



**Minority Media &
Telecom Council**

3636 16th Street N.W. Suite B-366
Washington, D.C. 20010
Phone: 202-332-0500 Fax: 202-332-0503
www.mmtconline.org

FCC JURISDICTION TO ADOPT THE KATRINA PETITION

December 2, 2011

I. Introduction

As the Commission recently noted, “Americans still rely on radio and TV for emergency information far more than any other medium....”¹ This is why broadcasting multilingual emergency information is so important. Our national demographics are changing.² At a time when earthquakes, tornados, and floods devastate parts of the nation and we face heightened potential for terrorist attacks, an emergency communications system that does not include a multilingual component does not serve the public interest.³

¹ Steven Waldman *et al.*, *The Information Needs of Communities: The Changing Media Landscape in a Broadband Age*, p. 213 (June 2011) (citing American Red Cross, *Social Media in Disasters and Emergencies*, p. 5 (2010), available at <http://www.redcross.org/www-files/Documents/pdf/other/SocialMediaSlideDeck.pdf> (last visited September 6, 2011)).

² See, e.g., Conor Dougherty, U.S. Nears Racial Milestone, *The Wall Street Journal* (WSJ.com) (June 11, 2011), available at <http://online.wsj.com/article/SB10001424052748704312104575298512006681060.html> (last visited September 6, 2011).

³ In the wake of Hurricane Katrina, only four of the 41 radio stations in New Orleans were able to continue broadcasting after the storm, some were only able to stay on air by partnering with stations who had not lost their signal. See Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks, Report and recommendations to the Federal Communications Commission (June 12, 2006), p. 12. During Katrina, “[t]he distribution of emergency weather information in languages other than English appeared limited, based primarily on the willingness and ability of local weather forecasting offices and the availability of ethnic media outlets.” *Id.* at p. 30.

This public interest factor gives the Commission ample statutory authority to grant the 2005 MMTC et al. Katrina Petition, which asks the Commission to ensure that radio listeners have access to multilingual information by requiring broadcasters to implement a “designated hitter” model during and after an emergency. To ease the cost to broadcasters of meeting this obligation, we urge the Commission to incentivize broadcasters to serve as designated hitters by waiving a designated hitter’s application and regulatory fees for one year. The Commission should also work with the Secretary of Homeland Security and FEMA to expedite the process of ensuring that multilingual communications are a priority at every level of the national and local emergency communications system.

II. Summary

The Commission has authority under sections 303(r), 307 and 309 to adopt and implement multilingual emergency communications regulations.

The following sections of the Communications Act are relevant but not sufficient, on their own to enable the Commission to adopt and implement multilingual emergency communications regulations: Sections 151,⁴ 154(i),⁵ 154(o),⁶ 303(g),⁷ and 615.⁸

⁴ The Commission’s creation statute provides a general policy to regulate communications to ensure that all citizens have access to service, without discrimination, “for the purpose of promoting safety of life and property through the use of wire and radio communication....” 47 U.S.C. §151. Note, however, that while this section can determine the scope of authority, this general policy does not reflect a specific delegation of power. See Comcast v. FCC, 600 F.3d 642, 654 (D.C. Cir. 2010).

⁵ To execute the goals of the Communications Act, the Commission “may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.” 47 U.S.C. §154(i). This section does not serve as a specific delegation of authority. See Comcast, 600 F.3d at 654 (“Although policy statements may illuminate that authority, it is Title II, III, or VI to which the authority must ultimately be ancillary.”)

⁶ “Use of communications in safety of life and property. For the purpose of obtaining maximum effectiveness from the use of radio and wire communications in connection with safety of life and property, the Commission shall investigate and study all phases of the problem and the best

Sections 158 and 159 grant the Commission the flexibility to waive application and regulatory fees when there is good cause that furthers the public interest. Thus the Commission could waive fees to incentivize designated hitters to provide lifesaving information in an emergency so long as the Commission deems it to advance the public interest.

