

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Waiver of the Rules of the Federal) FO Docket No. 91-301
Communications Commission Relating) FO Docket No. 91-171
to Implementation of the Emergency)
Broadcast System) Branch Cable, Inc.

To: Chief, Technical & Public Safety Division, Enforcement Bureau

**PETITION FOR WAIVER OF
EMERGENCY ALERT SYSTEM REQUIREMENTS**

Branch Cable, Inc. (hereinafter "Petitioner"), by its attorneys, respectfully requests a waiver of Section 11.11 of FCC Rules, 47 U.S.C. § 11.11. Specifically, Petitioner seeks a waiver of the requirement that cable television system operators implement Emergency Alert System ("EAS") equipment and procedures by October 1, 2002. Section 11.11 requires small cable television systems serving fewer than 5,000 subscribers either to provide the national level EAS message on all programmed channels - including the required testing - or to install EAS equipment and provide a video interrupt and audio alert on all programmed channels and EAS audio and visual messages on at least one programmed channel by October 1, 2002.

As set forth below, circumstances exist wherein EAS-compliant technology compatible with Petitioner's cable television system facilities is not yet commercially available at a financially reasonable expense, and may not be available for an undetermined period of time. Installation at current prices threatens the financial viability of Petitioner's systems. For the reasons shown herein,

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Petitioner requests waiver of the EAS requirements, and particularly of the requirement that EAS implementation be achieved by October 1, 2002.

Petitioner relies herein upon the mechanism for waiver established in the Second Report and Order in FO Docket Nos. 91-301 and 91-171, FCC 97-338 (by the Commission), released September 29, 1997 ("2nd Report and Order"). As demonstrated herein, good cause exists for this waiver because it is economically and technically infeasible for Petitioner to comply with the October 1, 2002 deadline for EAS implementation.^{1/}

Background and Facts

1. The FCC has adopted rules to implement Section 624(g) of the Communications Act, as amended by the Cable Act of 1992, fulfilling the Congressional directive that every cable television operator ensure that viewers of video programming on cable systems are afforded the same information as is afforded by the emergency broadcasting system.^{2/} The Commission began by replacing the Emergency Broadcast System with the Emergency Alert System ("EAS").^{3/} Subsequently, the Commission declined to exempt small cable television systems from the EAS

^{1/} "The Commission may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest." WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969). Waiver of a Commission rule is appropriate where (1) the underlying purpose of the rule will not be served, or would be frustrated, by its application in a particular case, and grant of the waiver is otherwise in the public interest, or (2) unique facts or circumstances render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest, and there is no reasonable alternative.

^{2/} See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, §16(b), 106 Stat. 1460 (1992).

^{3/} Report and Order and Further Notice of Proposed Rulemaking, 10 FCC Rcd 1786 (1994).

requirements, or to adopt a specific waiver policy.^{4/} However, the Commission did establish a policy whereby it would receive requests for individual relief, to be considered on a case-by-case basis, to be granted in appropriate circumstances upon sufficient showing of need.^{5/} The Commission indicated that such requests would be required to contain at least the following:

1. justification for the waiver;
- 2) information about the financial status of the entity, such as a balance sheet and income statement for the past two years (audited, if available);
- 3) the number of other entities that serve the requesting entity's coverage area and that are expected to install new EAS equipment; and
- 4) the likelihood (such as proximity or frequency) of hazardous risks to the requesting entity's audience.^{6/}

2. Petitioner has made efforts to assess what steps it would need to take to meet the October 1, 2002 deadline, and has determined that compliance is presently impossible due to the unavailability of equipment to facilitate compliance with Section 11.11 in an economically reasonable manner. Specifically, Petitioner has procured information from several vendors concerning the cost of equipment, and it has worked closely with the National Cable Television Cooperative and the American Cable Association to find affordable solutions for small independent cable operators such as Petitioner. However, no satisfactory solution has been identified that would allow Petitioner to become EAS compliant by October 1, 2002..

