

Security Measures Proposed for EAS

The FCC has proposed significant new rules to address issues related to the security of the Emergency Alert System (“EAS”). These proposals are published in a *Notice of Proposed Rulemaking* (FCC 22-82) in Docket 22-329 (“NPRM”). Most notably, the Commission is proposing that every EAS participant, including all broadcasters, develop and maintain a cybersecurity risk management plan.

The Commission observes that incidents have occurred during the past decade that involved hoax or false alerts transmitted to the public. In some cases, these events could have been prevented if EAS participants had merely changed the manufacturer’s default passwords on their EAS equipment, or taken other reasonable security precautions.

As a fundamental element of system security and functionality, the Commission seeks to promote operational readiness. Some 565 EAS participants reported that their equipment suffered transmission issues during the 2021 Nationwide EAS Test and more than 5,000 participants reported using outdated software. Under the current rules, EAS equipment can be out of service for up to 60 days without an obligation to report that outage to the FCC. The NPRM requests comment about the nature of the equipment failures that result in this down time, and the nature of the

continued on page 6

\$500,000+ Forfeiture Confirmed for TV Multiple Ownership Violation

The FCC has adopted a *Forfeiture Order* (FCC 22-83) imposing a \$518,283 fine against Gray Television, Inc. for violating the local market television multiple ownership rule. The Commission had issued a *Notice of Apparent Liability for Forfeiture* (FCC 21-81) (“NAL”) in July 2021, proposing to fine Gray for owning two full service television stations in the Anchorage, Alaska DMA, both of which were ranked among the top four stations in the market. The FCC’s Rules permit the common ownership of two stations with overlapping

continued on page 8

DOJ Enhances Press Protection in New Compulsory Process Rules

The U.S. Department of Justice has adopted new rules to govern the use of compulsory process to obtain information or records from members of the news media. This includes the use of legal instruments such as subpoenas, search warrants, and certain other court orders. These revisions replace regulations that featured a balancing test that weighed the government’s need for evidence of wrongdoing to prosecute bad actors versus the media’s ability to investigate and report on wrongdoing. The Department says that, except in limited circumstances, it will no longer use compulsory legal process to obtain information or records from members of the news media acting within the scope of their newsgathering duties. These rules and policies were published in *Policy Regarding Obtaining Information From or Records of Members of the News Media; and Regarding Questioning, Arresting, or Charging*

continued on page 3

IN THIS ISSUE

New Reference Adopted for DMA Definitions	2
FM Computer Modeling Now Allowed	2
Deadlines to Watch.....	4-5
CAP Polling Rule Effective December 12	5

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New Reference Adopted for DMA Definitions

The FCC has adopted new guidelines for determining a television station's designated market area ("DMA") for purposes of cable and satellite carriage rights. This action came in a *Report and Order* (FCC 22-89) in Docket 22-239.

The Communications Act and the FCC's Rules require that the annual Nielsen Station Index Directory (or a successor publication) be used for assigning television stations to DMAs. It is important for stations to be identified with a specific DMA because a station is entitled to carriage on cable television systems in its DMA, and on any satellite provider that carries another local station in the same DMA. The Nielsen Company no longer publishes the Station Index, replacing it with the monthly Local TV Station Information Report.

The Commission proposed earlier in this proceeding to adopt the Local TV Station Information Report as a successor to the Station Index as a reference for DMA station assignments. The Commission says that commenters in this proceeding were unanimous in supporting this proposal.

The Station Index was published annually with data current as of October. As the reference for the triennial must-carry/retransmission-consent cycle, the Commission used

the edition published two years prior to the beginning of each cycle. The Commission now will rely on the edition of the Report published in October two years prior to the deadline for electing must-carry or retransmission-consent status every third year.

The Commission noted concerns expressed by Commissioner Simington in his separate statement released with the *Notice of Proposed Rulemaking* in this proceeding. He questioned whether it was prudent for the Commission to rely exclusively on one source for data referenced in a number of its rules and suggested that the Commission should open an inquiry about this situation. In comments addressing this issue, the National Association of Broadcasters asked the Commission to monitor developments in the marketplace and to consider alternate sources of data that may become available in the future. The Commission concluded that it would be premature to open an inquiry on this matter given the limited record on this issue and the apparent lack of a current alternative to Nielsen. The Commission closed by promising to continue to monitor the issue, and encouraged stakeholders to stay apprised of changes in the market for measuring audience.

FM Computer Modeling Now Allowed

New rules came into effect on November 10 that permit the use of computer modeling to demonstrate that an antenna proposed to produce a directional coverage pattern will perform as proposed. The FCC amended its Rules to this effect earlier this year in a *Report and Order* in Docket 21-422 (FCC 22-38).

