

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

In the Matter of )  
 )  
Review of the Emergency Alert System ) EB Docket No. 04-296

**REPLY COMMENTS OF**  
**THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

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The National Cable & Telecommunications Association (“NCTA”) hereby submits its reply comments in the above-captioned proceeding.

**INTRODUCTION AND SUMMARY**

This proceeding has garnered a wide range of comments from parties with varying interests in the future of the Emergency Alert System (“EAS”) and related mechanisms for notifying the public of emergency situations. Some parties believe that the existing EAS infrastructure should be retained and upgraded, while others argue that EAS should be modified or replaced with an entirely new warning system.<sup>1</sup> Many parties agree that strong federal oversight of public warning systems is needed, including the development of model state and local EAS plans.<sup>2</sup> And many parties commented on the feasibility and need to extend EAS obligations to direct broadcast satellite (“DBS”), wireless and other services in order to reach more people during life-threatening or other hazardous situations.<sup>3</sup> In general, the record

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<sup>1</sup> See e.g. Comments of NCTA; Joint Comments of the National Association of Broadcasters and the Association for Maximum Service Television, Inc (“Comments of NAB/MSTV”); Comments of Stations WTOP (AM), WTOP-FM, and WXTR (AM).

<sup>2</sup> See e.g. Comments of NCTA, Comments of NAB/MSTV; Comments of Verizon. ComLabs, Inc., for example, notes that there are 50 different state plans, with some differing significantly among adjoining states. It also describes the “great deal” of confusion from state to state on the activation of EAS for certain events.

<sup>3</sup> See e.g., Comments of CTIA- The Wireless Association, XM Radio, Inc., NCTA, Charter Communications, Inc.

supports a more uniform, consistent approach to disseminating emergency alerts to the public and improved coordination between all entities involved at the federal, state and local level.

In its initial comments, NCTA discussed the cable industry's long history of providing emergency information to its customers and its ongoing work with the FCC's Media Security and Reliability Council ("MSRC") and other federal agencies. Most recently, NCTA announced, for example, the cable industry's participation in the U.S. Department of Homeland Security's "Ready" Campaign, a series of video, radio, and print public service announcements that encourage families to discuss and develop plans for emergency preparedness in the event of terrorist attack or natural disaster.<sup>4</sup>

NCTA explained, however, that the effectiveness of the EAS is hampered by a patchwork of emergency alert obligations imposed on cable systems pursuant to thousands of local franchise agreements. We demonstrated that inconsistencies and conflicts between EAS and local franchised-based alert requirements within state and between towns on how EAS and alternative local alert systems are used, what policies and procedures should apply, and what events should trigger activation of the systems has adversely affected the public warning system nationwide. The cable industry believes that a consistent set of federal standards and guidelines on emergency alerting, as recommended by MSRC, is necessary given the disparity in the way states and localities implement emergency notifications today.

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<sup>4</sup> "Cable Industry Assists Department of Homeland Security In Promoting Disaster Preparedness", NCTA News Release, November 22, 2004.

NCTA and other parties also believe that the goal of improving EAS may be achieved with the existing EAS infrastructure. Consistent with MSRC's recommendations, the installed base of EAS equipment should not be rendered obsolete, but upgraded where appropriate and necessary. With regard to small cable systems, NCTA, the American Cable Association and Charter Communications, urge the Commission to extend waivers or exempt small cable systems from EAS compliance, unless funds are made available to make it economically feasible for them to participate.

There is also ample support in the record for the Commission to extend EAS to DBS given its broad reach as a provider of multichannel video programming to millions of Americans across the nation.<sup>5</sup>

NCTA's reply comments address two major issues raised in the initial comments. First, we address the Commission's authority to preempt state and local regulation of emergency alerting that is inconsistent with EAS or impedes an important federal interest. And, second, we address once again the broadcasters' attempt to have the Commission mandate cable operators to install equipment capable of selecting out broadcast channels from the override of all channels carried on the cable system with state and local EAS or other local alert messages.

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<sup>5</sup> See e.g. Comments of NCTA, Charter Communications, Inc.

