improvement of the EAS occurred in June 2012, when the FCC's rule took effect requiring all EAS Participants to be able to receive and retransmit CAP-formatted EAS alert messages. Below are a few highlights from the Order adopted in June 2015.

The "Six Zeroes" National Location Code Has Been Adopted. The FCC has adopted its proposal to create a new national location code comprised of six zeroes (000000). Stations will be required to use EAS equipment that is capable of processing this location code. Multiple EAS equipment manufacturers filed comments in the FCC's proceeding, and some observed that they would provide a free software upgrade to EAS Participants to meet this requirement, while other vendors suggested that users of their equipment would need to pay for a firmware update or would need to completely replace legacy EAS gear. While the new requirements are not yet in effect (the precise effective date is not yet known), stations may wish to begin the process of contacting their EAS equipment vendors to ascertain whether there will be budgetary implications to comply with the new rules.

The FCC believes that the use of the "six zeroes" code will create consistency between the EAS rules and the industry CAP standard, which already recognizes "six zeroes" as the national location code. Additionally, it will facilitate the integration of the EAS into the IP-based IPAWS system and also provide improved geo-targeting of a Presidential alert in the event the President wishes to address a particular part of the country rather than the nation as a whole.

Future Nationwide EAS Tests Will Use an NPT Event Code. The FCC has adopted its proposal to use the National Periodic Test ("NPT") event code for future nationwide EAS tests. The NPT code used in nationwide tests will be limited in duration to two minutes or less, and it will have normal priority. In addition, the new rules require that the NPT be retransmitted by stations immediately upon receipt. To support its decision, the FCC stated in the Order that "the NPT code is already recognized by virtually all existing EAS devices or can be easily enabled by EAS Participants through simple reconfigurations of the code filters on their encoder devices." As a result, the FCC concluded, the cost of compliance with this new requirement will be minimal. In addition, because the NPT clearly appears to the public as a test,

use of the NPT will obviate the need for the kind of extensive outreach that stations conducted in advance of the November 2011 nationwide EAS test.

Electronic Test Reporting System. Due, in large part, to the relative success of the voluntary, temporary, electronic filing system employed for the first nationwide EAS test in November 2011, a permanent electronic test reporting system ("ETRS") has now been adopted by the FCC. The ETRS will be used in connection with nationwide EAS tests, and, at this time, the FCC has not adopted any new filing requirements for RWTs (required weekly tests) and RMTs (required monthly tests). The permanent ETRS will feature some improvements over the temporary system that was employed in 2011, including the ability of stations to revise and amend filings and the issuance of a filing receipt upon the filing of nationwide test reports. Just as with the first nationwide EAS test in 2011, ETRS will require broadcasters to file nationwide reports using three electronic forms, the first of which will identify each EAS Participant, facility location, EAS monitoring assignments, EAS equipment type, and other, similar background information. The second form will require stations to report whether they received the nationwide test alert code and whether they propagated it downstream, and the third form will request more detailed information about each station's nationwide test experience.

EAS Mapbook. The FCC plans to develop an EAS Mapbook to illustrate the manner in which an EAS alert is propagated throughout part or all of the United States and to allow the Commission to maintain a centralized database containing all EAS monitoring assignments and alert distribution pathways. According to the Order, the ETRS will be developed in a way that facilitates the production of the EAS Mapbook.

Accessibility Requirements. In the Order, the FCC furthers its policy to make all information, especially emergency alerts, accessible to all Americans for the safety and security of the public. With that policy in mind, the Commission adopted some new rules and amended some existing rules to facilitate access to EAS information for those who have hearing or visual disabilities. Simply put, the new rules require that the on-screen EAS text be legible, complete and appropriately placed. (The new rules do not require audiovisual synchronicity for EAS messages.)

Under the new rules, a visual EAS message must be displayed at the top of the television screen or where it will not interfere with other visual messages, and the message must be displayed in a size, color, contrast, location and run at a speed that is readily readable and understandable by viewers. (When block text is used for a visual EAS message, the text must remain on the screen for a sufficient length of time to be read.) The new rules also require that the EAS visual message be displayed in its entirety at least once during any EAS alert message, and the Commission encourages television stations to display any EAS visual message in its entirety more than once if it is possible.

With respect to audio quality, the new rules require that the audio portion of any EAS alert play in full at least once during any EAS message. The FCC articulated an expectation that the audio portion of the EAS message be delivered "in a manner and cadence that is sufficient for the consumer who does not have a hearing loss to readily comprehend it."

Text to Speech. The Commission declined to require the use of Text-to-Speech technology. However, recognizing that Text-to-Speech is an important and developing technology, the Commission encouraged its use to construct EAS audio from the EAS header codes in order to provide access to emergency information by individuals who are blind or visually impaired.

Compliance Timing. The Commission set a number of deadlines by which EAS Participants must come into compliance with the new and amended rules. In each case, the timeline begins at the effective date of the adopted rules. The effective date is 30 days after the publication of the Order in the Federal Register, which, as of June 18, 2015, has not yet occurred.

To implement the National Location Code and NPT rules, the Commission set a compliance deadline of twelve months from the effective date of the rule amendments. The Order observes that FEMA plans to conduct a nationwide EAS test in the near future using both the "six zeroes" location code and the NPT, and this was apparently an important part of the Commission's decision to establish the twelve month effective date for these parts of the new rules.

The compliance timeline for the ETRS portion of the new rules is sixty days from the effective date of the ETRS rules or within sixty days of the launch of the ETRS, whichever is later. Once the ETRS is functional, the new rules will require stations to update their ETRS identifying information concurrently with any update to their EAS State Plans and to complete the "Day of Test" portion of their filing obligation within 24 hours of any nationwide test, and the remainder of the filing obligation within 45 days of the relevant EAS nationwide test.

Concerning the accessibility portion of the new rules, stations will have six months from the effective date to come into compliance with the newly adopted legibility, completeness and placement requirements.

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If you have any questions concerning the information discussed in this memorandum, please contact your communications counsel or any of the undersigned.

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