An FM applicant proposing a directional coverage pattern must include with its license application a plot of the composite pattern of the directional antenna, and a tabulation of the measured relative field pattern. Until now these data had to be obtained either by building a full-size mockup of the antenna and supporting structures or by constructing a scale model of the antenna and structures on a test range or in an anechoic chamber.

FM license applicants covering a directional construction permit will now have the option (but not the requirement) to

employ computerized models to demonstrate the antenna's performance. This less expensive option comes with the restriction that the computer model must be developed by the antenna's manufacturer.

The Commission will now also permit multiple license applicants to rely on the same computer modeling to support their applications if they are using the same model of antenna. When a particular antenna model or series of elements has been verified by any license applicant using a particular modeling software, the Commission will allow all subsequent license applicants using the same antenna model number or elements and using the same modeling software to submit the computer model for the subsequent antenna installation, and to provide a cross reference to the file number for the application that first used it.

DOJ Enhances Press Protection in New Compulsory Process Rules

continued from page 1

Members of the News Media, Docket No OAG 179; AG Order No. 5524-2022, 87 FR 66239.

In its statement of principles underlying the new regulations, the DOJ said that “[a] free and independent press is vital to the functioning of our democracy.” Furthermore, a free press is measured by the freedom of the news media to investigate and report the news. For this reason, the DOJ says that its policy is intended to protect members of the news media from certain law enforcement tools and actions in both criminal and civil cases that might unreasonably impair newsgathering. The DOJ observes there is an important national interest in protecting journalists from compelled disclosure of information. This is to avoid revealing the sources that journalists use to inform the American people about the workings of their government.

The DOJ clarifies that this policy is not intended to shield journalists from accountability who are themselves the subjects or targets of a criminal investigation for conduct outside the scope of newsgathering.

The new rules generally prohibit federal prosecutors and investigators from using compulsory legal process to obtain records or information from a member of the news media who has only received, possessed, or published government information, including classified information, or has established a means of receiving such information, including from an anonymous or confidential source. The following are exceptions to this blanket prohibition:

1. The authentication for evidentiary purposes of information or records that have already been published, in which case the authorization of a Deputy Assistant Attorney General for the Criminal Division is required;
2. The acquisition of information or records after a member of the news media agrees to provide or consents to the provision of the requested records or information in response to the proposed compulsory legal process, in which case the authorization of a Deputy Assistant Attorney General for the Criminal Division is required;
3. The prevention of imminent or concrete risk of death or serious bodily harm, including terrorist acts, kidnappings, specified offenses against a minor, or incapacitation or destruction of critical infrastructure, in which case the authorization of the Attorney General is required.

If the news media member is not acting within the scope of newsgathering, the new rules permit a wider use of compulsory legal process:

1. To obtain information or records of a nonmember of the news media, when the nonmember is the subject or target of an investigation, and the information or records are in a physical space, device, or account shared with the news media member;

2. To obtain purely commercial, financial, administrative, technical or other information or records unrelated to newsgathering, or for information or records relating to personnel not involved in newsgathering;
3. To obtain information or records related to public comments, messages, or postings by readers, viewers, customers, or subscribers over which a news member does not exercise editorial control;
4. To obtain information or records of a news media member who may be a victim or witness to crimes or other events, or whose premises may be the scene of a crime, when such status is not based on or within the scope of newsgathering;
5. To obtain only subscriber information.

Using compulsory process in the above situations requires the approval of a Deputy Assistant Attorney General for the Criminal Division, except that (a) in cases where the journalist has voluntarily agreed to provide information or records, approval must be obtained from the U.S. Attorney or the Assistant Attorney General responsible for the matter, and (b) a search warrant for the premises of a news media entity or person requires the authorization of the Attorney General.

Generally, an official authorizing compulsory legal process must find that the following conditions are met:

1. The government has exhausted all reasonable avenues to obtain the desired information from other sources outside of the news media.
2. The government has pursued negotiations with the news media member unsuccessfully, unless the authorizing official determines, for compelling reasons, that such negotiations would pose a threat to the integrity of the investigation or pose risks of harm to individuals or destruction of critical infrastructure.
3. The proposed compulsory legal process is narrowly drawn. The process may not be used to obtain peripheral, nonessential, or speculative information.

DOJ officials must obtain the approval of the Deputy Attorney General to seek a warrant for an arrest, conduct an arrest, seek a grand jury bill of indictment, or file an information against a member of the news media. If the arrest or charge against the news media member has no nexus to the person’s news media activities, DOJ personnel must obtain the prior authorization of the Deputy Attorney General for the Criminal Division and provide prior notice to the Deputy Attorney General. When prior authorization is not possible, DOJ personnel must notify the authorizing official as soon as possible.

