



Virginia Association of Broadcasters Legal Review



Brooks, Pierce, McLendon, Humphrey &
Leonard, LLP
Counsel to VAB • (919) 839-0300

250 West Main Street, Suite 100
Charlottesville, VA 22902 • (434)
977-3716

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Legal Memorandum

In this issue, link to information about

Reminders: [Preparations Should Begin for September 28 Nationwide EAS Test](#)
[New EAS Handbook](#)
[TV Stations: Get Closed Captioning Certifications from Programmers](#)

Two Week Countdown: Nationwide EAS Test Scheduled for September 28 at 2:20 p.m. ET; Station Preparations Should Begin Now

As we have previously advised, the FCC and FEMA (the Federal Emergency Management Agency) have scheduled a nationwide test of the Emergency Alert System (“EAS”) for Wednesday, September 28, 2016. **(The test is scheduled to occur at 2:20 p.m. Eastern Time.)** On Monday, July 18, the FCC released a [Public Notice](#) relating to the nationwide test. The highlights of the Public Notice are below.

The September test is intended to assess the reliability and effectiveness of the EAS, and it will provide an opportunity to evaluate various steps the FCC has taken to improve the EAS since the first nationwide EAS test almost 5 years ago. On September 28, the nationwide test message will clearly state that the alert is only a test of the EAS, and it will be transmitted by FEMA in both English and Spanish. Unlike the first nationwide test in November 2011, the FCC is *not requiring* stations to engage in public outreach and education in advance of the September 28 test. In addition, the FCC has not announced a special “day-of” EAS Operating Handbook like the one published for the 2011 test, but the FCC did recently release a new all-purpose EAS Operating Handbook (see the [article below](#)).

To help stations to prepare for the September 28 test, the FCC has encouraged stations to take the following steps:

- Review the station's state EAS plan;
- Ensure that a copy of the [new EAS Operating Handbook](#) is located at normal duty positions or EAS equipment locations and is immediately available to operators;
- Review the new EAS Operating Handbook to become familiar with and prepare for the actions that will need to be taken upon receipt of the test alert;
- Ensure that the station's EAS equipment operates in compliance with the Commission rules, such as being capable of receiving and processing the NPT (national periodic test) code and the "six zeroes" national location code (all stations were required, as of July 30, 2016, to have EAS equipment capable of recognizing and processing the six zeroes code);
- Upgrade, as needed, EAS equipment software and firmware to the most recent version;
- Register in the new ETRS (Electronic Test Reporting System) filing system and complete "Form One" for the station (registration and submission of Form One was due by August 26; **stations that haven't yet filed Form One should do so immediately**; and
- Manually synchronize EAS equipment clocks to the official time provided by NIST (the National Institute of Standards and Technology), if the station's equipment does not automatically synchronize to an Internet time source.

One of the most important preparatory steps referenced above is the requirement to register in the new ETRS system and submit "Form One" by August 26, 2016. Obviously, August 26 came and went more than two weeks ago, but we have heard from FCC Staff that multiple stations have not registered and submitted Form One. If your station has not registered in ETRS and submitted Form One, please contact legal counsel immediately. Moreover, if your station did timely submit Form One, you can make revisions to and refile Form One no later than September 26, 2016.

Stations must also remember that they will be required to file "Form Two"—which will contain "day of test" information about the nationwide test—by 11:59 p.m. Eastern Time on the day of the test. The FCC has not yet made Form Two available, but we expect it to be a relatively short, self-explanatory report. Subsequently, stations will be required to file "Form Three" with detailed data about the test performance by November 14, 2016. In the event it becomes necessary to delay the September 28 nationwide test, the alternate test date has been established as Wednesday, October 5, which is one week later.

As you review the material above and below and as you begin your preparations for the September 28 nationwide EAS, please remember that all broadcast stations are required to participate in the EAS (the FCC no longer recognizes "non-participating" status for stations in the EAS rules). Accordingly, all stations must participate in the September 28 (2:20 p.m. ET) nationwide test, and all stations must submit Form One, Form Two, and Form Three through the FCC's ETRS, and, if the September 28 nationwide test is delayed, participate in a rescheduled nationwide test on October 5.