III. Background

The United States has a public alert policy of ensuring that “under all conditions the President can communicate with the American people.”⁹ The Commission was originally granted authority to create an emergency communications system by President Truman in 1951.¹⁰ By Executive Order 13407, the Secretary of Homeland Security now has the primary responsibility of including “all Americans, including those with disabilities and those without an understanding of the English language...” in warning plans, such as the EAS.¹¹ In carrying out its duties, the Secretary of Homeland Security must coordinate with the Commission.¹² The

methods of obtaining the cooperation and coordination of these systems.” 47 U.S.C §154(o). This section does not represent a delegation of authority. See Comcast, 600 F.3d at 654.

⁷ One of the Commission’s duties is to “[s]tudy new uses for radio, provide for experimental uses of frequencies, and **generally encourage the larger and more effective use of radio in the public interest.**” 47 U.S.C. §303(g) (emphasis added).

⁸ Congress also charged the Commission with regulating 9-1-1 services by “encourag[ing] and support[ing] efforts by States to deploy comprehensive end-to-end emergency communications infrastructure and programs, based on coordinated statewide plans, including seamless, ubiquitous, reliable wireless telecommunications networks and enhanced wireless 9-1-1 service.” 47 U.S.C. §615 (support for universal emergency telephone number). See also 47 U.S.C. §615a-1(a) (requiring IP-enabled voice providers to offer 9-1-1 and e-9-1-1 service).

⁹ See Executive Order 13407, Public Alert and Warning System, Sec. 1 (July 3, 2006) (“Executive Order 13407”). See also 47 U.S.C. §606 (delineating the President’s war power over emergency communications).

¹⁰ See Susan S. Kuo, Speaking in Tongues: Mandating Multilingual Disaster Warnings in the Public Interest, 14 Wash. & Lee J. Civil Rts. & Soc. Just. 3, 8 (2007) (discussing the evolution of emergency alert system since its Cold War era CONELRAD (Control of Electromagnetic Radiation) to the Emergency Broadcast System, and to EAS).

¹¹ See Executive Order 13407 at Sec. 2(a)(iv).

Director of Federal Emergency Management Agency (FEMA) has been assigned the duty of developing plans for an EAS system – in consultation with the Federal Communications Commission¹³ – the Commission also has a significant role within the National Communications System.¹⁴

Under the current Memorandum of Understanding (“MOU”) with FEMA, the National Oceanic and Atmospheric Administration and the National Industry Advisory Committee, the Commission’s responsibilities include (1) providing rules for an emergency alert system and coordinating with state and local emergency communications committees; (2) ensuring that state and local systems are ready for immediate action; (3) provide continuing emergency

¹² See *id.* at Sec. 2(b) (“In performing the functions set forth in subsection (a) of this section, the Secretary of Homeland Security shall coordinate with the Secretary of Commerce, the heads of other departments and agencies of the executive branch (agencies), and other officers of the United States, as appropriate, and the Federal Communications Commission.”) The Commission is directed 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.” *Id.* at Sec. 3(b)(iii).

¹³ See Executive Order 12472, Assignment of National Security and Emergency Preparedness Telecommunications Functions, Sec. 3(b)(4) (April 3, 1984). The Director of FEMA shall: “Develop, upon request and to the extent consistent with law and in the consonance with regulations promulgated by and agreements with the Federal Communications Commission, plans and capabilities for, and provide policy and management oversight of, the Emergency Broadcast System, and advise and assist private radio licensees of the Commission in developing emergency communications plans, procedures and capabilities.” *Id.*

¹⁴ The Commission is directed to: “(1) Review the policies, plans and procedures of all entities licensed or regulated by the Commission that are developed to provide national security or emergency preparedness communications services, in order to ensure that such policies, plans and procedures are consistent with the public interest, convenience and necessity; (2) Perform such functions as required by law with respect to all entities licensed or regulated by the Commission, including (but not limited to) the extension, discontinuance or reduction of common carrier facilities or services; the control of common carrier rates, charges, practices and classifications; the construction, authorization, activation, deactivation or closing of radio stations, services and facilities; the assignment of radio frequencies to Commission licensees; the investigation of violations of pertinent law and regulation; and the initiation of appropriate enforcement actions; (3) Develop policy, plans and procedures adequate to execute the responsibilities assigned in this Order under all conditions or crisis or emergency; and (4) Consult as appropriate with the Executive Agent for the NCS and the NCS Committee of Principals to ensure continued coordination of their respective national security and emergency preparedness activities.” See *id.* at Sec. 3(h).

