May 6, 2022

Legal Memorandum

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# No Current Plans to Conduct 2022 National EAS Test, According to FEMA

A representative of the Federal Emergency Management Agency (“FEMA”) announced at the recent NAB Show that the agency plans to forego this year’s national periodic test of the Emergency Alert System (“EAS”). A formal announcement from FEMA is expected in the coming days; in the interim, we have reached out to a FEMA source who informally confirmed the cancellation plans and clarified some details. Despite the apparent likelihood that there will not be a 2022 national EAS test, **it is still possible that broadcasters may have to file EAS Form One pursuant to the FCC’s rules**.

In lieu of the test, FEMA has indicated that it intends to focus on creating a comprehensive survey instrument to study the effectiveness of wireless emergency alerts (WEAs), which in recent years have typically been tested as part of the same national test of the broadcast side of the EAS. This comes only a short time after the FCC’s April 2022 [Further Notice of Proposed Rulemaking](https://docs.fcc.gov/public/attachments/FCC-22-31A1.pdf) proposing a requirement that mobile providers who participate in WEA file public reports on the reliability, speed, and accuracy of WEA messages. Because federal law (specifically, the Paperwork Reduction Act) requires FEMA to obtain a number of approvals before disseminating a nationwide survey, FEMA apparently intends to postpone the national EAS test until early 2023.

As you may recall from past years, there are usually three (yes, three!) reports that each station must file in connection with a nationwide EAS test. Those reports must be filed electronically in the FCC’s [EAS Test Reporting System](https://www.fcc.gov/general/eas-test-reporting-system) (“ETRS”) by certain deadlines established by the FCC and administered by its Public Safety and Homeland Security Bureau (“PSHSB”). The first report—called Form One—is unique as compared to the others insofar as Form One comes prior to the nationwide test and contains basic identifying information about each station, including its transmitter location, EAS monitoring assignments, and make and model of EAS gear. The subsequent reports—Form Two and Form Three, respectively—contain information about each station’s experience with the nationwide test itself and are completed and filed after the test has been administered.

If and when FEMA formally announces the cancellation of the 2022 nationwide EAS test, we expect further clarity from the FCC’s PSHSB on how the cancellation announcement affects broadcasters’ EAS obligations related to the 2022 nationwide EAS test. If there is indeed no nationwide test in 2022, it necessarily follows that EAS Participants will almost certainly not be required to file Forms Two and Three in ETRS (given that the obligation to file Forms Two and Three are tied to the administration of a nationwide test). However, the requirement for EAS Participants to “renew [their] identifying information on a yearly basis”—i.e., to file Form One—remains a discrete obligation. When the nationwide EAS test was last waived in 2020 due to the COVID-19 pandemic, the PSHSB independently waived broadcasters’ requirement to file Form One; however, no similar announcement has been made thus far regarding the 2022 national EAS test. We have contacted PSHSB regarding this year’s Form One filing requirement, and have received informal guidance that PSHSB expects to provide additional information after an official announcement by FEMA regarding the 2022 nationwide EAS test.

Please note that, because there has been no official FEMA or FCC action at this time, we cannot say with complete certainty that there will be no EAS test in 2022 (and broadcasters may still be required to file Form One regardless of any cancellation). While it seems likely that the nationwide test will be cancelled, we will continue to monitor the situation and provide an update when more information is available. In the meantime, broadcasters should remain in contact with their communications counsel and promptly follow any guidance received by FEMA and/or the PSHSB. Please also remember that a cancellation of the nationwide EAS test does not waive any of broadcasters’ other obligations under the Commission’s EAS Rules. Among other things, **broadcasters must still continue to monitor and ensure the operational readiness of their EAS equipment and continue to conduct required weekly and monthly tests.**

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# New Comment Period Announced for

# FM Booster Geo-targeting Proposal

The FCC recently [reopened](https://docs.fcc.gov/public/attachments/DA-22-492A1.pdf) for comments a 2020 proposal to allow radio broadcasters to use FM booster stations to air “geo-targeted” content—independent of their primary stations—in certain limited circumstances. Although the broadcast industry largely opposed the proposal during the last comment window on this issue (which closed in early 2021), the FCC’s Media Bureau has indicated that reopening a brief comment period on the proposal is warranted to address several recent technical filings in the docket.