FCC Issues New Mandatory EAS Handbook for All Broadcast Stations

On August 19, 2016, the FCC released a [Public Notice](#) announcing the issuance of a [new EAS Handbook](#) for all broadcast stations. Prior to the August 19 announcement and release, stations have been operating under the 2007—yes, nearly a decade old!—version of the EAS Handbook. (In addition, the FCC had required all stations to use a special one-day Handbook in connection with the November 2011 nationwide EAS test, but that 2011 one-day Handbook should not be used in connection with the September 28, 2016, nationwide test.)

All broadcast stations should print this [new EAS Handbook](#) and post it at the location of the station's EAS equipment. All prior versions of the EAS Handbook are now outdated, superseded, and ripe for recycling. In addition, all stations should carefully review the new EAS Handbook and take the opportunity to “fill in the blanks” where the Handbook gives stations the opportunity to do so. All station personnel involved in any aspect of EAS compliance—weekly and monthly tests; nationwide tests; state and local alerts; EAS logging; equipment procurement; etc.—should review the new EAS Handbook and ensure that it is posted at the appropriate location(s).

We have learned from industry reports that stations and others may be circulating versions of the new EAS Handbook with altered content, i.e., versions where the substance of the FCC's narrative has been changed, beyond stations completing the “fill in the blank” portions. Stations should resist the temptation to attempt to improve or change the text of the new EAS Handbook other than to complete the “fill in the blank” portions. The FCC Staff has acknowledged that a more user-friendly version (such as writable PDF) would be helpful, and that the new EAS Handbook contains a few minor errors that warrant correction by the agency. It is our understanding that the FCC is working on a new version of the new EAS Handbook, but it may not be ready for distribution prior to the September 28 nationwide test. Thus, stations should treat the current version of the [new EAS Handbook](#) as the relevant document for the September 28 nationwide test and into the future.

TV Stations: Remember to Obtain Closed Captioning Certifications from Programming Providers

With the new broadcast season upon us, it is a good time for television stations to take stock of the closed captioning certifications they have received from programming providers. Stations may recall that the FCC's rules relating to written certification of compliance with the closed captioning quality standards became effective in March 2015, and they require stations (and other video programming distributors such as MVPDs) to make “best efforts” to obtain a written certification from all video programmers from whom they obtain programming regarding compliance with the closed captioning quality standards.

Hold on a Minute; What About the Rules Adopted in February 2016 That Require Program Providers to File Certifications with the FCC? In February 2016, the FCC adopted new rules that will change the closed captioning certification process—once the new rules go into effect, stations will not be required to collect certifications from programming providers, and, instead,

programming providers will be required to file certifications electronically with the FCC. However, **the new certification procedures adopted in February 2016 ARE NOT YET IN EFFECT**. The new certification requirements will become effective only after the Office of Management and Budget (“OMB”) reviews and approves them and after the FCC builds and launches a certification filing system. As of September 13, 2016, OMB has not yet approved the new certification process, and the FCC has not constructed the filing system. Thus, for the indefinite future, the certification requirements from March 2015 remain in effect.

How to Obtain a Certification. To achieve compliance with the “best efforts” requirement, stations may retrieve a programmer’s closed captioning quality certification from a website or other widely available location. If a station is unable to so locate a programmer’s certification, the station is then required to make a written request to the video programmer in order to obtain the certification. In such case, the written request must ask each programmer to certify that the programmer either (1) complies with the captioning quality standards; **or** (2) adheres to the Best Practices for video programmers set out in the new rules; **or** (3) is exempt from the closed captioning rules under one or more properly applicable and specified exemptions. The written request must also ask the programmer to make the certification “widely available.” Finally, if a station cannot locate the certification itself and is unable to obtain the certification after requesting it in writing from the programmer, the station “shall promptly submit a report” to the FCC to identify the programmer that did not make a certification available. (More information on the reporting requirement is further below.)

What if a Station (or Channel) Is Exempt from Closed Captioning Requirements? When a station (or an individual channel, such as a multicast channel) qualifies for exemption from the general closed captioning requirements (e.g., under the \$3 million gross revenue exemption), the station must still request certification from all programmers because such a station is still required to pass-through and air all captions embedded in programming by the program provider.