^{4/} Second Report and Order, 15 FCC Rcd 15503, at ¶19 (1997)

^{5/} Id., at ¶20.

^{6/} Id., at fn. 59.

EAS Cost Estimates

3. Petitioner is a coaxial cable television system operator serving only 3,030 subscribers from a total of *nine* headends, listed below:

<u>Headend Location and Physical System Identification No.</u>	<u>Number of Subscribers</u>	<u>Communities Served</u>
Isola - 004484	543	MS0202 - Isola, MS (town) MSO203 - Humphreys County, MS (unincorporated) MS0251 - Inverness, MS (town) MS0332 - Sunflower County, MS (unincorporated)
Bude - 008871	706	MS0209 - Bude, MS (town) MS0210 - Franklin County, MS (unincorporated) MS0211 - Meadville, MS (town)
Roxie-013704	177	MS0450 - Roxie, MS (town)
Ackerman - 013969	869	MS0292 - Ackerman, MS (town) MS0448 - Weir, MS (town) MS0449 - Choctaw County, MS (unincorporated)
Louise - 014162	157	MS0253 - Louise, MS (town)
New Augusta - 015160	106	MS0254 - New Augusta, MS (town)

<u>Headend Location and Physical System Identification No.</u>	<u>Number of Subscribers</u>	<u>Communities Served, Cont'd</u>
Crosby - 015161	98	MS0451 - Crosby, MS (town) Wilkinson County MS0452 - Crosby, MS (town) Amite County
New Hebron - 015162	122	MS0220 - New Hebron, MS (village) MS0333 - Lawrence County, MS (unincorporated)
Warren County - 016450	252	MS0532 - NW portion of Warren County, MS, a/k/a Eagle Lake (unincorporated)

Petitioner is accordingly in the category of cable television systems serving fewer than 5,000 subscribers. Its unusual circumstance is that it does so from nine headends because the communities served are small, rural, and geographically disconnected.

4. In adopting the EAS requirements, the FCC estimated the cost of becoming capable of providing audio and video EAS messages on one channel, along with an audio alert message and a video interrupt on all programmed channels, would be approximately \$6,000 to \$10,000 *per headend*. This estimate, born out by Petitioner's own research, has a severe impact on Petitioner because of the unique configuration of Petitioner's facilities. The FCC furthermore estimated that the cost per subscriber for a 1,000 subscriber system would be approximately twelve cents per month over a seven year period, and that the cost per subscriber for a 100 subscriber system would be \$1.20 per month

over a seven year period.^{7/} At the same time the Commission recognized that smaller systems do not have access to the financial resources, purchasing discounts and other efficiencies of larger companies. In this context the Commission chose to make no distinction between those cable systems which are affiliated with larger companies and those which are not.^{8/}

5. Using the Commission's cost estimates, supported by Petitioner's investigation, Petitioner faces having to spend over \$100,000, over seven years, to implement EAS. (This assumes that favorable financing terms become available to Petitioner, which has not yet happened.) To finance EAS, subscriber rates would have to be raised an average of 3.4% per system. Worst hit would be the customers served by the headend located at Crosby, Mississippi. Their rates would be raised by 7.13% to cover the cost of EAS installation at the Crosby headend. An extra \$1.36 per month would be added to each subscriber's cable bill. Likewise, the rates at the New Augusta system would increase by 5.70% (\$1.26/month), at New Hebron by 4.95% (\$1.09/month), at Louise by 3.85% (\$0.85/month), at Roxie by 3.51% (\$0.75/month), at Warren County by 2.40% (\$0.53/month), at Isola by 1.11% (\$0.25/month), at Bude by 0.86% (\$0.19/month) and at Ackerman by 0.71% (\$0.15/month). These figures demonstrate that the cost of EAS is too great a burden to place upon this set of small systems, whose entire operation cumulatively showed less than a \$1,000 income in year 2001.^{9/}

6. Indeed, the conclusion of Petitioner's detailed review of equipment vendors' proposals to enable Petitioner to provide its subscribers with EAS messages and interrupts is that the prospect

^{7/} Id., at ¶23.

