February 11, 2022

Legal Memorandum

*In this issue, please find information about*

|  |  |
| --- | --- |
| *Headlines:* | [FCC Adopts Minor Changes to Political Programming Rules](#_Commission_Adopts_Minor)  [FCC Continues to Take Action on Unlicensed White Space Operations](#_FCC_Continues_to)  [Report on August 11, 2021, EAS NPT Shows General Improvement; Minor Transmission, Reception, and Filing Challenges](#_Report_on_August)  [FCC Seeks Comment on EAS Accessibility Issues, Including Ways to Improve EAS Clarity and Effectiveness](#_FCC_Seeks_Comment) |

# Commission Adopts Minor Changes to Political Programming Rules

As part of the FCC’s agenda for its January 2022 open meeting, the Commission adopted a [Report and Order](https://protect-us.mimecast.com/s/jwf0CZ6yR5H5ZgoyfzWJjKL?domain=docs.fcc.gov) (the “Order”) revising several of its political programming rules in relatively minor ways. The revisions generally reflect preexisting station practices that simply hadn’t yet been formally written into the FCC’s rules. The areas targeted by the FCC’s recent rule revisions are stations’ recordkeeping practices and the criteria relevant to whether an individual running as a write-in candidate qualifies as a “legally qualified candidate for public office.

*Background.* As broadcasters are well aware, various statutory and FCC rules govern many of the specifics related to requests to purchase political advertising time, particularly when those requests are either (1) made by or on behalf of a “legally qualified candidate” or (2) communicate a message relating to “any political matter of national importance.” Those political broadcasting rules have been in the spotlight for the last several years—particularly those relating to broadcasters’ political file recordkeeping obligations—as the full Commission has issued several Orders “clarifying” aspects of the rules and the Media Bureau has entered into consent decrees with broadcasters both large and small for what the Bureau has viewed to be deficient political file recordkeeping compliance.

Among the FCC’s many, various political broadcasting rules, the two directly affected by the Order are: (1) stations’ recordkeeping obligations related to requests for advertising time by a third-party (i.e., by someone other than a legally qualified candidate or the candidate’s authorized campaign committee) that communicates a message relating to any political matter of national importance (i.e., national “issue” ads); and (2) the criteria relevant to whether an individual running as a write-in candidate has made a “substantial showing” of bona fide candidacy sufficient to qualify as a “legally qualified candidate” for purposes of relevant law and FCC rules (e.g., the “lowest unit charge,” “equal opportunities,” and “reasonable access” rules).

*The Order’s Minor Rule Revisions.* As noted above, the minor revisions adopted in the Order generally mirror existing station practices and therefore are unlikely to surprise stations. For example, the Order’s revisions to the FCC’s political file recordkeeping rules simply harmonize the Commission’s rules with broadcasters’ pre-existing statutory obligations (adopted in 2002) to retain and upload relevant records for national third-party issue ads. Put differently, stations still must retain and timely upload to their political files the following information relating to requests for time for national third-party issue ads: whether the request to purchase broadcast time is accepted or rejected by the station; the rate charged for the broadcast time; the date and time on which the advertisement is aired; the class of time that is purchased; all political matters of national importance to which the advertisement refers; and the name of the person or entity purchasing the time, including the name, address, and phone number of a contact person for such purchaser and a list of the chief executive officers or members of the executive committee or of the board of directors of such purchaser.

The Order’s other primary revision brings into the digital era the analysis regarding whether an individual running as a write-in candidate has made a “substantial showing” of bona fide candidacy sufficient to qualify as a “legally qualified candidate.” Specifically, the Order finds both use of social media and creation of a campaign website to be criteria relevant to that determination. The Order therefore adds those online items to the Commission’s preexisting, non-exclusive criteria, which include: “evidence that the person claiming to be a candidate has engaged to a substantial degree in activities commonly associated with political campaigning,” including “making campaign speeches, distributing campaign literature, issuing press releases, maintaining a campaign committee, and establishing campaign headquarters.” As examples of how the new criteria might apply, the Order notes that “social media activities that may support a substantial showing of a bona fide candidacy include the use of social media to fundraise, solicit votes, share policy positions, and engage in digital dialogues with voters.” The Order emphasizes, however, that online presence is insufficient—standing alone—to constitute a “substantial showing,” and formally codifies that nuance into the updated rule: “[t]he creation of a campaign website and the use of social media shall be additional indicators of a bona fide candidacy, not determinative factors, and such digital activities must be combined with other activities commonly associated with political campaigning that are conducted in substantial portions of the relevant geographic area.”