**I. THE COMMISSION HAS EXPRESS AUTHORITY TO REGULATE EMERGENCY ALERTING ON CABLE TELEVISION AND MAY PREEMPT STATE AND LOCAL EMERGENCY ALERT REQUIREMENTS IF THEY CONFLICT WITH FEDERAL LAW OR IMPEDE IMPORTANT FEDERAL OBJECTIVES**

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In a joint filing, various municipalities and municipal organizations, including the National Association of Telecommunications Officers and Advisers (“NATOA”) (collectively “Municipalities” or “cities”), challenge any effort by the federal government to achieve national uniformity in the dissemination of emergency information if it results in preempting “other, alternative alert systems such as those required under any cable franchises.”<sup>6</sup> They assert that the “separate cable-based alert systems required under cable franchise agreements cannot legally be and should not be preempted under the Commission’s rulemaking” on the grounds that Congress made local governments “the sole decision maker as to whether a local alert system is required in a cable franchise.”<sup>7</sup>

The cities base their assertion that the FCC lacks the authority to preempt local emergency alerting regulations on section 626 of the Communications Act, which sets forth the process for renewing cable franchises. 47 U.S.C. § 546. They argue that section 626 gives the local municipality the sole authority “to impose and approve” franchise terms which the city’s legislative body determines meets, among other things, its “future-cable-related community needs and interests.”<sup>8</sup> By contrast, the cities argue, the Commission’s authority over the emergency alert system rests on a general grant in section 4(i) of the Act, which gives the

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<sup>6</sup> See Joint Comments of Municipalities and Municipal Organizations (consisting of NATOA; International Municipal Lawyers Association; National Association of Counties; United States Conference of Mayors; National League of Cities; Texas Coalition of Cities for Utility Issues; and various individual cities (“Municipalities”).

<sup>7</sup> Comments of Municipalities at 9.

<sup>8</sup> *Id.* at 10, citing 47 U.S.C. 546 (a) (1).

Commission the authority to perform any acts “not inconsistent with the Communications Act” as may be necessary to execute the Commission’s functions.<sup>9</sup>

Municipalities argue that “any attempt by the Commission to preempt cable franchise-based local alert systems is inconsistent with the *express* provisions” of section 626, and thus beyond the Commission’s authority.<sup>10</sup> The cities’ argument adheres to a well-established tenet of statutory construction: that an express provision of authority supersedes a general grant of authority.<sup>11</sup> But the facts in this case are precisely the opposite. Section 624(g) of the Communications Act, which the cities largely ignore, requires cable operators to comply with “*such standards as the Commission shall prescribe* to ensure that viewers of video programming on cable systems are afforded the same emergency information as is afforded by the emergency broadcasting system pursuant to Commission regulations.” 47 U.S.C. § 544(g) (emphasis added).

Thus, Congress *expressly* granted the Commission authority to prescribe rules and regulations for the dissemination of emergency information to cable television viewers consistent with those adopted for broadcasting under the Communications Act. And nothing in section 624(g) restricts the Commission from imposing rules affecting state and local emergency

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<sup>9</sup> In addition to section 4(i), NCTA notes that Commission authority emanates from section 1, 4(o), 303© and 706 of the Communications Act, as amended. Section 1 states that the Commission was created for the purposes of, *inter alia*, national defense and promoting safety of life and property through the use of wire and radio communication. Section 4(o) provides the FCC with authority to investigate, study, and propose best methods to resolve any and all problems preventing the maximum effective use of radio and wire communications in connection with safety of life and property. Section 303(r) is a general grant of rulemaking authority and Section 706 grants specific, communications-related powers to the President in time of war or national emergency. See Review of the Emergency Alert System, Notice of Proposed Rulemaking, EB Docket No. 04-296, ¶ 10, rel. August 12, 2004.

<sup>10</sup> Comments of Municipalities at 10 – 11 (emphasis added).

<sup>11</sup> See e.g., Sutherland Statutory Construction, Sixth Ed., Volume 2A, § 47.17; *U.S. v. LaPorta*, 46 F.3d 152 (2<sup>nd</sup> Cir. 1994).

alerting. Municipalities, on the other hand, have no express grant of authority over emergency alerting, relying instead on the *general* franchise renewal provisions of section 624. In light of this, the specific statutory provisions relating to EAS in section 624(g) supersede the general section 626 franchise renewal provisions with regard to any FCC regulation of emergency notification systems via cable television.

Apart from the general vs. express grant of authority, there are numerous bases for preemption of state regulation that could potentially be applied in this case. For example, where state regulation impedes the full achievement of important federal objectives, *i.e.* homeland security and emergency preparedness, or when there is a conflict between federal and state law.<sup>12</sup> As the Commission recently stated, “courts routinely recognize that there may be circumstances where state regulation would necessarily conflict with the Commission’s valid exercise of authority.”<sup>13</sup> Even the cities admit that “at most” under the Communications Act “the Commission has the authority to preempt local emergency alert requirements to the extent they interfere with the operation of the Federal EAS.”<sup>14</sup> The Commission expressed concern six years ago about the conflict between requirements of local jurisdictions and federal regulations regarding the EAS and concluded that “should any local jurisdictions’ EAS requirements conflict or interfere with those adopted by the Commission, the local jurisdiction’s requirements will be preempted.”<sup>15</sup>

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<sup>12</sup> See *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 368-69 (Supreme Court summarizes circumstances where federal law and policy preempt state law).

