Before the
Federal Communications Commission
Washington, D.C. 20554

JAN 25 2010

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

SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: January 12, 2010 **Released: January 14, 2010**

Comment Date: **[30 days after publication in the Federal Register]**
Reply Comment Date: **[60 days after publication in the Federal Register]**

By the Commission: Commissioner Copps issuing a statement.

TABLE OF CONTENTS

Paragraph

I. INTRODUCTION 1
II. BACKGROUND 5
III. DISCUSSION 13
A. Present EAS Vulnerabilities 13
B. Limitations of the Commission's EAS Testing Rules 16
C. Next Generation EAS Concerns 20
D. Multi-Agency Planning for a National EAS Test 23
E. Proposed Rule 24
IV. CONCLUSION 33
V. PROCEDURAL MATTERS 34
A. *Ex Parte* Presentations 34
B. Comment Filing Procedures 35
C. Accessible Formats 36
A. Regulatory Flexibility Analysis 37
B. Paperwork Reduction Act Analysis 38
C. Congressional Review Act 39
VI. ORDERING CLAUSES 40
APPENDIX A: Proposed Rule
APPENDIX B: Initial Regulatory Flexibility Analysis

I. INTRODUCTION

1. In this *Second Further Notice of Proposed Rulemaking*, we propose to amend our Part 11 rules governing the Emergency Alert System (EAS) to provide for national testing of the EAS and collection of data from such tests.

2. The EAS is a national alert and warning system that exists primarily to enable the President of the United States to issue warnings to the American public during emergencies.[1] To date, however, neither the EAS nor its predecessor national alerting systems[2] have been used to deliver a national Presidential alert.[3] Moreover, while our Part 11 rules provide for periodic testing of EAS at the state and local level, no systematic national test of the EAS has ever been conducted to determine whether the system would in fact function as required should the President issue a national alert, and, in their current form, our EAS rules do not mandate any such test.

3. In the *Second Report and Order* in this docket, the Commission noted that it is vital that the EAS operate as designed.[4] In the *Further Notice of Proposed Rulemaking* adopted concurrently with the *Second Report and Order* the Commission sought comment on various issues relating to maintaining the quality of the EAS, including additional testing.[5] Finally, in the Chairman's recent 30-Day Review on FCC Preparedness for Major Public Emergencies, the Public Safety and Homeland Security Bureau noted that concerns had been raised regarding the frequency and scope of EAS testing.[6] The Bureau recommended that the three Federal partners responsible for EAS – the Commission, the Federal Emergency Management Agency (FEMA) and the National Weather Service (NWS), review the testing regime to see where improvement could be made.[7]

4. Since the 30-Day Review was conducted, the Commission, FEMA, and NWS, along with the Executive Office of the President (EOP), have initiated discussions regarding testing of the EAS at the national level. We and our Federal partners agree that it is vital that the EAS work as designed and we share concerns that existing testing may be insufficient to ensure its effective operation. In light of this, as described below, the Commission, FEMA, NWS and EOP have begun planning for a national EAS test, with subsequent tests to occur thereafter. To facilitate this test program, in this *Second Further Notice of Proposed Rulemaking*, we propose to amend our EAS rules to specifically provide for national EAS testing and data collection. We seek comment on all issues discussed herein, including whether our proposed rule would effectively ensure accurate EAS testing at the national level.

---

[1] *See* Amendment of Part 73, Subpart G, of the Commission's Rules Regarding the Emergency Broadcast System, FO Docket 91-301, FO Docket 91-171, *Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 15503 , 15503-15506 ¶¶ 1-4 (1994) (*1994 Report and Order*)(EAS, as successor to CONELRAD and EBS, is intended to be a national alerting system).

[2] *See* discussion at para. 5, *infra*.

[3] On January 6, 2010, FEMA and the FCC, along with State of Alaska officials and the Alaska Broadcasters Association, conducted a live code test of the Presidential alert and warning capabilities of the EAS in the State of Alaska. *See* "Federal And State Partners To Test National Emergency Alert System In Alaska," *available at* http://www.fema.gov/news/newsrelease.fema?id=50157 (last visited Jan. 12, 2010).

[4] Review of the Emergency Alert System; Independent Spanish Broadcasters Association, the Office of Communication of the United Church of Christ, Inc., and the Minority Media and Telecommunications Council, Petition for Immediate Relief, EB Docket No. 04-296, *Second Report and Order and Further Notice of Proposed Rule Making*, 22 FCC Rcd 13275, 13306 ¶ 71 (2007) (*Second Report and Order*).

[5] *Second Report and Order*, 22 FCC Rcd at 13308 ¶ 75.

[6] *See FCC Preparedness for Major Public Emergencies Chairman's 30 Day Review*, prepared by the Public Safety and Homeland Security Bureau (Sep. 2009)(*Chairman's Review*) at 24, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293332A1.pdf.

[7] *Id.*

II. BACKGROUND

5. The EAS is a national public warning system that provides the President with the ability to rapidly and comprehensively communicate with the American public during a national crisis.[8] The EAS is the successor to two prior national warning systems: CONELRAD (Control of Electromagnetic Radiation), established in 1951, and the Emergency Broadcast System (EBS), established in 1963.[9]

6. The Commission, in conjunction with FEMA and NWS, implements EAS at the federal level.[10] The respective roles these agencies play are defined by a 1981 Memorandum of Understanding between FEMA, NWS, and the Commission;[11] a 1984 Executive Order;[12] a 1995 Presidential Statement of EAS Requirements;[13] and a 2006 Public Alert and Warning System Executive Order.[14] As a general matter, the Commission, FEMA, and NWS all work closely with radio and television broadcasters, cable providers, and other participants in EAS (EAS Participants)[15] as well as with state, local, and tribal governments, to ensure the integrity and utility of EAS.

7. The Commission's EAS regulations are set forth in Part 11 of the rules, which imposes requirements governing mandatory participation in the national EAS by all EAS Participants.[16] Part 11 rules also govern EAS participation at the state and local level, although currently state and local EAS participation is voluntary. State Emergency Coordination Committees (SECCs) and Local Emergency

---

[8] The Commission's EAS rules are intended to ensure that national activation of EAS would enable the President to communicate with the American public within ten minutes from any location at any time. These messages must take priority over any other messages and preempt other messages in progress. Review of the Emergency Alert System, EB Docket No. 04-296, *First Report and Order and Further Notice of Proposed Rulemaking*, 20 FCC Rcd 18625, 18628, ¶ 8 (2005) (*First Report and Order*); 47 C.F.R. § 11.44(a).