\* \* \* \* \*

With the 2022 political season rapidly heating up, we encourage you to promptly and regularly review your station’s political file recordkeeping and general political programming obligations to assist with compliance. And, when you do, please take note of the above-described rule updates.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

# FCC Continues to Take Action on Unlicensed White Space Operations

A recent set of FCC [Orders and a Further Notice of Proposed Rulemaking](https://docs.fcc.gov/public/attachments/FCC-22-6A1.pdf) (the “Decisions”) continue to develop the regulatory framework governing unlicensed operations in television white spaces. Among the multiple issues encompassed by the Decisions, those most relevant to broadcasters encompass the frequency with which unlicensed white space devices are or will be required to “recheck” the white spaces databases for potential interference conflicts.

*Background.* Since 2008, the Commission has been slowly opening up “vacant” portions of the VHF and UHF broadcast television bands for unlicensed operations. Such unlicensed operations are conducted via “white space devices,” which generally use those vacant/unused portions of the TV bands (i.e., “white spaces”) to provide or facilitate the deployment of wireless services such as broadband. However, because unlicensed white space operations have the potential to cause harmful interference to existing, licensed broadcast (and other) operations, the FCC has adopted rules both limiting the scope of permissible unlicensed operations and requiring white space devices to regularly check certain databases to ensure that their operations are taking (or will take) place on a viable, available channel and at a permissible power level.

*Database Recheck Frequency.* As noted above, the Decisions encompass multiple issues relating to the current regulatory ecosystem for white space devices (including rejection of an NAB challenge to a particular database administrator and rejection of the adopted but never‑implemented requirement for databases to “push” notifications regarding changes in channel availability to help guard against interference with licensed wireless microphone deployments). Most notably for broadcasters, the Decisions (1) adopt a requirement that fixed and personal/portable white space devices must re-check the white space database at least once every hour when not in sleep mode, and to cease operations after two failed scheduled checks, and (2) seek comment on how frequently narrowband fixed, Mode II personal/portable, and mobile white space devices should be required to re-check the white space database. As framed in the Decisions, the crux of the issue surrounding how frequently database “rechecks” should be required is balancing the need for licensed wireless microphone operators to be able to quickly deploy in breaking news and other exigent circumstances, while at the same time ensuring that white space devices don’t needlessly clog bandwidth and suffer battery drain due to required rechecks that occur more often than actually is necessary to prevent harmful interference. With that balance in mind, the FCC requests comments on whether the current once-per-day recheck interval for narrowband fixed devices should be tightened to hourly and/or whether there are any other safeguards that can or should be implemented to ensure against harmful interference The FCC also proposes that mobile white space devices should be subject to the same hourly recheck requirement as fixed and personal/portable white space devices and seeks comment on that proposal and/or any alternatives.

Comment dates have not yet been set, but opening comments will be due 30 days after publication in the *Federal Register*, with reply comments due 60 days after such publication.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

# Report on August 11, 2021, EAS NPT Shows General Improvement; Minor Transmission, Reception, and Filing Challenges

The Public Safety and Homeland Security Bureau (the “Bureau”) released a [Report](https://docs.fcc.gov/public/attachments/DOC-378861A1.pdf) (the “Report”) detailing and analyzing the results of the FCC’s August 11, 2021, nationwide test of the Emergency Alert System (“EAS”). Broadcasters will recall that the 2021 nationwide EAS test, like the last nationwide test in 2019 (the 2020 nationwide test was cancelled due to COVID-19), relied solely on the broadcast-based distribution system (otherwise known as the “daisy chain”), and was intended to evaluate EAS participants’ ability to receive and, in turn, retransmit the EAS alert to other stations in the absence of internet connectivity. Stations were asked to file EAS Forms One, Two, and Three (the “Forms”) via the FCC’s EAS Test Reporting System (“ETRS”) at various points prior to and after the test. The Report, which compiled data from those three Forms, concludes that the data demonstrate that “the national EAS distribution architecture is largely effective as designed,” but also “shed light on challenges” that prevented some participants from receiving and/or retransmitting the test. Here are some of the most important data points:

* The test message reached 89.3% of EAS participants, an increase from 82.5% in the 2019 test. The overall retransmission success rate also improved from 79.8% in 2019 to 87.1% in 2021, with radio and television broadcasters each seeing an approximately 7% increase in successful retransmission.
* Technical complications at Primary Entry Point stations (“PEPs”), the initial delivery points for the test message, were reduced. Only 7 of the 76 PEPs reported problems—including PEPs in North Carolina and Virginia—down from 12 in 2019. This likely contributed to the overall higher receipt and retransmission rates noted above.
* Test participants reported modestly fewer complications with receipt and retransmission when compared to 2019, although audio quality issues and failures in receiving transmissions remained the most-reported complications.
* Of approximately 25,644 EAS participants, 75.3% participated in the test by filing one or more Forms. This is down from 78.6% participation in 2019, with radio broadcasters decreasing from 82% to 79.9% and television broadcasters decreasing from 68.2% to 62.6%.