^{8/} Id., at ¶26. Petitioner's affiliation with a larger company, Telapex, Inc., of Jackson, Mississippi, is therefore not a subject for consideration in this matter.

^{9/} Petitioner's unaudited adjusted income statement and balance sheet for years 2000 and 2001 are attached hereto.

is economically untenable. Current estimates run between \$5,995 and \$8,310, *excluding* necessary accessories and installation, per headend (and excluding financing costs). The accessories and installation alone would add about \$1,000 to the base estimate, per headend. Having obtained these figures, Petitioner has sought to secure financing for the purchases. Petitioner's efforts have proved unsuccessful because of leverage restrictions placed upon Petitioner by existing lenders.

7. Petitioner's position in this matter is supported by the American Cable Association. Attached is a letter demonstrating that Petitioner is among the class of small operators whose service to customers would be jeopardized by enforcement of the EAS implementation requirements. Petitioner's subscribers do not have the means to pay higher cable rates to cover the costs; they are already demanding more services and more programming channels for the rates they pay presently. Petitioner's customers pay an average of \$21.62 for an average of 31 channels. This rate of about 70¢ per channel is very close to the national average of about 69¢, even though Petitioner's costs per subscriber are much higher.^{10/} The low rate that Petitioner charges for high cost systems is reflective in part of the economic conditions of Petitioner's service areas.

Alternative Sources of Emergency Alerting, and Types and Frequency of Risks

8. Petitioner carries on the basic tier of all of its systems all of the off-air broadcasting signals that are available for carriage in the communities served, including the public broadcasting signals.

^{10/} Rates of cable television systems not subject to effective competition, as set forth in Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 00-132, Seventh Annual Report, 16 FCC Rcd 6005 (2001), updated by Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 01-129, Eighth Annual Report, released January 14, 2002. Petitioner's systems are not subject to effective competition, likely because of the low number of households that exist per mile of cable plant.

Every system is served by at least one 24-hour news network, making national breaking news available to all subscribers on the basic tier. The basic tier of each system also includes The Weather Channel, which carries local weather information and updates, as well as national alerts. Finally, local and county Civil Defense systems are installed to cover many of the communities served by Petitioner. No other cable television systems serve the communities serviced by Petitioner, so there are none that would be expected to install new EAS equipment in Petitioner's service areas.

9. The main risk to the served communities, that involves emergency alerting, is the occasional weather emergency. Tornadoes and floods are the common hazard. Residents are generally aware of heavy rains as they are occurring, and the Civil Defense siren systems alert residents to impending hazard from severe weather systems. Petitioner strives to keep its systems operating during such times so that viewers can tune into local broadcast stations or to The Weather Channel for specific alert information.

10. The likelihood of the occurrence of an unusual or surprise national emergency that would directly affect Petitioner's subscribers is remote. None of the communities is in close proximity to a nuclear reactor or major airport. None are located near an international border, and no major prisons, reservoirs, hospital, military or weapons facilities are installed nearby. It is therefore likely that if a national emergency were to occur, Petitioner's subscribers would be informed by the existing alerting systems and by the cable television and broadcast programming that Petitioner now provides. For this reason it is in the subscribers' interests that Petitioner's operations remain in service, at low monthly rates, and that they not be compromised by the financial burden of a specially installed EAS system.

Justification for Waiver

11. As demonstrated herein, Petitioner's compliance with the EAS by October 1, 2002 is not reasonably achievable because it is technically and economically infeasible. Petitioner, along with the National Cable Television Cooperative and the American Cable Association, continues to work closely with suppliers and programmers to find EAS solutions for use by small cable systems. Petitioner remains willing to install suitable EAS equipment. To do so by the October 1, 2002 deadline, however, would require a \$100,000 expenditure and place Petitioner at serious business risk. The cost of EAS will be reduced as alternative small system solutions are adopted. Petitioner and its customers will benefit if Petitioner's installation of EAS is postponed until such time.