[9] A more detailed overview of the history of EAS is set out in the first *Notice of Proposed Rulemaking* in this docket. *See* Review of the Emergency Alert System, EB Docket No. 04-296, *Notice of Proposed Rulemaking*, 19 FCC Rcd 15775, 15776-77, ¶¶ 6-8 (*2004 NPRM*).

[10] FEMA acts as Executive Agent for the development, operation, and maintenance of the national-level EAS. *See Memorandum*, Presidential Communications with the General Public During Periods of National Emergency, The White House (Sept. 15, 1995) (*1995 Presidential Statement*).

[11] *See* 1981 State and Local Emergency Broadcasting System (EBS) Memorandum of Understanding Among the Federal Emergency Management Agency (FEMA), Federal Communications Commission (FCC), the National Oceanic and Atmospheric Administration (NOAA), and the National Industry Advisory Committee (NIAC) *reprinted as* Appendix K to Partnership for Public Warning Report 2004-1, The Emergency Alert System (EAS): An Assessment.

[12] *See* Assignment of National Security and Emergency Preparedness Telecommunications Functions, Exec. Order No. 12472, 49 Fed. Reg. 13471 (1984).

[13] *See 1995 Presidential Statement.*

[14] Public Alert and Warning System, Exec. Order No. 13407, 71 Fed. Reg. 36975 (June 26, 2006) (*Executive Order*). Section 3(b)(iii) of the *Executive Order* directs the Commission to "adopt rules to ensure that communications systems have the capacity to transmit alerts and warnings to the public as part of the public alert and warning system." A discussion of the *Executive Order* is provided in the Second Report and Order in this docket. *See Second Report and Order*, 22 FCC Rcd at 13278-80 ¶¶ 5-7.

[15] EAS Participants include analog AM, FM and television broadcast stations, digital broadcast stations, analog cable systems, digital cable systems, wireless cables systems, Direct Broadcast Satellite (DBS) services, Satellite Digital Audio Radio Service (SDARS), and other participating entities. *See* 47 C.F.R. § 11.1.

[16] *See* 47 C.F.R. Part 11.

Coordination Committees (LECCs) undertake the development of operational plans and procedures for implementing state and local EAS activations. These organizations prepare coordinated emergency communications plans utilizing the EAS (which may be combined with other emergency information distribution plans and methodologies). State and local EAS plans must comply with Part 11 requirements and are submitted to the Commission for review.[17]

8. Functionally considered, the present-day EAS is a hierarchical alert message distribution system.[18] Initiating an EAS message, whether at the national, state, or local level, requires the message initiator (*e.g.*, FEMA, which initiates EAS alerts at the national level on behalf of the President) to deliver specially-encoded messages to a broadcast station-based transmission network that, in turn, delivers the messages to individual broadcasters, cable operators, and other EAS Participants who maintain special encoding and decoding equipment that can receive the message for retransmission to other EAS Participants and to end users (broadcast listeners and cable and other service subscribers).[19] Sections 11.32 and 11.33 of the Commission's rules set forth minimum requirements for these EAS encoders and decoders, respectively,[20] the functions of which can be combined into a single unit that is commonly referred to as an Encoder/Decoder.[21]

9. The national EAS delivery/transmission system is commonly referred to as a "daisy chain." At its initial level, it consists of various FEMA-designated radio broadcast stations – known as Primary Entry Point (PEP) stations – which are tasked with receiving and transmitting "Presidential Level" messages initiated by FEMA. As the entry point for national level EAS messages, these PEP stations are designated "National Primary" (NP). At the next level (*i.e.*, below the PEP stations), designated "State Primary" stations monitor specifically-designated PEP 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 (EOC). At the level below the State Primary stations, Local Primary stations monitor the State Primary and PEP stations and are monitored, in turn, by all other EAS Participants (radio and television broadcasters, cable TV service providers, *etc.*). At present, the United States is divided into approximately 550 EAS local areas, each of which contains at least two Local Primary stations, designated "Local Primary One" (LP1), "Local Primary Two" (LP2), and so on. The LP stations must monitor at least two EAS sources for Presidential messages (including State Primary stations and in some cases a regional PEP station), and also can serve as the point of contact for state and local authorities and NWS to activate the EAS for localized events such as severe weather alerts. All other EAS Participants are designated Participating National (PN) stations and must monitor at least two EAS sources, including an LP1 and an LP2 station as specified in the state's EAS plan.

10. The White House, through FEMA, initiates a presidential-level EAS alert by transmission of a coded message sequence, which includes an Emergency Action Notification (EAN) event code.[22] Immediately upon receipt of an EAN message, EAS Participants must begin monitoring

[17] *See* 47 C.F.R. § 11.21.

[18] All broadcast stations and cable systems have EAS designations that describe their functions within EAS. *See* 47 C.F.R. § 11.18.

[19] 47 C.F.R. § 11.31.

[20] 47 C.F.R. §§ 11.32, 11.33.

[21] 47 C.F.R. § 11.34(c). EAS equipment also provides a means to automatically interrupt regular programming and is capable of providing warnings in the primary language that is used by the station or cable system. *See* 47 C.F.R. §§ 11.33(a)(4), 11.51(k)(1), 11.54.

[22] *See* 47 C.F.R. § 11.54 (EAS operation during a national level emergency).

two EAS sources, discontinue normal programming, follow the transmission procedures in the appropriate section of the EAS Operating Handbook, and undertake various other requirements, until receipt of an Emergency Action Termination (EAT) message.[23] Essentially, receipt of an EAN is designed to "seize" broadcast transmission equipment for the transmission of a presidential message. The equipment is not freed for resumption of regular broadcasting until the EAT is received.[24]

11. State and local emergency operations managers also can request activation of the EAS by utilizing state-designated EAS entry points, such as the State Primary stations or State Relay stations.[25] State Relay sources relay state-common emergency messages to local areas.[26] Local Primary sources are responsible for coordinating the carriage of common emergency messages from sources such as the NWS or local emergency management offices as specified in EAS local area plans.[27] State transmission systems vary from state to state, but can include "daisy chain" links between broadcast and other terrestrial communications facilities as well as satellite-based facilities.