“All” Video Programmers. Stations must obtain the certifications referenced above from all video programmers. Thus, stations must obtain (or, if unavailable, request) such certifications not only from networks and syndicators but also all paid programming providers, religious programming providers, and any other provider of program material to the station. Note, however, that the FCC specifically stated that MVPDs are not required to request or obtain certifications from television stations.

Are Stations Required to Obtain Certifications from Programmers Every Year? The rules merely require stations to obtain closed captioning certifications from all programming providers. So long as a certification continues to apply to a programming provider’s programming airing on a station, the station does not need to obtain a new certification from the provider. In short, stations are not required to obtain new certifications on an annual basis. However, from time to time stations begin airing (i) programming from a new programming provider or (ii) programming from an existing provider that isn’t covered by an existing certification—in such situations, stations must obtain a closed captioning certification from the programming provider. This memorandum is really directed intended to remind stations to obtain certifications in those situations.

Is it Sufficient for a Programmer to Provide a Station with a Certification from a Captioning Vendor? In May 2015, the FCC released a Public Notice to clarify that if a video programmer chooses to provide a certification stating that, in the ordinary course of business, it has adopted

and follows the Best Practices for video programmers with respect to captioning quality, such certification must be executed by the *video programmer* and state that the *video programmer* adheres to the Best Practices for video programmers. A video programmer that provides only a certification *from a captioning vendor* stating that the captioning vendor complies with the captioning vendor Best Practices will not have provided a certification that satisfies the rule. In other words, to satisfy the certification rule, the certification from the video programmer must state that the *video programmer* adheres to the video programmer Best Practices.

Stations That Provide Programming to Other Distributors Must Provide Certifications to Those Distributors. As noted above, each video programmer must certify in writing to any distributor that the programming either (1) complies with the captioning quality standards; or (2) adheres to the Best Practices for video programmers set out in the new rules; or (3) is exempt from the closed captioning rules under one or more properly applied and specified exemptions. For stations that share content—for example, where one station provides news or other programming to another station—one station may be a programmer (certification provider) and the other a distributor (certification requester and recipient). If the programmer station does not provide the certification and the recipient carries the programming anyway, the recipient station must report the non-certifying station to the Commission. Note, however, that the FCC specifically stated that MVPDs are not required to request or obtain certifications from television stations.

What Are the “Best Practices” Standards for Programmers? For programmers that elect to certify compliance with “Best Practices” (as opposed to certifying compliance with the four-prong quality standards—accuracy, synchronicity, completeness, and placement—themselves), the rules contain rigorous standards for programmers to ensure the quality of their closed captioning. The Best Practices rules are extensive and were the subject of prior legal memoranda. Please let us know if you would like a copy of the Best Practices rules.

How Does a Station Report a Programmer that Fails to Provide a Certification? According to the FCC May 2015 Public Notice, here is the process by which stations should report non-certifying programmers:

- A station must send the name and “contact information” of the video programmer via e-mail to captioningcertification@fcc.gov. The “contact information” of the video programmer must include the video programmer’s address, telephone number, and e-mail address.
- Stations must report the information of non-certifying programmers within 40 days of the date that the station informed the programming provider that a certification is required.
- Upon receipt of a report identifying a non-certifying video programmer, the FCC sends an acknowledgement to the station by e-mail and places the name of the non-certifying programmer in a [publicly available database](#).
- If a programmer provides a certification in compliance with the rules after a station has submitted a report identifying the programmer to the FCC as non-certifying, the station

may notify the FCC of this certification by sending an e-mail to captioningcertification@fcc.gov.

Reporting any entity to the FCC for any reason is an undertaking that warrants careful consideration. In the realm of closed captioning certifications, revenue streams and relationships may be at risk because stations are required to obtain certifications from all programmers, including paid programming providers. Stations are encouraged to work closely with rep firms, agencies, and programmers to ensure sufficient certifications are obtained in a timely fashion. Stations would be well-advised to consult with legal counsel before reporting a non-certifying programmer to the FCC.

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

Stephen Hartzell, Editor

BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.

Wade H. Hargrove
Mark J. Prak
Marcus W. Trathen
David Kushner
Coe W. Ramsey
Charles E. Coble
Charles F. Marshall
Stephen Hartzell
J. Benjamin Davis
Julia C. Ambrose
Elizabeth E. Spainhour
Eric M. David
Timothy G. Nelson

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