12. Grant of Petitioner's request for a waiver of Section 11.11 is in the public interest. The unique and unusual circumstances surrounding the Petitioner's inability to comply with the implementation deadline is due to some of the very circumstances which were contemplated by the Commission as being grounds for relief from EAS obligations. Special consideration is warranted under the circumstances presented, which, while common among small systems, have been demonstrated herein to be uniquely applicable to Petitioner's operation and efforts in this matter.

13. Enforcement against Petitioner would threaten the ongoing viability of Petitioner's cable television systems, some of which are extremely small, and all of which are located in very rural areas of the State of Mississippi. Petitioner consistently attempts to offer the best service possible to its subscribers, some of whom would otherwise not receive local programming and other services in the remote areas where they reside. In this case, Petitioner requests the opportunity to continue to provide the high quality of service that it presently offers to its customers, without the risk of jeopardy resulting from the high cost of EAS implementation.

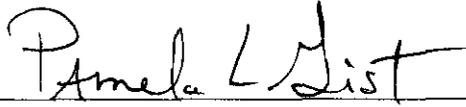
CONCLUSION

For the reasons explained, Petitioner requests that it be relieved of the obligation to provide EAS, and in particular, that it be granted a waiver of the October 1, 2002 date for commencement of compliance with Section 11.11 of the FCC's rules. The Petitioner's showing herein is consistent with the requirements for relief set forth in the 2nd Report and Order in this matter. Furthermore, the public interest benefit of such grant equals or exceeds that which the Commission has found in other instances to be sufficient for waiver of the EAS requirements. Accordingly, Petitioner requests that a waiver be granted as proposed.

The Commission may contact L. Brooks Derryberry, General Manager, Branch Cable, Inc., 125 S. Congress St., Suite 1100, Jackson, MS 39201-3304, Phone: (601) 355-1522, fax: (601) 353-0950, with any questions regarding this request. Please direct a copy of any written communications to Petitioner to Lukas, Nace, Gutierrez & Sachs, Chtd., Attention Pamela L. Gist, 1111 19th Street N.W. Suite 1200, Washington, D.C. 20036; Phone: (202) 828-9473; FAX: (202) 828-8408; Email: pgist@fcclaw.com.

Respectfully submitted,

BRANCH CABLE, INC.

By: 
Pamela L. Gist
Its Attorney

Date: February 12, 2002

Lukas, Nace, Gutierrez & Sachs, Chartered
1111 19th Street N.W. Suite 1200
Washington, D.C. 20036
Ph# 202-857-3500