12. As noted above, although the EAS (and its EBS and CONELRAD predecessor warning systems) were designed primarily to carry a national warning issued by the President, no such warning has ever been issued. In fact, the great majority of EAS alerts issued to date have been localized weather-related alerts originated by the NWS.[28]

III. DISCUSSION

A. Present EAS Vulnerabilities

13. Because of its daisy chain structure, the EAS is potentially vulnerable to "single point of failure" problems, *i.e.*, where failure of a participating station results in system-wide failure for all points below that station on the daisy chain. The Commission was made aware of one such failure during an inadvertent issuance of a national alert during a testing operation conducted by FEMA. In June 2007, FEMA was testing a new satellite warning system in Illinois and FEMA contractors inadvertently triggered a national-level EAS alert.[29] This event caused some confusion to broadcasters and other communications in the Ohio valley and beyond before the test/alert was terminated by a combination of EAS Participant intervention and equipment failure. It was subsequently discovered that some EAS Participant equipment simply did not pass on the alert.[30] The Commission has also received numerous

[23] *See* 47 C.F.R. § 11.54.

[24] *Id.*

[25] The State Relay Network is composed of State Relay sources, leased common carrier communications facilities, or any other available communication facilities. In addition to EAS monitoring, satellites, microwave, FM subcarrier, or any other communications technology may be used to distribute state emergency messages. *See* 47 C.F.R. § 11.20.

[26] 47 C.F.R. § 11.18(d).

[27] 47 C.F.R. § 11.18(b).

[28] *See Second Report and Order*, 22 FCC Rcd at 13282 ¶ 14. So-called "Amber Alerts," which are centrally-delivered emergency alerts concerning missing persons, are another significant source of regular EAS activations. *See Report and Order*, FCC Rcd 7255.

[29] *See* Illinois Emergency Management Agency, *Press Release*, "Federal test of Emergency Alert System mistakenly sends message out over TV, radio airwaves" (June 26, 2007).

[30] *See* Primary Entry Point Administrative Council, Inc., Encoder/Decoder Closed Circuit Test Report, August 8, 2008 (2008 PEPAC Report). The PEPAC administers the PEP stations – the primary entry points for a national-level EAS alert.

anecdotal reports from EAS Participants and state and local emergency managers of problems with state and local level alert delivery architectures, as well as reports indicating problems with PEP station readiness as tested by FEMA.[31]

14. As noted above, the EAS is administered and tested by multiple agencies at multiple levels of its operations, and this too may lead to vulnerabilities in functioning or gaps in nationwide coverage. For example, EAS PEP station operation and maintenance is the responsibility of FEMA, which tests the PEP stations but typically does not test other stations. The NWS tests its own National Weather Radio (NWR) facilities independently or as integrated with state and local level emergency alert delivery architectures, but again, its focus is solely on the proper operation of NWS/NWR facilities as those facilities interact with state and local EAS architectures. State EOC facilities are maintained and tested by their respective state officials. Thus, none of these entities have been responsible for "top-to-bottom" national testing of EAS.

15. Finally we note that the Government Accountability Office has recently testified before Congress on "long-standing weaknesses" that limit the reliability of the national-level EAS relay system. GAO specifically cited lack of redundancy, gaps in coverage, a lack of testing and training, and limitations on how alerts are disseminated to the public.[32] This too heightens our concern regarding potential EAS vulnerabilities.

B. Limitations of the Commission's EAS Testing Rules

16. Currently, the Commission's Part 11 rules provide for mandatory weekly and monthly tests at the state and local level.[33] The rules also provide for "[p]eriodic [n]ational [t]ests"[34] and "special tests." at the state or local level.[35] Section 11.61(a) further states that in addition to the EAS testing at regular intervals prescribed by the rules "additional tests may be performed anytime."[36] However, Part 11 does not contain comparable rules for testing of EAS at the national level.

17. While the current rules give the Commission broad authority over EAS testing, the rules generally focus on testing of components of the system rather than the system as a whole. Sections 11.61(a)(1) and (a)(2) specify in detail the requirements for mandatory weekly and monthly EAS tests that are conducted at the state and local level. However, these tests are designed to ascertain whether the EAS equipment belonging to individual EAS Participants is functioning properly; they do not test whether the national EAS infrastructure as a whole works well or at all. Similarly, while the rules authorize "additional tests" and "special tests," these typically are carried out at the state or local level, and are usually designed to test for readiness during specific warning situations, for example, child

[31] *See* United States Government Accountability Office, Report to Congressional Committees, EMERGENCY PREPAREDNESS: Current Emergency Alert System Has Limitations, and Development of a New Integrated System Will Be Challenging, March 2007 at 15 (*2007 GAO Report*).

[32] Statement of Mark L. Goldstein, United States Government Accountability Office, Testimony Before the Subcommittee on Economic Development, Public Buildings, and Emergency Management, Committee on Transportation and Infrastructure, House of Representatives, at 4-5 (Sep. 30, 2009). *See also 2007 GAO Report* at 14-17.

[33] 47 C.F.R. § 11.61(a)(1),(2).

[34] 47 C.F.R. § 11.61(a)(3).

[35] 47 C.F.R. § 11.61(a)(4).

[36] 47 C.F.R. § 11.61(a).

abduction cases covered by so-called Amber Alerts.[37]

18. The current Part 11 rules also require EAS participants to record data from EAS tests, but the data collected is limited in scope. Specifically, the rules require EAS Participants to log the dates/times that EAN and EAT messages are received, and to determine and log the cause of any failures in the reception of the required monthly and weekly tests.[38] However, this data is not sufficient to provide an assessment of whether the EAS is capable of functioning nationally.

19. Section 11.61(a)(3) of the rules is entitled "Periodic National Tests," indicating that national EAS testing was at least contemplated when the rules were adopted. This rule, however, merely states that NP/PEP stations shall participate in such tests "as appropriate," but does not elaborate upon who would conduct such tests, how they would be conducted, or how often. In any case, as noted above, no national test has ever been conducted, under this provision or otherwise.