In light of its analysis, the Bureau highlighted a number of measures it plans to take to continue to improve the EAS. Measures include proposals to improve the clarity and descriptiveness of visual information displayed with the national EAS test (more on this below), implementing further “user-friendly” changes to the ETRS filing process to improve station participation, and working with State Emergency Communications Committees to ensure state EAS plans are tailored to ensure the best possible coverage, particularly in areas where broadcast signals are weakest.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

# FCC Seeks Comment on EAS Accessibility Issues, Including Ways to Improve EAS Clarity and Effectiveness

Comment deadlines have recently been set for a [Notice of Proposed Rulemaking](https://docs.fcc.gov/public/attachments/FCC-21-125A1.pdf) (the “NPRM”) and [Notice of Inquiry](https://docs.fcc.gov/public/attachments/FCC-21-125A1.pdf) (the “NOI”) aimed at improving the clarity of EAS messages by increasing the congruity between audio and visual aspects of the alerts.

*Background.*  The EAS and its predecessor systems have long been one of the nation’s most important methods for quickly and reliably communicating emergency information to the United States public. A fundamental component of broadcasters’ public-interest service to communities, the current system now incorporates multiple mechanisms for distributing emergency information. The so-called “legacy” (i.e., pre-internet) EAS architecture broadcasts a customizable audio-only message along with the EAS attention signal and various predefined codes containing general information about the source of the alert and type of emergency. By contrast, a more recent, internet‑based EAS architecture allows for online distribution of alerts through the FEMA‑administered Integrated Public Alert and Warning System “IPAWS.” As compared to legacy EAS messages—which are audio-only—messages transmitted via IPAWS are formatted in Common Alerting Protocol (“CAP”), are IP-based, and may incorporate various types of information (text, audio, video, streaming links, etc.). While the CAP system allows for distribution of more varied information, the legacy EAS is considered more robust, and less likely to be rendered unavailable in cases of national emergency.

*Encouraging Uniformity.*  As a result of the limitations of each system, there is often a discrepancy between the visual text that is broadcast in conjunction with an audio EAS message. For legacy EAS, television broadcasters (and other video-service EAS participants) must construct the accompanying visual crawl based on the pre-defined information codes accompanying the audio message, which may not precisely match the content of the customizable audio message. And although CAP-formatted alerts can include specific text in conjunction with audio messages, a lack of standardization can lead to limited information being included in the accompanying visual crawl.

As a start to remedying these perceived limitations, the NPRM proposes standardized language for use in the visual crawl accompanying legacy nationwide EAS test alerts, as well as a change to the terminology for nationwide EAS tests delivered via CAP. Ultimately, the goal of each proposal is to encourage greater consistency between visually displayed information and the accompanying audio message. With that consistency in mind, the NPRM also solicits more general comment on whether other EAS alert events besides the nationwide test (e.g., forest fires or flash flooding) would benefit from using a uniform scripted message rather than basing the visual message on the pre-defined information codes transmitted with each alert. Further, with the goal of increasing the use of CAP and its capacity to provide matching visual and audio messages, the NPRM also proposes to require stations to poll IPAWS whenever they receive a legacy EAS alert to determine whether there is a CAP version of that alert and, if so, use that CAP version instead of the legacy version.

*Broad Call for Ideas.*  In addition to the foregoing specific proposals, the NOI broadly asks commenters to opine on any ways that the EAS may be improved to increase functionality and accessibility of the system, including the possibility of requiring CAP-formatting for all alerts other than national emergencies and nationwide tests. The request for comments is far-reaching, and touches on how the legacy EAS system might be modified (if at all), how new digital transmission standards such as ATSC 3.0 might improve EAS capabilities, and the corresponding costs and benefits of any suggested changes.

Comments on the NPRM are due by March 11, with reply comments due by March 28. Comments on the NOI are due by April 11, with reply comments due by May 10.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

*Tim Nelson, Editor*

[BROOKS, PIERCE, McLENDON,](http://www.brookspierce.com/)

[HUMPHREY & LEONARD, L.L.P.](http://www.brookspierce.com/)

[Mark J. Prak](mailto:mprak@brookspierce.com)   
[Marcus W. Trathen](mailto:mtrathen@brookspierce.com)  
[David Kushner](mailto:dkushner@brookspierce.com)  
[Coe W. Ramsey](mailto:cramsey@brookspierce.com)  
[Stephen Hartzell](mailto:shartzell@brookspierce.com)

[Julia C. Ambrose](mailto:jambrose@brookspierce.com)

[Elizabeth E. Spainhour](mailto:espainhour@brookspierce.com)

[J. Benjamin Davis](mailto:bdavis@brookspierce.com)

[Tim Nelson](mailto:tnelson@brookspierce.com)

[Patrick Cross](mailto:pcross@brookspierce.com)

Noah Hock

Micole Little

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

This Legal Review should in no way be construed as legal advice or a legal opinion on any specific set of facts or circumstances. Therefore, you should consult with legal counsel concerning any specific set of facts or circumstances.

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

© 2022 Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P.