BRANCH CABLE, INC.
Adjusted Income Statement
CATV Operations
- Unaudited -

CATV REVENUES	<u>12/31/01</u>	<u>12/31/00</u>
CABLE REVENUES - BASIC SERVICE	778,528	778,172
CABLE REVENUES - INSTALLATION	23,711	26,332
CABLE REVENUES - ADDITIONAL OUTLETS	54,506	55,137
CABLE REVENUES - LATE FEES	32,808	35,320
HOME SHOPPING COMMISSIONS	3,424	5,576
PAY CHANNEL - CINEMAX	37,428	40,934
PAY CHANNEL - HBO	97,737	110,704
PAY CHANNEL - THE MOVIE CHANNEL	4,858	4,869
UNCOLLECTIBLES	-4,769	-1,435
TOTAL CABLE REVENUES	<u>1,028,231</u>	<u>1,055,617</u>
CATV EXPENSES		
SALARIES	74,494	98,945
BENEFITS	31,601	23,569
401K CONTRIBUTIONS	377	2,658
PAYROLL TAXES	9,528	4,520
RENT - DISTRIBUTION	28,643	38,371
RENT - HEADEND	3,687	3,586
RENT - WAREHOUSE	1,119	1,221
OFFICE EXPENSES & SUPPLIES	4,542	35
MAINTENANCE - HEADEND	29,724	17,588
MAINTENANCE - DIST. SYSTEM	143,078	94,257
SCRAP	709	1,760
TRAVEL	1,247	0
VEHICLE EXPENSES	14,883	16,847
MEALS & ENTERTAINMENT	926	0
ADVERTISING EXPENSE	5,385	5,514
COMPUTER USAGE	19,010	20,505
NETWORK EXPENSE - TPI	0	3,970
CUSTOMER BILLING	18,341	26,799
PAY CHANNEL COSTS	87,798	91,046
BASIC CHANNEL COSTS	283,100	271,041
CABLE GUIDE COST	3,582	2,946
FRANCHISE COSTS	1,073	1,091
HEADEND POWER	28,469	26,719
TOTAL CATV EXPENSES	<u>791,316</u>	<u>752,988</u>
CABLE PROFIT	<u>236,915</u>	<u>302,629</u>
DEPRECIATION EXPENSE	195,683	232,866
AMORTIZATION EXPENSE	5,292	4,851
INTEREST EXPENSE - OTHER	35,019	26,564
INCOME BEFORE TAXES	<u>\$921</u>	<u>\$38,348</u>

BALANCE SHEET-UNAUDITED

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	12/01	12/00
	-----	-----
ASSETS		
CASH AND CASH EQUIVALENTS	344,119	229,104
ACCOUNTS RECEIVABLE CUSTOMERS	100,055	114,890
ACCOUNTS RECEIVABLE AFFILIATE	537	1,414
ACCOUNTS RECEIVABLE OTHER	911	1,968
INVENTORIES	99,453	122,754
PREPAID EXPENSES	20,036	7,432
DEFERRED INCOME TAXES	15,003	15,203
	-----	-----
TOTAL CURRENT ASSETS	580,114	492,765
NONCURRENT ASSETS		
INVESTMENTS	13,170	44,391
DEFERRED CHARGES	3,929	26,001
	-----	-----
TOTAL INVESTMENTS & OTHER ASSETS	17,099	70,392
PROPERTY, PLANT & EQUIPMENT		
CABLE:		
PLANT IN SERVICE	4,372,544	4,463,293
LESS ACCUMULATED DEPRECIATION & AMO	(3,383,953)	(3,361,111)
	-----	-----
TOTAL NET PLANT	988,591	1,102,182
	-----	-----
TOTAL ASSETS	1,585,804	1,665,339
	=====	=====
LIABILITIES		
ACCOUNTS PAYABLE	44,404	77,715
AFFILIATED ACCOUNTS PAYABLE	48,645	70,545
TAXES PAYABLE	8,589	(8,545)
ACCRUED EXPENSES	33,202	29,009
CUSTOMER DEPOSITS & ADVANCED BILLIN	110,580	111,866
CURRENT DEBT	35,019	35,019
	-----	-----
TOTAL CURRENT LIABILITIES	280,439	315,609
LONG TERM DEBT	231,766	254,947
NONCURRENT LIABILITIES		
DEFERRED INCOME TAXES	136,962	141,946
	-----	-----
TOTAL DEFERRED CREDITS	136,962	141,946
	-----	-----
TOTAL LIABILITIES	649,167	712,502
STOCKHOLDER'S EQUITY		
COMMON STOCK	1,090	1,090
ADD'L PAID-IN	138,511	140,048
RETAINED EARNINGS	797,036	811,699
	-----	-----
TOTAL STOCKHOLDER'S EQUITY	936,637	952,837
	-----	-----
TOTAL LIABILITIES & EQUITY	1,585,804	1,665,339
	=====	=====



Independent Companies. One Voice.