C. Next Generation EAS Concerns

20. The 2006 Presidential Executive Order requires provision of "as many communications pathways as practicable" to reach the American people during crises.[39] In this regard, the development of additional "next generation" alert distribution systems is already under way.[40] FEMA is presently working to upgrade the existing EAS through its Integrated Public Alert and Warnings System (IPAWS), envisioned as a network of alert systems utilizing common or complementary delivery architectures.[41] FEMA envisions IPAWS as supporting both the current EAS architecture and so-called "Next Generation" EAS.

21. The Commission is also involved in the transition to Next Generation EAS, which will utilize state-of-the-art technologies and Common Alerting Protocol (CAP) to increase the amount and quality of alert and other emergency information delivered to the public. CAP is a standard alert message format that specifies data fields to facilitate data sharing across different distribution systems.[42] In its May 2007 EAS *Second Report and Order*, the Commission adopted a requirement that all EAS Participants be able to accept CAP-formatted EAS messages no later than 180 days after FEMA publicly adopts a CAP standard.[43] This requirement applies to EAS Participants regardless of whether they are

---

[37] 47 C.F.R. § 11.61(a)(4).

[38] *See* 47 C.F.R. §§ 11.35(a), 11.54(b)(13), and 11.61(b).

[39] *See Executive Order*, Section 2(a)(iii). Section 3(b)(iii) of the *Executive Order* directs the Commission to "adopt rules to ensure that communications systems have the capacity to transmit alerts and warnings to the public as part of the public alert and warning system."

[40] The Commercial Mobile Alerting System (CMAS) is one such system. On the CMAS, *see* The Commercial Mobile Alert System, PS Docket No. 07-287, *First Report and Order*, 23 FCC Rcd 6144 (2008); The Commercial Mobile Alert System, PS Docket No. 07-287, *Second Report and Order and Further Notice of Proposed Rulemaking*, 23 FCC Rcd. 10,765 (2008); The Commercial Mobile Alert System, PS Docket No. 07-287, *Third Report and Order*, 23 FCC Rcd. 12,561 (2008).

[41] *See* "FEMA Announces Intention to Adopt Common Alerting Protocol 1.1" *available at* http://www.fema.gov/news/newsrelease.fema?id=45424 (last visited Jan. 12, 2010).

[42] A CAP-formatted alert may include fields for message type, scope, event information, event certainty, sender, geographic scope, and expiration, among others. CAP-formatted messages also can include links to data, audio and video files, and can be validated and authenticated through the use of digital signatures and encryption.

[43] *Second Report and Order*, 22 FCC Rcd at 13276-77 ¶ 1. FEMA presently anticipates adopting CAP as early as the third quarter of 2010. *See* "FEMA Reaches Milestone With Integrated Public Alert & Warning System" *available at* http://www.fema.gov/news/newsrelease.fema?id=49848 (last visited Jan. 12, 2010).

utilizing existing EAS or Next Generation EAS.[44] The *Second Report and Order* also required EAS Participants to adopt Next Generation EAS delivery systems no later than 180 days after FEMA publicly releases standards for those systems.[45]

22. While significant efforts are being made to transition to Next Generation EAS, testing of the existing EAS remains important because it is likely that the existing EAS will continue to function as a critical alerting system for the foreseeable future. Moreover, while we expect that FEMA's adoption of CAP as part of IPAWS will spur the development of Next Generation EAS, there is at yet no established timetable for the development of next generation systems that will completely replace the existing EAS architecture, either at the federal or the state and local levels. Thus, we expect that FEMA will rely on the existing EAS daisy chain structure for at least the initial stages of IPAWS development and implementation. The various states and localities also appear to be at different stages in their ability to adopt and utilize CAP-based EAS architecture. As a result, our ability to systematically test the existing EAS architecture is important to support Next Generation EAS – at least in its initial stages of deployment – as well as to ensure the continued effectiveness of the current EAS.

D. Multi-Agency Planning for a National EAS Test

23. As noted above, concerns regarding the frequency and scope EAS testing raised in our recent 30-day review of emergency preparedness[46] have led the Commission and its Federal partners to begin planning a program for annual EAS testing at the national level. Specifically, the Commission, FEMA, NWS, and EOP have formed a working group that is planning an initial national test of the Presidential-level EAS.[47] As planned, this test will involve nationwide transmission of the EAN and associated messages and codes within the EAS. The purpose of the test is to assess for the first time the readiness and effectiveness of the EAS from top-to-bottom, *i.e.*, from origination of an alert by the President and transmission through the entire EAS daisy chain, to reception by the American public. Following the conduct and evaluation of the initial national test, it is contemplated that we and our Federal partners will continue to test EAS nationally.

E. Proposed Rule

24. Given the potential vulnerabilities of EAS in the absence of national testing, the above-described multi-agency initiative to begin a national test program, and the lack of specific provisions in our Part 11 rules relating to national tests, we propose to amend our Part 11 rules to expressly require all EAS Participants to participate in national testing and to provide test results to the Commission. Specifically, we propose to amend section 11.61(a)(3) of our rules to read as follows:

> *National Tests.* All EAS Participants shall participate in national tests as scheduled by the Commission in consultation with the Federal Emergency Management Agency (FEMA). Such tests will consist of the delivery by FEMA to PEP/NP stations of a coded EAS message, including EAS header codes, Attention Signal, Test Script, and EOM code. The coded message shall utilize EAS test codes as designated by the Commission's rules or such other EAS codes as

[44] *See Second Report and Order*, 22 FCC Rcd at 13277, ¶ 1.

[45] *Id.*, (and recognizing FEMA's lead role in the development of Next Generation EAS).

[46] *See Chairman's Review* at 24.

[47] *See* Statement of Damon Penn, Assistant Administrator, Department of Homeland Security, Federal Emergency Management Agency, on "This is NOT a Test: Will the Nation's Emergency Alert System Deliver the President's Message to the Public?," before the Subcommittee on Economic Development, Public Buildings, and Emergency Management, Committee on Transportation and Infrastructure, U.S. House of Representatives, Sep. 30, 2009, at 12.

the agencies conducting the test deem appropriate. A national test shall replace the required monthly test for all EAS Participants in the month in which it occurs. Notice shall be provided to EAS Participants by the Commission at least two months prior to the conduct of any such national test. Test results as required by the Commission shall be logged by all EAS Participants and shall be provided to the Commission's Public Safety and Homeland Security Bureau within thirty (30) days following the test.