communications education for state and local broadcasters and government officials; (4) assist in state and local planning; (5) serve as the link between the member of this agreement and its subcommittees; (6) submit copies of State and local emergency alert plan to the regional directors and officers of FEMA and NOAA; and (7) help to develop local emergency alert system planning meetings and provide FEMA and NOAA with advance notice of these meetings.¹⁵ This MOU can be amended by mutual agreement and terminated by any party based on written notification.¹⁶

Under the Commission's current rules, FEMA designates the Primary Entry Point System to receive Presidential alerts.¹⁷ While stations can decline to participate in National EAS alerts, they must hold an authorization letter issued by the Commission and respond to National alerts by "broadcast[ing] the EAS codes, Attention Signal, the sign-off announcement in the EAS Operating Handbook and then stop operating."¹⁸ EAS Participants must follow guidelines set forth in their EAS plans after approval by the Chief of the Public Safety and Homeland Security Bureau.¹⁹ At the state and local level, all EAS participants must provide alerts delivered by the governor.²⁰

¹⁵ 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) ("MOU"), reprinted as Appendix K to Partnership for Public Warning Report 2004-1, The Emergency Alert System (EAS): An Assessment, available at <http://www.ppw.us/ppw/docs/easassessment.pdf> (last visited November 22, 2011).

¹⁶ See id.

¹⁷ See 47 C.F.R. §11.2(a).

¹⁸ See 47 C.F.R. §11.18(f) (each of these stations are still "required to comply with §§11.51, 11.52, and 11.61"). See also 47 C.F.R. §11.19. See also 47 C.F.R. §§11.41, 11.43.

¹⁹ See 47 C.F.R. §11.21.

²⁰ See 47 C.F.R. §11.55(a).

IV. Commission Authority Over Emergency Information

a. Section 303(r)

The Commission, not broadcasters, is responsible for interpreting the standard and ensuring that the public interest is served. While Section 301 provides a general overview of the purpose of broadcasting licensing, to “maintain the control of the United States over all the channels of radio transmission; and to **provide for the use of such channels, but not the ownership thereof...**”,²¹ Section 303 sets out the Commission’s duties and authority,²² including the authority to “[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provision of this Act...”²³ Under this section, the Commission has the authority to interpret the Communications Act.²⁴ The Supreme Court has stated, “this general rulemaking authority permits the Commission to implement its view of the public-interest standard of the Act ‘so long as that view is based on consideration of permissible factors and is otherwise reasonable.’”²⁵ The Commission should use its authority under 303(r) to interpret the public interest standard in

²¹ 47 U.S.C. §301 (emphasis added). The D.C. Circuit has surmised that Title III of the Communications Act delegates specific regulatory authority. *See supra* n. 2. “In [Southwestern Cable and Midwest Video I], the Supreme Court relied on policy statements not because, standing alone, they set out “statutorily mandated responsibilities,” but rather because they did so in conjunction with an express delegation of authority to the Commission, *i.e.*, Title III’s authority to regulate broadcasting.” Comcast, 600 F.3d at 652 (referencing United States v. Southwestern Cable Co., 392 U.S. 157 (1968) and United States v. Midwest Video Corp., 406 U.S. 649 (1972)).

²² *See* 47 U.S.C. §303.

²³ 47 U.S.C. §303(r).

²⁴ “The Commission’s authority to interpret Section 312(a)(7) is not in dispute. That authority derives from Section 303(r) of the Communications Act...” CBS v. FCC, 629 F.2d 1, 14 (D.C. Cir. 1980), *affirmed by* CBS v. FCC, 453 U.S. 367 (1981).

²⁵ FCC v. WNCN Listeners Guild, 450 U.S. 582, 594 (1981) (quoting FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 793 (1978)).

Sections 307 and 309 as allowing the Commission to require broadcasters to transmit multilingual emergency communications during and after an emergency.

b. The Public Interest Standard – Sections 307 and 309

Sections 307 and 309 give the Commission power to grant licenses “if the public convenience, interest, or necessity will be served....”²⁶ The public interest would be served by requiring broadcasters to have a plan to serve the entire population in the event a non-English speaking station is unable to broadcast in or after an emergency.