<sup>13</sup> *In the Matter of Vonage Holdings Corporation, Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, Memorandum Opinion and Order*, WC Docket No. 03-211, ¶ 19, rel. November 12, 2004.

<sup>14</sup> Comments of Municipalities at 12.

<sup>15</sup> *Amendment of Part 73, Subpart G, of the Commission’s Rules Regarding the Emergency Broadcast System*, Second Report and Order, 12 FCC Rcd 15503, 15520 (1997).

Nevertheless, the patchwork of local emergency alerting requirements persists, often bumping heads with cable's implementation of the federal EAS for state and local emergency messaging and creating a host of inefficiencies and costs to the detriment of the overall effectiveness of the public warning system. With the federal government's emphasis on protecting the homeland and improving emergency preparedness and responsiveness, the time is right for the adoption of uniform national standards for a public warning system. Federal standards and guidelines for state and local plans and for when and how state and local emergency managers and officials may activate an all-hazard warning system is clearly preferable to the disparate manner in which local governments implement it today.

In addition to advocating for separate city-by-city emergency alerting systems, Municipalities also seek to make cable's participation in state and local EAS mandatory and seek the right to unrestricted access to EAS for issuance of local alerts. The fact that cities want discretionary access to EAS outside of state and local EAS plans and procedures and without the checks inherent in a systematic emergency management process illustrates the problem of dual federal-local emergency alerting systems in many communities nationwide.<sup>16</sup>

The Maine State Emergency Communications Committee recognizes the difficulties associated with local officials having direct, unmediated access to EAS.<sup>17</sup> In opposing rules requiring broadcasters to make their facilities available to local emergency managers, it discusses

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<sup>16</sup> With regard to the Municipalities' call for mandatory implementation of new event codes, the Commission has found, and we agree, that this should be accomplished on a voluntary basis. Many large cable systems have already installed the software or firmware necessary to respond to the new codes and others have plans to do so in the near future. The FCC's rules require cable systems that replace EAS equipment after February 1, 2004 to install equipment with the codes built-in. Moreover, it would be a major financial hardship for small cable systems to retrofit existing equipment to implement the new codes to meet a mandatory deadline. See Comments of NCTA at 12-13.

<sup>17</sup> See Comments of Maine State Emergency Communications Committee.

the impracticality of having many emergency managers at the county and local level, some of whom are part-time and wear many hats, “stop, create an EAS message, enter the proper codes, record a voice message, and trigger an EAS alert” – all of which could be in contravention of the state EAS plan procedures.<sup>18</sup> Moreover, the Committee points out that without a “bottom-up filtering system”, the system “may fall victim to overuse”:

The hallmark of EAS is its rarity. When the public hears the “squawks” of an EAS alert, they should immediately sit up and pay attention. If every local emergency manager is suddenly given direct access to EAS, it can logically be expected that improper use of the system will skyrocket, thus rendering it completely ineffective for the times when it is truly needed.<sup>19</sup>

As NCTA argued in its initial comments, should the Commission mandate that cable operators participate in EAS at the state and local level, it should make clear under what terms a local official may access the system and it should preempt any franchise-based emergency alerting requirements.

The Municipalities’ other arguments for local emergency alert systems are unpersuasive. They argue, for example, that alternative local cable-franchised based alert systems are needed to provide back-up to the federal EAS. But cable EAS equipment works well and there is no evidence that a separate system is necessary, particularly given the risks of over-inclusive, excessive or inconsistent activations.<sup>20</sup>

In sum, the Commission should consult with appropriate state and local authorities in developing national standards to ensure that state and local emergency notification needs are met.

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<sup>18</sup> *Id.* at 3.

<sup>19</sup> *Id.*

<sup>20</sup> Joint Comments of Named State Broadcast Associations at 28.

But a consistent body of federal standards and guidelines is necessary to ensure a fully integrated, seamless public warning system.

**II. THE COMMISSION HAS REJECTED THE IMPOSITION OF A MANDATORY “SELECTIVE OVERRIDE” REQUIREMENT ON CABLE SYSTEMS MULTIPLE TIMES AND THE BROADCASTERS HAVE PRESENTED NO REASONS TO REVISIT THIS DECISION**

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For at least the third time in the past nine years, the broadcast industry, led by the National Association of Broadcasters (“NAB”), the Association for Maximum Service Television (“MSTV”) and various state broadcast associations, has sought rules that would require cable system operators to install equipment that would filter out broadcast channels from the override of all channels on a cable system by an EAS message.<sup>21</sup> This “selective override” issue has been exhaustively addressed by the Commission and there is nothing new presented in this proceeding.<sup>22</sup>

In 1998, in the Third Report and Order on EAS, the Commission explicitly rejected mandatory selective channel overrides in favor of allowing cable operators and broadcasters to enter into voluntary written agreements to institute selective overrides. Among other considerations, the Commission recognized that since broadcast stations often serve a wide coverage area crossing hundreds of communities, they may not issue alerts relating to particular local emergencies, such as non-weather related conditions, covering a single community.<sup>23</sup> Also, to the extent that cable operators remain subject to EAS override requirements in their local franchises, mandatory selective overrides would be inconsistent with such requirements. The

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<sup>21</sup> See e.g., Comments of NAB/MSTV, and Comments of State Broadcast Associations.