25. We seek comment on the specific language of our proposed rule and its sufficiency to ensure an adequate framework for the conduct of national tests implemented by this agency in collaboration with FEMA and our other Federal partners. We also seek comment on whether the specific rule that we propose is, on balance, the best way to implement national testing of the EAS, or whether different provisions should be adopted.

26. We also propose implementing the national test on a yearly basis. We seek specific comment on this proposal. We believe that regular testing of the EAS is necessary to ensure that it can function properly during emergencies. We also believe that testing the EAS nationally at least once a year may be necessary to produce reliable results regarding the on-going operational readiness of the EAS. On the other hand, we do not propose to require national testing more frequently than once a year, because we are concerned that more frequent testing could cause unnecessary disruption of regular broadcasting and other service transmission to the public. We also wish to minimize attendant costs. We seek comment on this analysis.

27. We do not propose to specify a set time each year for the national EAS test to occur. We believe that avoiding a set date will yield more realistic data about EAS reliability and performance, and will discourage complacency. On the other hand, we believe it is essential to provide sufficient notice of such tests to EAS Participants so that they can prepare for the test and alert the public that a national-level EAS test is pending. We believe that two months notice provides enough preparation time for EAS Participants. We seek comment on the sufficiency of a two-month notice period..

28. We envision that national EAS testing will involve many of the same test elements that are already included in required monthly EAS testing at the state and local level (*e.g.*, EAS header codes, Attention Signal, Test Script and EOM code). Accordingly, we propose that the annual national test would replace the required monthly test for the month in which it occurs. We see no benefit to requiring EAS Participants to give up further broadcast time for a redundant test.

29. In connection with national testing, we propose requiring that EAS Participants record and 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. We also anticipate asking EAS Participants to provide us with a description of their station identification and level of designation (PEP, LP-1, etc.); the date/time of receipt of the EAN message by all stations; the date/time of PEP station acknowledgement of receipt of the EAN message to FOC; the date/time of initiation of actual broadcast of the Presidential message; the date/time of receipt of the EAT 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.

30. We propose to require that this information be provided to the Commission no more than thirty (30) days following the test date. We also anticipate making this information publicly available. We foresee two related benefits from this data collection and its public release. First, it will provide the Commission and our Federal partners with necessary diagnostic information to assist our analysis of the readiness of the EAS. Second, it will provide state and local authorities with useful diagnostic information related to their evaluation of the system's regional and local performance. We seek

comment on this proposal. Are there any concerns with making this data publicly available? Should we instead limit availability to, for example, only our Federal partners and/or authorized personnel of state, tribal and local government emergency management agencies?

31. We also note that we plan to coordinate with FEMA on a regular basis in the implementation of the national test. FEMA is the agency responsible for transmission of a presidential-level alert to the PEP stations, and for the implementation and maintenance of PEP stations. Moreover, FEMA is integrating EAS into IPAWS. Although we believe it is unnecessary to specifically state in our proposed rule that we will coordinate with FEMA on a regular basis, we seek comment on whether this should in fact be written into the rule.

32. Finally, it has been brought to our attention that different ENDEC manufacturers may have programmed their devices to receive and transmit EANs in different ways, which may affect the ability of some ENDECs to properly relay an EAN. In its 2008 Closed Circuit Test Report, the Primary Entry Point Administrative Council noted that, many ENDECs process EAN messages by a ignoring FIPS, i.e. location codes for national level messages on the assumption that a national message is intended for the entire nation.[48] Accordingly, they transmit the message whether or not an EAN contains a FIPS code. At least one ENDEC manufacturer, however, has devices which require a FIPS code match.[49] Thus in order to properly forward an EAN, the devices must receive a message that contains an appropriate FIPS code as authorized by Commission rules. As a result, there is some concern that such devices may not properly transmit an EAN message nationwide. We seek comment on this situation. Could the difference in how these ENDECs are programmed result in breaks in the "EAS chain"?[50] Could this impact the relay of an EAN test message during a national EAS test? If so, how? We also seek comment on what actions the Commission should take to address this problem prior to a national test? Should the Commission, for example, adopt a requirement that all ENDECs relay an EAN message irrespective of any FIPs code? What would be the cost of implementing such a requirement prior to a national test? Alternatively, are there non-regulatory actions the Commission should take? Should the Commission designate a national-level FIPS code and, if so, what would the impact of the ENDEC manufacturers be?

IV. CONCLUSION

33. The EAS is intended to provide a reliable mechanism for the President to communicate with the country during emergencies. Yet the EAS has never been tested nationally in a systematic way, *i.e.*, by use of a test methodology that can identify system flaws and failures comprehensively and on a nationwide basis. We believe that development of such a test methodology is critically important to ensuring that the EAS works as intended, now and in the future. We solicit comment on all issues, analysis, and proposals set out in this *Notice*, including our proposed rule. We intend 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.

---

[48] *See 2008 PEPAC Report* at 5. Federal Information Processing Standards or "FIPS" Codes correspond to specific geographic regions.

[49] *Id. at* 7.

[50] *2008 PEPAC Report. See also* Illinois Emergency Management Agency, *Press Release*, "Federal test of Emergency Alert System mistakenly sends message out over TV, radio airwaves" (June 26, 2007).

V. PROCEDURAL MATTERS

A. *Ex Parte* Presentations

34. This matter shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[51] Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substauce of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.[52] Other requirements pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission's rules.

B. Comment Filing Procedures

35. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. **All filings related to this Second Further Notice of Proposed Rulemaking should refer to EB Docket No. 04-296.** Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://www.fcc.gov/cgb/ecfs/ or the Federal eRulemaking Portal: http://www.regulations.gov. Filers should follow the instructions provided on the website for submitting comments.

  - For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.

  - Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

  Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- Effective December 28, 2009, all hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-

[51] 47 C.F.R. §§ 1.200 *et seq.*

[52] *See* 47 C.F.R. § 1.1206(b)(2).

A325, Washington, DC 20554. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. **PLEASE NOTE**: The Commission's former filing location at 236 Massachusetts Avenue, NE is permanently closed.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

- U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW, Washington DC 20554.

C. Accessible Formats

36. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (TTY).

A. Regulatory Flexibility Analysis

37. As required by the Regulatory Flexibility Act of 1980, *see* 5 U.S.C. § 603, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules addressed in this document. The IRFA is set forth in Appendix B. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments filed in response to this Further Notice of Proposed Rulemaking as set forth in paragraph XX, and have a separate and distinct heading designating them as responses to the IRFA.

