



Virginia Association of Broadcasters Legal Review



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

600 Peter Jefferson Parkway, Suite 300
Charlottesville, VA 22911 • (434) 977-3716

SPECIAL REPORT

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January 28, 2010

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FCC PROPOSES NEW RULES REGARDING NATIONAL EAS TESTS AND REPORTS

The FCC has released a Second Further Notice of Proposed Rulemaking (“Notice”) that proposes to amend the FCC’s Emergency Alert System (“EAS”) rules to provide for national testing of EAS and collection of data from these new, national tests. The rules, if adopted, would make participation in an annual national test mandatory for all EAS participants, and data concerning national tests would be required to be submitted to the FCC within 30 days after the test. (Under the FCC’s current rules, EAS participants must conduct weekly and monthly state and local, not national, tests, and although certain test data is required to be retained, that data is not required to be submitted to the Commission.)

The EAS national alert and warning system exists, in part, to enable the President to deliver messages to the public during emergencies, but no systematic national test of EAS has ever been conducted to determine whether the system would actually function as required if the President were to issue a national alert. Indeed, the FCC rules currently in effect do not mandate any such test. However, according to the Notice, a September 2009 report on the FCC’s preparedness for major public emergencies issued at Chairman Genachowski’s request raised “concerns” about “the frequency and scope of EAS testing.” This report recommended that the three federal agencies responsible for EAS—the FCC, the Federal Emergency Management Agency (“FEMA”), and National Weather Service—review the testing regime to determine what improvements, if any, should be made. The proposed rules are a result of this inter-agency review.

The Notice also discusses perceived vulnerabilities with the existing EAS structure, including its reliance on a “daisy chain” of connections between participating stations. At its initial level, the EAS “daisy chain” consists of various FEMA-designated broadcast stations, known as Primary Entry Point stations, which receive and transmit

“Presidential Level” messages initiated by FEMA. As the entry point for national level EAS messages, these Primary Entry Point stations are designated “National Primary” or NP. At the next level (below the Primary Entry Point stations), designated “State Primary” stations monitor specifically-designated Primary Entry Point stations and re-transmit the Presidential-level alert, as well as state-level EAS messages originating from the Governor or a State Emergency Operations Center. At the level below the State Primary stations, Local Primary stations monitor the State Primary and Primary Entry Point stations and are monitored, in turn, by all other EAS Participants (radio and television broadcasters, cable TV service providers, etc.). According to the Notice, this “daisy chain” structure makes EAS potentially vulnerable to “single point of failure” problems, where a failure at one participating station may result in a system-wide failure for all points below that station in the chain. The proposed national testing rules are an effort to test the strength of the “daisy chain” system and address concerns about the viability of the EAS system.

Here is a summary of the issues upon which the FCC seeks comment:

- * *National Testing.* The FCC proposes to amend its rules to expressly require all EAS participants to participate in national testing and to report the results of such tests to the Commission. Any national test would replace the required monthly test for all EAS participants in the month in which it occurs. Additionally, the FCC would give EAS participants at least two months’ notice prior to the national test. Test results would be required to be logged by all EAS participants and would also be submitted to the Commission’s Public Safety and Homeland Security Bureau within 30 days following the test.

The FCC seeks comment on this proposed rule and its sufficiency to ensure an adequate framework for the conduct of national tests. The Commission also invites comment on whether the proposed rule is, on balance, the best way to implement national EAS testing, or whether different provisions should be adopted.

- * *Annual Testing.* The FCC proposes to implement the national test on a yearly basis, and it seeks comment on this proposal. According to the Notice, the Commission proposes an annual test in order to achieve regular testing while minimizing the attendant costs associated with such testing.
- * *Advance Notice.* To obtain “realistic data about EAS reliability and performance” and to “discourage complacency,” the FCC does not propose a specific time of year for the annual test. However, the proposed rule provides for two months’ notice in advance of a national EAS test in order for EAS participants to prepare and alert the public of an upcoming national EAS test. The FCC seeks comment on this proposal.

- * *Data Collection And Submission.* The FCC seeks comment on its proposal to require EAS participants to record and, within 30 days, submit to the Commission the following test-related diagnostic information for each alert received from each message source monitored at the time of the national test: (1) whether they received the alert message during the designated test; (2) whether they retransmitted the alert; and (3) if they were not able to receive and/or transmit the alert, their “best effort” diagnostic analysis regarding the cause or causes for such failure. According to the Notice, the FCC also “anticipates” asking EAS participants to provide the Commission with a description of their station identification and level of designation (Primary Entry Point, Local Primary-1, etc.); the date/time of receipt of the Emergency Alert Notification message by all stations; the date/time of Primary Entry Point station acknowledgement of receipt of the Emergency Alert Notification message to FEMA; the date/time of initiation of actual broadcast of the Presidential message; the date/time of receipt of the Emergency Action Termination message by all stations; who they were monitoring at the time of the test; and the make and model number of they EAS equipment that they utilized.

- * *Public Availability Of Test Data.* The Commission seeks comment on its proposal to make available to the public the data described above. The Notice asks if there are any concerns with making this data publicly available and whether the FCC should instead limit availability to certain government and tribal entities.

- * *Coordination With FEMA.* The Notice states the FCC plans to coordinate with FEMA on a regular basis to implement the national test. The FCC seeks comment on whether or not agency coordination with FEMA should be written into the national testing rule. (As currently proposed, such coordination is not referenced in the rule.)

- * *Device Concerns.* The FCC seeks comment on reports that manufacturers of certain encoding and decoding devices (ENDECs) used in EAS messaging may have programmed their devices to receive and transmit Emergency Action Notifications in different ways. According to the Notice, these programming differences may affect the ability of some devices to properly relay an Emergency Action Notification. The FCC invites comment on how such device differences may impact the relay of an Emergency Action Notification test message during a national EAS test and what actions the Commission should take to address this issue prior to a national test.

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The Notice states that the Commission “intend[s] to move quickly to adopt any and all necessary rule changes to ensure that the Commission and other federal, state, local, and non-governmental EAS stakeholders have the necessary diagnostic tools to evaluate EAS performance and readiness nationwide.” Therefore, broadcasters should prepare for potential action by the Commission in the relatively near term.

Comments on the proposed national testing rules are due 30 days after publication of the Notice in the Federal Register, and reply comments are due 60 days after publication. As of January 26, 2010, publication has not yet occurred.

We will continue to keep you apprised of significant developments with this proceeding.

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

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
Mary Peña

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