<sup>22</sup> See *Amendment of Part 73, Subpart G, of the Commission’s Rules Regarding the Emergency Broadcast System, Memorandum Opinion and Order*, 10 FCC Rcd 11494 (1995) (“Memorandum Opinion and Order”); *Amendment of Part 73, Subpart G, of the Commission’s Rules Regarding the Emergency Broadcast System, Third Report and Order*, 14 FCC Rcd 1273 (1998) (“Third Report and Order”).

<sup>23</sup> Third Report and Order, 14 FCC Rcd 1273, 1282.

decision as to when and how often to override programming on the cable system with emergency information is almost always in the hands of the designated town or city official not the cable operator.

The cable industry recognizes that broadcast stations and regional cable news channels provide in-depth news and information about weather-related and other emergency situations. But there is no reason to believe that local cable operators are providing less informative EAS alerts than local broadcast stations. NAB, MSTV and the state broadcast associations provide no evidence of a problem to warrant revisiting the Commission's well-settled decision.

Capitol Broadcasting Company provides several examples of EAS overrides of its broadcast programming by the Time Warner system in the Raleigh, North Carolina market.<sup>24</sup> But as NCTA found in each instance, these were isolated instances of an equipment bug or the particular timing of a required monthly test that have been addressed by the cable operator in close cooperation with the broadcast station. In the case of a tornado alert in August 2004, Capitol Broadcasting objected to the cable system's dissemination of an EAS message during a report by the station's meteorologist. However, the Time Warner system has the capability to target specific counties with EAS alerts and as the emergency was unfolding it passed the National Weather Service tornado alert to the relevant customers as soon as it was issued. This was a situation where a broadcast station, here WRAL, provided general coverage of tornado warnings across the entire viewing area but the cable operator, Time Warner, was able to get emergency information to people in a specific county as quickly as possible to enable them to prepare for a potentially life-threatening situation.

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<sup>24</sup> Comments of Capitol Broadcasting Company at 1-2.

In any event, EAS alerts are of very short duration and more and more typically involve a video crawl rather than an audio and video override of the channels so the interruption of programming is minimal.

Apart from the foregoing legal and policy reasons for all-channel override, selective override of broadcast vs. non-broadcast channels is a costly proposition for most cable systems. As NAB and MSTV estimate, it costs between \$10,000 to \$15,000 per cable facility to install selective override equipment, which is hardly an “incremental” cost for any small to mid-sized cable system as broadcasters claim.<sup>25</sup> Indeed, even for large cable companies that have the capability to target specific customers without unduly alerting other customers in the cable viewing area, it would be very expensive to reconfigure headend facilities and equipment currently in place in order to filter out broadcast channels. But as we pointed out in our initial comments many cable operators do not have the capability to target specific customers, so they would have to purchase and install new equipment to meet selective override requirements.<sup>26</sup>

The important point is that cable operators and broadcasters are voluntarily negotiating agreements to implement the non-override of broadcast channels in certain circumstances, as the Commission encouraged in its rules. Time Warner and WRAL, for example, have recently entered into an “EAS Opt Out” agreement. The technical aspects of such EAS opt-out plans are complicated by the size and complexity of many large cable systems. But they are the appropriate means to resolve these issues, not government regulation.

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<sup>25</sup> NAB Comments at 20.

<sup>26</sup> NAB argues that cable overrides violate the must carry provisions, section 614(b)(3)(B) of the Communications Act, with regard to carriage of the entirety of the television stations’ program schedule. The Commission rejected NAB’s assertion in 1995 and ruled that it is not the intent of the must carry rules to prohibit emergency transmissions and that the public benefit of ensuring an operational emergency alert system outweighs the possible harm from momentarily interrupting a broadcast signal carried by a cable television system. *Memorandum Opinion and Order*, 10 FCC Rcd 11494, 11498.

## CONCLUSION

For the foregoing reasons, we urge the Commission to take this opportunity to formulate national standards and guidelines for emergency alerting in cooperation with all stakeholders and utilizing the existing EAS infrastructure. The Commission also should reject the broadcasters' request for mandatory selective override regulation.

Respectfully submitted,

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