B. Paperwork Reduction Act Analysis

38. This document contains proposed or modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), we seek specific comment on how we might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

C. Congressional Review Act

39. The Commission will send a copy of this Second Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act ("CRA"), *see* 5 U.S.C. § 801(a)(1)(A).

VI. ORDERING CLAUSES

40. Accordingly, IT IS ORDERED that pursuant to sections 1, 2, 4(i), 4(o), 301, 303(r), 303(v), 307, 309, 335, 403, 624(g),706 and 715 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i) and (o), 301, 303(r), 303(v), 307, 309, 335, 403, 544(g), 606, and 615, this Second Further Notice of Proposed Rulemaking IS ADOPTED.

41. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Second Further Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

42. IT IS FURTHER ORDERED that pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on this Second Further Notice of Proposed Rulemaking on or before XX days after publication in the Federal Register, and interested parties may file reply comments on or before XX days after publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Proposed Final Rule

PART 11 – EMERGENCY ALERT SYSTEM (EAS)

1. Revise § 11.61(a)(3) to read as follows:

National Tests. All EAS Participants shall participate in national tests as scheduled by the Commission in consultation with the Federal Emergency Management Agency (FEMA). Such tests will consist of the delivery by FEMA to PEP/NP stations of a coded EAS message, including EAS header codes, Attention Signal, Test Script, and EOM code. The coded message shall utilize EAS test codes as designated by the Commission's rules or such other EAS codes as the agencies conducting the test deem appropriate. A national test shall replace the required monthly test for all EAS Participants in the month in which it occurs. Notice shall be provided to EAS Participants by the Commission at least two months prior to the conduct of any such national test. Test results as required by the Commission shall be logged by all EAS Participants and shall be provided to the Commission's Public Safety and Homeland Security Bureau within thirty (30) days following the test.

APPENDIX B

Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[53] the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this Second Further Notice of Proposed Rulemaking *(Second Further Notice)*. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Second Further Notice* provided in Section IV of the item. The Commission will send a copy of the *Second Further Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).[54] In addition, the *Second Further Notice* and IRFA (or summaries thereof) will be published in the Federal Register.[55]

A. Need for, and Objectives of, the Proposed Rules

2. Today's *Second Further Notice* seeks to ensure that the Commission's emergency alert services ("EAS") rules better protect the life and property of all Americans.[56] To further serve this goal, the *Further Notice* invites additional comment on a proposed rule to implement national testing of the Emergency Alert System (EAS) through use of a coded EAS message which will replace a required monthly test, and requiring logging and provision to the Commission of test-related diagnostic information within 30 days of the test.[57]

B. Legal Basis

3. Authority for the actions proposed in this *Second Further Notice* may be found in sections 1, 4(i), 4(o), 303(r), 403, 624(g) and 706 of the Communications Act of 1934, as amended, (Act) 47 U.S.C. §§ 151, 154(i), 154(j), 154(o), 303(r), 544(g) and 606.

C. Description and Estimate of the Number of Small Entities to Which Rules Will Apply

4. The RFA directs agencies to provide a description of, and, where feasible, an estimate of, the number of small entities that may be affected by the rules adopted herein.[58] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[59] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[60] A "small business

[53] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[54] *See* 5 U.S.C. § 603(a).

[55] *Id.*

[56] *See* Appendix B at ¶ 2 for description of rules the Commission adopted in the *Second Report and Order*.

[57] *See Second Further Notice* at ¶¶ 24, 26-32 for a more detailed discussion of this subject.

[58] 5 U.S.C. § 604(a)(3).

[59] 5 U.S.C. § 601(6).

[60] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity (continued....)

concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA").[61]

5. A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[62] Nationwide, as of 2002, there were approximately 1.6 million small organizations.[63] The term "small governmental jurisdiction" is defined as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."[64] As of 1997, there were approximately 87,453 governmental jurisdictions in the United States.[65] This number includes 39,044 county governments, municipalities, and townships, of which 37,546 (approximately 96.2 percent) have populations of fewer than 50,000, and of which 1,498 have populations of 50,000 or more. Thus, we estimate the number of small governmental jurisdictions overall to be 84,098 or fewer. Nationwide, there are a total of approximately 22.4 million small businesses, according to SBA data.[66]

6. *Television Broadcasting*. The SBA has developed a small business sized standard for television broadcasting, which consists of all such firms having $14 million or less in annual receipts.[67] Business concerns included in this industry are those "primarily engaged in broadcasting images together with sound."[68] According to Commission staff review of BIA Publications, Inc. Master Access Television Analyzer Database, as of May 16, 2003, about 814 of the 1,220 commercial television stations in the United States had revenues of $12 million or less. We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations[69] must be included.[70] Our estimate, therefore, likely overstates the number of small entities that might be affected

(Continued from previous page)
for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

[61] 15 U.S.C. § 632.

[62] 5 U.S.C. § 601(4).

[63] Independent Sector, The New Nonprofit Almanac & Desk Reference (2002).

[64] 5 U.S.C. § 601(5).

[65] U.S. Census Bureau, Statistical Abstract of the United States: 2000, Section 9, pages 299-300, Tables 490 and 492.

[66] *See* SBA, Programs and Services, SBA Pamphlet No. CO-0028, 40 (Jul. 2002).

[67] 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 515120.

[68] Office of Management and Budget, North American Industry Classification System: United States, 1997, at 509 (1997). This category description continues, "These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studios, from an affiliated network, or from external sources." Separate census categories pertain to businesses primarily engaged in producing programming. *Id.* at 502-05, NAICS code 512120, Motion Picture and Video Production; NAICS code 512120, Motion Picture and Video Distribution; NAICS code 512191, Teleproduction and Other Post-Production Services; and NAICS code 512199, Other Motion Picture and Video Industries.

[69] "Concerns are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both." 13 C.F.R. § 121.103(a)(1).

[70] "SBA counts the receipts or employees of the concern whose size is at issue and those of all its domestic concern's size." 13 C.F.R. § 121.103(a)(4).

by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. There are also 2,127 low power television stations ("LPTV").[71] Given the nature of this service, we will presume that all LPTV licensees qualify as small entities under the SBA size standard.