These rules became effective on November 3.



DEADLINES TO WATCH



License Renewal, FCC Reports & Public Inspection Files

SPECIAL EXTENSION OF PUBLIC FILE DEADLINES: All Public Inspection File October deadlines for stations that suffered damage from Hurricane Ian are extended until December 12, 2022.

December 1	Deadline to file license renewal applications for television stations in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.	December	Television stations in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont begin broadcasting license renewal post-filing announcements within five business days of acceptance for filing of license renewal application and continuing for four weeks.
December 1	Deadline to place EEO Public File Report in Public Inspection File and on station's website for all nonexempt radio and television stations in Alabama, Colorado, Connecticut, Georgia, Maine, Massachusetts, Minnesota, Montana, New Hampshire, North Dakota, Rhode Island, South Dakota, and Vermont.	January 10	Deadline to place quarterly Issues and Programs List in Public Inspection File for all full service radio and television stations and Class A TV stations.
December 1	Deadline for all broadcast licensees and permittees of stations in Alabama, Colorado, Connecticut, Georgia, Maine, Massachusetts, Minnesota, Montana, New Hampshire, North Dakota, Rhode Island, South Dakota, and Vermont to file annual report on any adverse findings and final actions taken by any court or governmental administrative agency involving misconduct of the licensee, permittee, or any person or entity having an attributable interest in the station(s).	January 10	Deadline for noncommercial stations to place quarterly reports regarding third-party fundraising in Public Inspection File.
December 1	Deadline for television stations that provided ancillary or supplementary services during the 12-month period ending September 30, 2022, to file an annual Ancillary/Supplementary Services Report.	January 10	Deadline for Class A TV stations to place certification of continuing eligibility for Class A status in Public Inspection File.
		January 30	Deadline for Children's Television Programming Reports for all full service and Class A television stations for 2022.
		January 30	Deadline for all full service and Class A television stations to place in Public Inspection File records documenting compliance with the commercial limits in children's programming.

Proposed Amendments to the FM Table of Allotments

The FCC is considering requests to amend the FM Table of Allotments by modifying channels for the communities identified below. The deadlines for submitting comments and reply comments are shown.

COMMUNITY	PRESENT CHANNELS	PROPOSED CHANNELS	COMMENTS	REPLY COMMENTS
Dennison, OH	---	272A	Dec. 8	Dec. 23
South Padre Island, TX	237A	288A	Jan. 3	Jan. 18

Proposed Amendment to the Television Table of Allotments

The FCC is considering a petition to amend the digital television Table of Allotments by changing the channel allotted to the community identified below. The deadlines for submitting comments and reply comments are shown.

COMMUNITY	STATION	PRESENT CHANNEL	PROPOSED CHANNEL	COMMENTS	REPLY COMMENTS
Norwell, MA	WWDP	10	36	Dec. 15	Dec. 30

FR+N means that the filing deadline is N days after publication of notice of the proceeding in the Federal Register



DEADLINES TO WATCH



Paperwork Reduction Act Proceedings

The FCC is required by the Paperwork Reduction Act to periodically collect public information on the paperwork burdens imposed by its record-keeping requirements in connection with certain rules, policies, applications and forms. Public comment has been invited about this aspect of the following matters by the filing deadlines indicated.

TOPIC	COMMENT DEADLINE
Station log, Section 73.1820	Nov. 25
Rebroadcasts, Sections 73.1207, 74.784, 74.1284	Dec. 5
Application for LPTV channel-sharing authorization, Form 2100, Schedule D	Dec. 12
User interfaces, menus and guides on digital apparatus, Sections 79.107, 79.108, 79.110	Dec. 12
Delivery of satellite signals to underserved households for purposes of the Satellite Home Viewer Act, Section 73.686	Dec. 12
Significantly viewed television signals, Section 76.54	Jan. 9
Class A Television license application, Form 2100, Schedule F	Jan. 9

Deadlines for Comments in FCC and Other Proceedings

DOCKET	COMMENTS	REPLY COMMENTS
(All proceedings are before the FCC unless otherwise noted.)		
Docket 20-299; 2nd NPRM (FCC 22-77) Foreign sponsorship identification	Dec. 19	Jan. 3, 2023
Docket 22-329; NPRM (FCC 22-82) EAS improvements	Dec. 23	Jan. 23, 2023
Docket 22-227; NPRM (FCC 22-73) Updating television rules	FR+60	FR+75

FR+N means the filing due date is N days after publication of notice of the proceeding in the Federal Register.