Opening comments in the reopened window are due by June 6, 2022, with reply comments due by June 21, 2022.

*Background.* Near the end of 2020, the FCC issued a Notice of Proposed Rulemaking (the “Notice”) in response to a Petition (the “Petition”) filed by a group called GeoBroadcast Solutions LLC seeking rule changes designed to purportedly “enable FM broadcasters to use FM booster stations to air geo-targeted content (e.g., news, weather, and advertisements) independent of the signals of [the associated] primary station within different portions of the primary station’s protected service contour for a limited period of time during the broadcast hour.” Such proposed rule changes would deviate from the historical treatment of FM booster stations, which the FCC first authorized in order to address FM station signal loss that can occur within a primary FM station’s authorized service contour by, among other things: being licensed to the licensee of the primary station; operating on the same frequency as the primary station; and being limited to rebroadcasting the signal of the primary station (i.e., booster stations may not transmit original content). Although commenters’ initial responses to the 2020 Petition were mixed, by the end of the Notice’s comment period in early 2021 the filings submitted by NAB and most broadcasters expressed opposition to the proposal due to concerns that geo-targeted content would, among other things: (1) be disruptive to listeners traveling throughout a station’s service contour and who might encounter self-interference from or different programming on the same “station” when moving from an FM booster to its parent station; and (2) decrease advertising revenue and further marginalize minority communities by facilitating advertisers’ ability to place buys particularized to geo-targeted boosters, rather than on a station as a “whole”—i.e., a parent station and any associated FM boosters or translators.

*The New Comment Period.* The Media Bureau has now reopened the comment period in order to seek input on several technical reports submitted by GeoBroadcast Solutions related to two stations operating pursuant to experimental STA to test the proposed geo-targeting technology—one station in San Jose, California, and one in Jackson, Mississippi. According to the Media Bureau, those reports “contain detailed technical discussions about the operation of GeoBroadcast Solutions’ booster technology, its compatibility with the Emergency Alert System, and its impact on digital FM broadcast.” GeoBroadcast Solutions has also been separately touting the “good results” obtained on the experimental stations in public and private meetings with the Commission.

Where the proceeding will eventually end up remains to be seen. However, the reopened comment period marks a limited opportunity for broadcasters to again weigh in on the geo‑targeting proposal. We will continue to keep you apprised of any future developments.

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# LMS Updates: New Applications Soon Available; Video Division Chief Urges Broadcasters to Review Contact Information in LMS

The Media Bureau has issued a Public Notice (the “Notice”) [announcing](https://docs.fcc.gov/public/attachments/DA-22-476A1.pdf) that beginning on May 17, 2022, a number of additional filings will be supported by the Commission’s Licensing and Management System (“LMS”). As we previously reported, the Commission’s transition to LMS from its older Consolidated Database System (“CDBS”) has been accelerating; after January 12, 2022, online filings were no longer accepted through CDBS, though certain types of applications remained housed in the legacy system. As a result, applicants have been required to make some filings by mail or email until the transition to LMS could be completed.

*Filings Soon Available via LMS*. According to the Notice, as of May 17, the following filings will begin to be available through LMS:

* Special Temporary Authorizations (“STAs”) for FM Engineering (including for full-power and low-power FM stations, as well as FM translator and booster stations)
* Silent STA Requests (including for all AM and FM services)
* Extensions of Silent STA and Extensions of Engineering STA (note, however, that extensions of silent or engineering STAs may not be filed in LMS when the preexisting silent or engineering STA was initially filed in CDBS; extensions of such CDBS-originated silent or engineering STAs must be submitted as an original (i.e., “new”) STA request with an attachment explaining the circumstances, if necessary)
* Suspension of Operations Notifications
* Resumption of Operations Notifications
* AM/FM Digital Notifications
* Modulation Dependent Carrier Level (MDCL) Notifications
* Change of Primary Station Notifications
* Tolling Notifications
* Reduced Power Notifications
* Withdrawal of Pending Applications

Once these filings become available in LMS (again, as of May 17), broadcasters may no longer use the temporary email-filing procedures for such filings—any such filings submitted through the temporary email‑filing procedures will be dismissed as procedurally defective. Accordingly, broadcasters should take care to use LMS whenever available and may wish to consult communications counsel as necessary.