7. *Radio Stations.* The revised rules and policies potentially will apply to all AM and commercial FM radio broadcasting licensees and potential licensees. The SBA defines a radio broadcasting station that has $7 million or less in annual receipts as a small business.[72] A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public.[73] Included in this industry are commercial, religious, educational, and other radio stations.[74] Radio broadcasting stations which primarily are engaged in radio broadcasting and which produce radio program materials are similarly included.[75] However, radio stations that are separate establishments and are primarily engaged in producing radio program material are classified under another NAICS number.[76] According to Commission staff review of BIA Publications, Inc. Master Access Radio Analyzer Database on March 31, 2005, about 10,840 (95 percent) of 11,410 commercial radio stations have revenue of $6 million or less. We note, however, that many radio stations are affiliated with much larger corporations having much higher revenue. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action.

8. *Wired Telecommunications Carriers.* The 2007 North American Industry Classification System ("NAICS") defines "Wired Telecommunications Carriers" as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry."[77] The SBA has developed a small business size standard for wireline firms within the broad economic census category, "Wired Telecommunications Carriers."[78] Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees. Census Bureau data for 2002 show that there were 2,432 firms in this category that operated for the entire year.[79] Of this total, 2,395 firms had employment of 999 or fewer

[71] *Broadcast Station Totals as of September 30, 2002*, FCC News Release (rel. Nov. 6, 2002).

[72] *See* 13 C.F.R. § 121.201, NAICS code 515112.

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers"; http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.

[78] 13 C.F.R. § 121.201, NAICS code 517110.

[79] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, "Establishment and Firm Size: 2002 (Including Legal Form of Organization)," Table 5, NAICS code 517110 (issued November 2005).

employees, and 37 firms had employment of 1,000 employees or more.[80] Thus, under this category and associated small business size standard, the majority of firms can be considered small.

9. *Wired Telecommunications Carriers -- Cable and Other Program Distribution.* This category includes, among others, cable operators, direct broadcast satellite ("DBS") services, home satellite dish ("HSD") services, satellite master antenna television ("SMATV") systems, and open video systems ("OVS"). The data we have available as a basis for estimating the number of such entities were gathered under a superseded SBA small business size standard formerly titled Cable and Other Program Distribution. The former Cable and Other Program Distribution category is now included in the category of Wired Telecommunications Carriers, the majority of which, as discussed above, can be considered small.[81] According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year.[82] Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million.[83] Thus, we believe that a substantial number of entities included in the former Cable and Other Program Distribution category may have been categorized as small entities under the now superseded SBA small business size standard for Cable and Other Program Distribution. With respect to OVS, the Commission has approved approximately 120 OVS certifications with some OVS operators now providing service.[84] Broadband service providers (BSPs) are currently the only significant holders of OVS certifications or local OVS franchises, even though OVS is one of four statutorily-recognized options for local exchange carriers (LECs) to offer video programming services. As of June 2006, BSPs served approximately 1.4 million subscribers, representing 1.46 percent of all MVPD households.[85] Among BSPs, however, those operating under the OVS framework are in the minority.[86] The Commission does not have financial information regarding the entities authorized to provide OVS, some of which may not yet be operational. We thus believe that at least some of the OVS operators may qualify as small entities.

10. *Cable System Operators (Rate Regulation Standard).* The Commission has developed its own small business size standard for cable system operators, for purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers nationwide.[87]

---

[80] *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with "1000 employees or more."

[81] *See supra* ¶ [9]. Under the superseded SBA size standard, which had the same NAICS code, 517110, a small entity was defined as one with $13.5 million or less in annual receipts.

[82] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002 (NAICS code 517510) (issued November 2005).

[83] *Id.* An additional 61 firms had annual receipts of $25 million or more.

[84] *See* Current Filings for Certification of Open Video Systems, http://www.fcc.gov/mb/ovs/csovscer.html (last visited July 25, 2007); Current Filings for Certification of Open Video Systems, http://www.fcc.gov/mb/ovs/csovsarc.html (last visited July 25, 2007).

[85] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542, 684, Table B-1 (2009) ("*13th Annual Report*").

[86] OPASTCO reports that fewer than 3 percent of its members provide service under OVS certification. *See id.* at 607, ¶ 135 n.473.

[87] 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determination that a small cable system operator is one with annual revenues of $100 million or less. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393 (1995), 60 FR 10534 (February 27, 1995).

We have estimated that there were 1,065 cable operators who qualified as small cable system operators at the end of 2005.[88] Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, the Commission estimates that there are now fewer than 1,065 small entity cable system operators that may be affected by the rules and policies proposed herein.

11. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, ("Act") also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[89] The Commission has determined that there are 67,700,000 subscribers in the United States.[90] Therefore, an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[91] Based on available data, the Commission estimates that the number of cable operators serving 677,000 subscribers or fewer, totals 1,065.[92] The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million,[93] and therefore are unable, at this time, to estimate more accurately the number of cable system operators that would qualify as small cable operators under the size standard contained in the Act.

12. *Broadband Radio Service (FCC Auction Standard).* The established rules apply to Broadband Radio Service ("BRS," formerly known as Multipoint Distribution Systems, or "MDS") operated as part of a wireless cable system. The Commission has defined "small entity" for purposes of the auction of BRS frequencies as an entity that, together with its affiliates, has average gross annual revenues that are not more than $40 million for the preceding three calendar years.[94] This definition of small entity in the context of MDS auctions has been approved by the SBA.[95] The Commission completed its MDS auction in March 1996 for authorizations in 493 basic trading areas. Of 67 winning bidders, 61 qualified as small entities. At this time, we estimate that of the 61 small business MDS auction winners, 48 remain small business licensees.

13. *Wireless Telecommunications Carrier (except satellite).* BRS also includes licensees of stations authorized prior to the auction. As noted above, the SBA has developed a definition of small entities for pay television services, Cable and Other Subscription Programming, which includes all such

[88] Paul Kagan Associates, Inc., Cable TV Investor, February 29, 1996 (based on figures for Dec. 30, 1995).

[89] 47 U.S.C. § 543(m)(2).

[90] *See FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice, 16 FCC Rcd 2225 (2001) ("*Jan. 24, 2001 Public Notice*").

[91] 47 C.F.R. § 76.901(f).