CAP Polling Rule Effective December 12

In September, the FCC adopted a *Report and Order* (FCC 22-75) in Docket 15-94 amending a number of its rules about the Emergency Alert System (“EAS”). Among the changes was the adoption of a mandate for EAS participants, including all broadcasters, to prioritize incoming alert messages from the IP-based Common Alerting Protocol (“CAP”) over the messages arriving on the legacy EAS. Upon receipt of a message from the legacy distribution system, the station’s EAS equipment is to poll the Integrated Public Alert and Warning System (“IPAWS”) for an incoming CAP version of the same message. If it is immediately available, the CAP version from IPAWS is to be given priority for broadcast.

A summary of the *Report and Order* was published in the Federal Register on November 10. This triggered the beginning of the 30-day waiting period for the new rules

to become effective. The effective date will be December 12 (the first business day after expiration of the 30-day period). In the *Report and Order*, the Commission stated that EAS participants would have 12 months from the new rules’ effective date to come into compliance with them. That means that by **December 12, 2023**, all EAS participants must comply with the following revised provisions of the FCC’s Rules:

Sections 11.55(c) and 11.61(a)(1)(iv) – Implementation of polling and prioritization of CAP messages.

Section 11.51(d)(3) – Displaying the new texts for the national alert originator code (PEP), the national test code (NPT), and the national emergency code (EAN).

Section 11.51(d)(3)(iii) – Displaying the standard script for NPT alerts issued in the legacy format.

Security Measures Proposed for EAS continued from page 1

efforts needed to resume normal operational status. It asks whether instead of allowing a 60-day period for equipment repairs, it would be preferable to simply require participants to repair equipment promptly with reasonable diligence. The Commission might also require the immediate reporting of outages so that the agency and other stakeholders could have an opportunity to mitigate the harm that might result for the public.

Section 11.45(b) of the FCC's Rules requires an EAS participant to notify the Commission by e-mail within 24 hours of its discovery that it has transmitted a false alert to the public. The Commission proposes to revise this rule to include the mandated reporting within 72 hours of when it knew *or should have known* of any unauthorized access to the EAS equipment, regardless of whether the incident resulted in a false alert. The NPRM suggests that early detection and reporting of unauthorized access by hackers or others could prevent bogus transmissions. For the purposes of this draft rule, the Commission proposes to define "unauthorized access" to EAS equipment, communications systems, and services to refer to any incident involving either remote or local access to EAS facilities, communications systems, or services by an individual or other entity that either does not have permission to access the equipment or exceeds their authorized access. The Commission proposes that this report include the date range of the incident, a description of the unauthorized access, the impact on the participant's EAS operational readiness, a description of the vulnerabilities exploited, and the techniques used to access the device.

To promote operational readiness and to mitigate the potential for problems, the FCC proposes to require EAS participants to certify annually that they have created, updated and implemented a cybersecurity risk management plan. This plan would describe how the EAS participant employs its organizational resources and processes to ensure the confidentiality, integrity, and availability of the EAS. The plan would discuss how the EAS participant identifies the cyber risks that it faces, the controls it uses to mitigate those risks, and how it ensures that those controls are applied effectively to its operation.

The Commission states that it would allow each EAS participant the flexibility to structure its plan as appropriate for its organization, provided that the plan includes affirmative steps by the EAS participant to analyze security risks and improve its security posture. The Commission anticipates that smaller EAS participants will be able to develop plans with their more limited resources that will meet their more limited security needs.

However, within that flexibility, the Commission proposes that each cybersecurity risk management framework include security controls sufficient to ensure the confidentiality, integrity, and availability of the EAS. The agency expects that reasonable security measures would include measures that

are commonly considered best practices. To ensure that each EAS participant implements a baseline of security controls, the Commission proposes to require that each plan include the following measures:

- changing the default passwords prior to operation;
- installing security updates in a timely manner;
- securing equipment behind properly configured firewalls or using other segmentation practices;
- addressing the replacement of end-of-life equipment; and
- wiping, clearing, or encrypting user information before disposing of old devices.

These would be the basic requirements, but the Commission expects that plans would include other elements as may be needed and relevant for specific environments. While the Commission does not propose to mandate a precise formula or template for the plan, it does suggest what it believes would be a usable model. The NPRM states that an EAS participant could satisfy the proposed requirement by structuring its plan to follow an established risk management template, such as the National Institute of Standards and Technology Risk Management Framework, or the Institute's Cybersecurity Framework.