In addition to the added filings, LMS search functionality will also be expanded. The Public Search page will begin to include the option to search by frequency or channel, and existing STA and silent notification records will be added to LMS from CDBS.

*Maintaining and Updating LMS Contact Information*. As FCC application procedures are increasingly housed within LMS, it is important that broadcasters take care to maintain their profiles within the system, with particular attention paid to keeping contact information up to date. Indeed, in connection with a recent FCC discussion regarding the LMS transition, FCC Video Division Chief Barbara Kreisman called on broadcasters and their legal counsel to review LMS to confirm the accuracy of their contact information and make all necessary corrections. According to the Chief, the Media Bureau regularly encounters LMS listings for licensees with incorrect contact information for the licensee company and/or its attorneys, which can have the real-world consequence of delaying application processing in certain instances. Accordingly, broadcasters are encouraged to regularly review and update their contact information in LMS to avoid such unnecessary delays and to ensure that they receive all relevant FCC correspondence regarding their pending applications.

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# FM Station Licensee Agrees to Pay $4K For Unauthorized Transfer of Control, Failure to File Biennial Ownership Reports

A recent [Order and Consent Decree](https://protect-us.mimecast.com/s/k3dcC1wqD5HppJ1MsLwjI26?domain=docs.fcc.gov) (the “Consent Decree”)—and a $4,000 penalty for the licensee subject thereto—serve as a salient reminder to broadcasters of the importance of seeking (and receiving!) FCC approval for any transfer of station control. The Consent Decree also underscores the fact that the Commission is unlikely to accept “inadvertence” or “accidental” as complete defenses for behavior that violates the agency’s Rules.

*The Rules at Issue*. The Communications Act as well as FCC Rules (Section 73.3540, to be specific) prohibit the transfer or disposal, by any means, of an FCC construction permit or license unless the current licensee first applies for permission to do so from the Commission. The FCC also requires broadcasters to file a biennial ownership report by December 1 in all odd-numbered years (per Rule 73.3615) cataloging the details of station ownership.

*What Happened Here*. In the situation discussed in the Consent Decree, the licensee entity of an Oklahoma FM station happened to be a single-member LLC with just one shareholder (the “Licensee Company”). In 2017, the then-sole shareholder gifted her entire interest in the Licensee Company to her son; per the Consent Decree, that gift occurred as part of the mother/shareholder’s “estate planning efforts and was inadvertently completed without FCC counsel.” You may be able to see where this is going: the mother’s gifting of 100% of her interest in the Licensee Company to her son created an unauthorized transfer of control.

According to the Consent Decree, the Licensee Company did not disclose this change in control to the Commission for several years; in 2021, the Licensee Company filed an application seeking consent to transfer control (retroactive to 2017) with the Commission. During the Commission’s investigation of the unauthorized transfer of control of the Licensee Company, the agency also found that the Licensee Company had failed to file its required biennial ownership reports in 2017 and 2019.

Ultimately, the Commission engaged in negotiations with the Licensee Company to resolve the situation, leading to the Consent Decree. The Licensee Company admitted that it had engaged in an unauthorized transfer of control when 100% of the entity was gifted from one family member to another without prior consent of the Commission; the Licensee Company also acknowledged its failure to file the 2017 and 2019 biennial ownership reports. The Licensee Company agreed to pay a civil penalty of $4,000.

Because the Media Bureau’s investigation did not raise any substantial or material questions as to whether the Licensee Company is otherwise qualified to hold a Commission license, the FCC anticipates granting the application for transfer of control so long as the terms of the Consent Decree are met and no other violations by the Licensee Company arise that would necessitate denial.

Again, fundamentally, this serves as a reminder to broadcasters that (1) Commission approval is required for a transfer of control involving an FCC licensee (and that the Commission will not accept the explanation of “we didn’t mean to do it!” if a licensee fails to seek consent), and (2) it is extremely important to timely file biennial ownership reports.

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*Tim Nelson, Editor*

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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.

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