Matthew M. Polka, President
Direct Dial: 412-922-8300 Ext. 14
E-Mail: mpolka@americancable.org
Website: www.americancable.org

January 4, 2002

Mr. Joseph P. Casey
Chief, Technical and Public Safety Division
Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

**Re: Branch Cable, Inc./EAS Waiver Request
Letter of Support from the American Cable Association**

Dear Mr. Casey:

On behalf of the American Cable Association, I submit this letter in support of the EAS Waiver Request of our member, Branch Cable, Inc. Branch's systems are precisely what the Commission had in mind when it recognized that the financial burdens of EAS compliance could be "financially ruinous" for certain small systems. For systems like Branch's, a grant of the requested limited waiver is the only real alternative. Without it, the viability of some of Branch's systems is in doubt, and hundreds, if not thousands, of rural subscribers will lose access to diverse video programming delivered over Branch's systems.

ACA and many of its members have a vital interest in the EAS waiver process. ACA represents the interests of more than 900 independent cable companies. Together, ACA members serve about 7.5 million cable subscribers, primarily in smaller markets and rural areas in all 50 states. ACA members range from small, family-run cable systems to multiple system operators focusing on smaller systems and smaller markets. About half of ACA's members serve less than 1,000 subscribers. Absent relief, these systems face the same compliance costs as systems serving 5,000 or more customers.

**One Parkway Center, Suite 212 • Pittsburgh, PA 15220
Phone (412) 922-8300 • FAX (412) 922-2110**

Mr. Joseph P. Casey
January 4, 2002
Page Two

Many ACA members, like Branch, are hurting from the financial squeeze of:

- Unfettered increases in programming costs by conglomerates like Disney/ABC and Fox/News Corp.
- Intense price and service competition from the national DBS companies EchoStar and DirecTV, which despite their size and access to capital, have no mandatory EAS obligations.
- Lack of access to capital for system upgrades, headend interconnection, and other improvements.

These forces, combined with the inherent higher cost structure of operating networks in small markets, make this a very challenging time for the small cable sector. For systems like Branch's, adding EAS compliance costs in 2002 of up to \$10,000 per headend could very likely be the proverbial straw that breaks the camel's back.

The unintended consequence of this result would be the loss of cable services to smaller market consumers, including EAS information on those broadcast and satellite channels that insert the national EAS messages at the source.

ACA has been active in EAS rulemakings and will continue to work with the Commission and Congress to obtain broader small system relief. A range of alternatives exists besides the current one that threatens to shut down many small systems. In the meantime, the Commission has repeatedly stated that it will grant case-by-case waivers for small systems demonstrating financial hardship. We look to you and the Enforcement Bureau to follow through on this commitment.

Branch's request clearly shows financial hardship and should be granted.

If ACA can provide any further assistance to assist your evaluation of Branch's request, please do not hesitate to contact me.

Yours sincerely,



Matthew M. Polka

cc: L. Brooks Derryberry

DECLARATION

I, L. Brooks Derryberry, hereby state and declare:

1. I am General Manager of Branch Cable, Inc., cable television operator and petitioner herein.

2. I am familiar with the facts contained in the foregoing Petition For Waiver of Emergency Alert System Requirements, and I verify that those facts are true and correct to the best of my knowledge and belief, except that I do not and need not attest to those facts which are subject to official notice by the Commission.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 11th day of February, 2002.



L. Brooks Derryberry
General Manager

CERTIFICATE OF SERVICE

I, Loren Costantino, an employee in the law offices of Lukas, Nace, Gutierrez & Sachs, Chtd., do hereby certify that I have on this 12th day of February, 2002, sent by hand-delivery, a copy of the foregoing PETITION FOR WAIVER OF EMERGENCY ALERT SYSTEM REQUIREMENTS to the following:

Joseph Casey, Chief
Technical & Public Safety Division
Enforcement Bureau
445 12th St., S.W., Room 7-A843
Federal Communications Commission
Washington, D.C. 20554


Loren Costantino