The NPRM proposes to require each EAS participant to certify that it has a satisfactory plan that is updated annually. The plan itself would not be routinely submitted to the FCC. The Commission asks whether EAS participants should conduct network security audits or vulnerability assessments to identify potential security vulnerabilities, and whether the results of such exercises should be reported to the agency. The Commission also asks for feedback on the concept of requiring EAS participants to develop incident response plans that describe the procedures to follow when responding to an ongoing cybersecurity incident.

The FCC explains that the drafting of and compliance with a cybersecurity risk management plan would not serve as a safe harbor or excuse or any other reduction of responsibility for negligent security practices. Any negligence in protecting the confidentiality, integrity, and availability of the EAS that results in transmission of false alerts or the non-transmission of valid EAS messages would be a breach of each participant's duty of vigilance regardless of the content of the plan. The NPRM indicates that an EAS participant's failure to sufficiently develop or implement its plan would be regarded as a rule violation.

The NPRM proposes to allow EAS participants to have 12 months from the effective date of the proposed rules in which to adopt their risk management plans.

Comments on these proposals must be submitted by December 23, 2022, and reply comments will be due on January 23, 2023.

\$500+K Forfeiture Confirmed for TV Multiple Ownership Violation

continued from page 1

contours in the same market only if not more than one of them is among the top four ranked stations in the market. Gray filed a request to cancel the forfeiture. In this Order, the Commission addressed and rejected Gray's arguments, imposing the full amount of the proposed fine.

Through subsidiaries, Gray owns KYES-TV and KTUU-TV, both licensed to Anchorage. KTUU-TV is an NBC affiliate and is one of the top four rated stations in the market. On July 31, 2020, Gray closed on the purchase of most of the non-license assets of another station in the market, KTVA(TV), including KTVA's affiliation with the CBS network. Most of the programming that had been on KTVA, including CBS programming, then moved to KYES-TV. With the CBS affiliation, KYES-TV also became one of the top four rated stations in the market. This gave rise to the FCC's investigation and eventually to the NAL. The Commission charged that this arrangement constituted a direct violation of Note 11 to Section 73.3555 of its Rules, which prohibits the transfer of a network affiliation from one station to another if such a transfer would result in two stations under common ownership being among the top four ranked stations in the market.

Opposing the NAL, Gray argued (1) that KYES-TV had already attained top-four status prior to the transaction (a licensee is permitted to improve a station's rankings by other means without violating the rule), (2) that it lacked notice that Note 11 prohibits purchases of network affiliations rather than just affiliation swaps, and (3) the Commission's interpretation of Note 11 interferes with Gray's content choices for KYES-TV and therefore violates the First Amendment.

The Commission rejected Gray's first argument as factually incorrect. In the last audience measurement conducted before the transaction, KYES-TV was ranked fifth in the market rather than among the top four. Furthermore, the Commission's policy for interpreting Note 11 holds that the new affiliate's post-transaction ranking will be considered to be the ranking of the previous affiliate at the time the agreement is executed. KTVA was the second-ranked station

in the market at the time of the agreement. That ranking is imputed to KYES-TV, resulting in Gray holding two top-four stations.

Gray's second argument was based on its reading of the Commission's order in the rulemaking proceeding that adopted Note 11. The order included a discussion of a swap of affiliations rather than a simple acquisition of an affiliation by one party from another. Gray relied on this to interpret Note 11 as pertaining only to swaps. The Commission observed that the word "swap" does not appear in Note 11 and that, in any event, the rule was intended to cover any situation that created the functional equivalent of a transfer of control or assignment of license. The FCC found that the transaction in question was the functional equivalent of an assignment of a license.

The Commission rejected Gray's argument about improper regulation of content with reference to the overall policy of seeking to minimize concentration of control in a market. Since the transfer of an affiliation can be the functional equivalent of an assignment of a license, over which the FCC has jurisdiction, it follows that the same policy concerns would permit Commission regulation of affiliation transfers. The Commission's approach does not consider content, but rather market concentration.

Gray claimed that the amount of the fine was unprecedented, but to no avail. The Commission's guidelines for forfeitures do not indicate a base amount for the violation in question. However, the Commission determined that this case was analogous to an unauthorized transfer of control, for which the base amount is \$8,000 per day. The violation continued for 215 days. At \$8,000 per day for 215 days, the total proposed fine would amount to \$1,720,000. The Commission is unable to levy a fine of that amount because the statutory cap is \$518,283. The Commission was required to reduce the fine to that amount but found no justification for reducing it further.

Gray has indicated that it will appeal this decision to the U.S. Court of Appeals for the D.C. Circuit.

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