[92] *See Jan. 24, 2001 Public Notice.*

[93] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to section 76.901(f) of the Commission's rules. *See* 47 C.F.R. § 76.909(b).

[94] 47 C.F.R. § 21.961(b)(1).

[95] *See Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, MM Docket No. 94-131 and PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589 (1995).

companies generating $15 million or less in annual receipts.[96] This definition includes BRS and thus applies to BRS licensees that did not participate in the MDS auction. Information available to us indicates that there are approximately 392 incumbent BRS licensees that do not generate revenue in excess of $11 million annually. Therefore, we estimate that there are at least 440 (392 pre-auction plus 48 auction licensees) small BRS providers as defined by the SBA and the Commission's auction rules which may be affected by the rules adopted herein. In addition, limited preliminary census data for 2002 indicate that the total number of cable and other program distribution companies increased approximately 46 percent from 1997 to 2002.[97]

14. *Educational Broadband Service*. The proposed rules would also apply to Educational Broadband Service ("EBS," formerly known as Instructional Television Fixed Service or "ITFS") facilities operated as part of a wireless cable system. The SBA definition of small entities for pay television services, Cable and Other Subscription Programming also appears to apply to EBS.[98] There are presently 2,032 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in the definition of a small business.[99] However, we do not collect annual revenue data for EBS licensees, and are not able to ascertain how many of the 100 non-educational licensees would be categorized as small under the SBA definition. Thus, we tentatively conclude that at least 1,932 are small businesses and may be affected by the proposed rules.

15. *Incumbent Local Exchange Carriers ("LECs")*. We have included small incumbent LECs in this present IRFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[100] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope.[101] We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts. Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[102] According to Commission data,[103] 1,303 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,303 carriers, an estimated 1,020 have 1,500 or fewer employees and 283 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our proposed rules.

---

[96] 13 C.F.R. § 121.201, NAICS code 515210.

[97] *See* supra note 74.

[98] 13 C.F.R. § 121.201, NAICS code 515210.

[99] 5 U.S.C. § 601(3).

[100] 15 U.S.C. § 632.

[101] Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small-business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. *See* 13 C.F.R. § 121.102(b).

[102] 13 C.F.R. § 121.201, NAICS code 517110.

[103] *Trends in Telephone Service,* Table 5.3.

16. *Competitive (LECs), Competitive Access Providers (CAPs), "Shared-Tenant Service Providers," and "Other Local Service Providers."* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[104] According to Commission data,[105] 769 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 769 carriers, an estimated 676 have 1,500 or fewer employees and 93 have more than 1,500 employees. In addition, 12 carriers have reported that they are "Shared-Tenant Service Providers," and all 12 are estimated to have 1.500 or fewer employees. In addition, 39 carriers have reported that they are "Other Local Service Providers." Of the 39, an estimated 38 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, "Shared-Tenant Service Providers," and "Other Local Service Providers" are small entities that may be affected by our proposed rules.

17. *Satellite Telecommunications.* The Commission has not developed a small business size standard specifically for providers of satellite service. The appropriate size standards under SBA rules are for the two broad categories of Satellite Telecommunications and Other Telecommunications. Under both categories, such a business is small if it has $12.5 million or less in average annual receipts.[106] For the first category of Satellite Telecommunications, Census Bureau data for 1997 show that there were a total of 324 firms that operated for the entire year.[107] Of this total, 273 firms had annual receipts of under $10 million, and an additional twenty-four firms had receipts of $10 million to $24,999,999. Thus, the majority of Satellite Telecommunications firms can be considered small.

18. *Other Telecommunications.* This category includes "establishments primarily engaged in ... providing satellite terminal stations and associated facilities operationally connected with one or more terrestrial communications systems and capable of transmitting telecommunications to or receiving telecommunications from satellite systems."[108] Of this total, 424 firms had annual receipts of $5 million to $9,999,999 and an additional 6 firms had annual receipts of $10 million to $24,999,990. Thus, under this second size standard, the majority of firms can be considered small.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

19. There are potential reporting or recordkeeping requirements proposed in this *Second Further Notice.* For example, the Commission is considering whether to adopt reporting obligations for EAS participants. The proposals set forth in this *Second Further Notice* are intended to advance our public safety mission and enhance the performance of the EAS while reducing regulatory burdens wherever possible.

---

[104] 13 C.F.R. § 121.201, NAICS code 517110.

[105] *Trends in Telephone Service,* Table 5.3.

[106] 13 C.F.R. § 121.201, NAICS codes 517410 and 517910.

[107] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, *Establishment and Firm Size (Including Legal Form of Organization),* Table 4, NAICS code 513340.

[108] Office of Management and Budget, North American Industry Classification System, 513 (1997) (NAICS code 517910.

E. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

20. The RFA requires an agency to describe any significant alternatives that it has considered in developing its approach, which may include the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities."[109]

21. The proposed rules are designed to minimally impact all EAS participants, including small entities, while at the same time protecting the lives and property of all Americans, which confers a direct benefit on small entities. As noted in paragraph 2 above, the *Second Further Notice* seeks comment on how the Commission may better protect the lives and property of Americans. In commenting on this goal, commenters are invited to propose steps that the Commission may take to further minimize any significant economic impact on small entities. When considering proposals made by other parties, commenters are invited to propose significant alternatives that serve the goals of these proposals. We expect that the record will develop to demonstrate any significant alternatives.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

None.

[109] 5 U.S.C. § 603(c)(1) – (c)(4).

STATEMENT OF COMMISSIONER MICHAEL J. COPPS

Re: Review of the Emergency Alert System, EB Docket No. 04-296

It is vitally important that the Emergency Alert System (EAS) work as it was designed to work to protect the American people. By providing for periodic national testing, we can achieve the certainty required to ensure that citizens get the warnings they need during emergencies. Just last week, using Alaska as the test site, the Commission joined FEMA, the Executive Office of the President, Federal and State of Alaska homeland security partners and the Alaska Broadcasters Association in conducting a first test of the national EAS. Analysis of the data we gathered in Alaska should help us in the development of a framework for testing the national EAS. I am particularly pleased that this Second Further Notice of Proposed Rulemaking contemplates a reporting mechanism that will allow the FCC, FEMA and other agencies to diagnose real-time EAS alerts and make needed improvements. I look forward to working with Chairman Genachowski and my colleagues to bring this proceeding to an expeditious conclusion.