The public interest standard has a long history in communications policy. The standard began as a way to ensure that a limited public resource was serving the entire population and later developed into a way to correct market failures.²⁷ While Congress never defined the requirement, the Court has long held that the standard is “a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy.”²⁸ The Court ultimately concluded that the Commission’s Policy Statement, which determined that allowing the market to provide diverse program formats furthered the public interest, was a valid application of the public interest standard,²⁹ noting, “...the goal of the Act is ‘to secure the maximum benefits of radio to all people of the United States’...[however, NBC v. U.S.] also

²⁶ 47 U.S.C. §307(a). See also 47 U.S.C. §309(a) (“Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.”)

²⁷ See Kuo, *supra* n. 10 at 32-38 (discussing the evolution of the public interest standard).

²⁸ FCC v. WNCN, 436 U.S. at 593 (quoting FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940)).

²⁹ See FCC v. WNCN, 436 U.S. at 604 (“...the Commission’s Policy Statement is not inconsistent with the Act. It is also a constitutionally permissible means of implementing the public interest standard of the Act.”)

emphasized that Congress had granted the Commission broad discretion in determining how that goal could best be achieved.”³⁰ The Court cautioned that if it were later shown that this policy does not serve the public interest, the Commission would have to change its stance.³¹

The Commission has also discussed its understanding of its public interest obligations. Even as the Commission deregulated radio it made clear that the marketplace concept does not supplant the public interest standard:

It is not the public interest standard that we proposed to eliminate. That standard is contained in the Communications Act of 1934, as amended, and could not be changed by us even if we wanted to. That is a job for Congress. Rather, since marketplace solutions can be consistent with public interest concerns, we sought to explore in this proceeding the question of whether or not in the context of radio the public interest can be met through the working of marketplace forces rather than by current Commission regulations.³²

The Commission further explained that deregulation did not absolve them of the duty or authority to regulate broadcasting in the public interest.³³ In the course of this proceeding the

³⁰ Id. at 594 (quoting NBC v. U.S., 319 U.S. 190, 217 (1943)).

³¹ See id. at 603. “Of course, the Commission should be alert to the consequences of its policies and should stand ready to alter its rule if necessary to serve the public interest more fully.” Id. The Court continued, “[i]f time and changing circumstances reveal that the ‘public interest’ is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations. Id. (quoting NBC v. U.S., 319 U.S. at 225).

³² Deregulation of Radio, Report and Order, 82 FCC2d 968, 974 ¶15 (1981) (“Deregulation Order”).

³³ See id. at 1011 ¶109. “The steps we are taking here in no way will reduce our responsibility, ability, and determination to provide a regulatory framework that assures radio broadcast programming in the public interest. We shall continue to be concerned that broadcasters be responsive to the public. It is our expectation that the added flexibility that broadcasters will have to respond to their audiences will indeed produce such results. There remains a possibility that, at least in some isolated cases, this might not happen. Fortunately, there are built-in mechanisms to allow us to detect such an occurrence. Part of the public interest obligation of any licensee is to address issues of importance to the community as a whole or, in larger markets with many stations, to the station’s listenership. If a station is not addressing issues, citizens will be able to file complaints or petitions to deny....” Id.

following hypothetical was presented as the Commission defended its decision to not define market size when allowing stations to specialize non-entertainment programming.³⁴ Reiterating that licensees have a basic duty to respond to community issues, the Commission stated:

For instance, in a community with only two radio stations, one Spanish language and one broadcasting in English, it may be permissible for the Spanish language station to focus its programming on issues of particular relevance to the Spanish speaking segment of the community and to ignore English language programming or issues of particular relevance to the English speaking portions of the community. **It is the responsibility of the licensee to determine that the other station is providing the programming for the rest of the community.**³⁵

This is exactly what the designated hitter proposal envisions - ensuring that broadcasters communicate with one another and have a plan to serve the entire population in the event a non-English speaking station is unable to broadcast during, or immediately after, an emergency.³⁶

V. Commission Authority Over Application and Regulatory Fee Waivers

The Commission has authority to waive application and regulatory fees for designated hitters that provide multilingual emergency communications under Sections 158(d)(2) and 159(d).³⁷

Commissioner Copps recently characterized the Commission's deregulation decision as "a straight forward, if rather narrow-minded, cost-benefit analysis" and restated his belief that it is the Commission's duty to rekindle its public interest obligations. See Statement of Commissioner Michael J. Copps, Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations and Extension of the Filing Requirement for Children's Television Programming Report (FCC Form 398), MB Docket Nos. 00-168, 00-44 (Oct. 27, 2011).

³⁴ See Deregulation of Radio, Memorandum Opinion and Order, 87 FCC2d 797, 804 ¶18 (1981).

³⁵ Id. at ¶17-18 (emphasis added).

³⁶ See, e.g. David Honig, President, MMTTC, Notice of Ex Parte Communications regarding Emergency Alert System et al., EB Docket No. 04-296 et al (Oct. 19, 2011), available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021715755> (last visited Nov. 1, 2011).

³⁷ This issue was presented in a recommendation by the Commission's Diversity Committee in the context of creating a rebuttable presumption that eligible entities are eligible for waivers, reductions, and deferrals. See Advisory Committee on Diversity for Communications in the

Section 158(d)(2) allows the Commission to “waive or defer ...[application fees] in any specific instance for good cause shown, where such action would promote the public interest.”³⁸

Section 159(d) is more permissive in granting the Commission authority to “waive, reduce, or defer payment of a fee in any specific instance for good cause shown, where such action would promote the public interest.”³⁹

The Commission’s regulations make it clear that waivers will only be considered on a case-by-case basis rather than for a class of applicants.⁴⁰ The Commission regulations specifically envision certain instances of financial hardship as qualifying for application or regulatory fee waivers.⁴¹ However, neither the statutes nor the regulations limit the public interest standard to financial hardship.⁴²

Digital Age, Recommendation on Application and Regulatory Fees (Oct. 28, 2008), available at <http://transition.fcc.gov/DiversityFAC/adopted-recommendations/app-reg-fees-102808.pdf> (last visited Nov. 3, 2011).

³⁸ 47 U.S.C. §158(d)(2).

³⁹ 47 U.S.C. §159(d). See also 47 U.S.C. §158(d)(2) (discussing waivers of application fees “for good cause shown” that is in the public interest).

⁴⁰ See 47 C.F.R. ¶1.1119(b) (“Request for waivers or deferrals will only be considered when received from applicants acting in respect to their own applications. Request for waivers or deferrals of entire classes of services will not be considered.”) See also 47 C.F.R. §1.1166 (“The fees established by sections 1.1152 through 1.1156 may be waived, reduced or deferred in specific instances, on a case-by-case basis, where good cause is shown and where waiver, reduction or deferral of the fee would promote the public interest. Request for waivers, reductions or deferrals of regulatory fees for entire categories of payors will not be considered.”)

⁴¹ See 47 C.F.R. §§1.1119(f), 1.1166(e).

⁴² See 47 U.S.C. §§158(d)(2), 159(d). See also 47 C.F.R. §§1.1119(c)-(d), 1.1166(c)-(d) (the Commission warns petitioners requesting waivers that the proper form and fees must be filed along with petition unless the petition is accompanied by a request for payment deferral due to documented financial hardship). Further, as discussed supra at 6-9, the public interest would be served by requiring broadcasters to have a plan for designated hitters to serve the entire population when a non-English speaking station loses service during or after an emergency.

The Commission should exercise its authority to allow application and regulatory fee waivers for designated hitters that step in to provide potentially life-saving multilingual emergency communications during or after a disaster.

VI. Conclusion

As documented here, the Commission has the authority under Section 303(r), 307, and 309 to require plans to ensure designated hitters provide multilingual emergency communications and Sections 158 and 159 grant the Commission authority to waive application and regulatory fees for the designated hitters that provide multilingual emergency communications.

The Commission should immediately begin working with the Secretary of Homeland Security and FEMA to ensure that multilingual service is a priority in emergency communications at every level of the emergency communications chain. As a first step, the Commission should exercise its authority to ensure that EAS participants are distributing multilingual communications to an increasingly diverse public. The Commission should incentivize participation in the designated hitter program by allowing broadcasters to recoup costs via waivers of application and regulatory fees for one year when they demonstrate that they served the public interest by acting as a designated hitter and issuing multilingual emergency alerts.

* * * * *