

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

In the Matter of)	
)	
Review of the Emergency Alert System;)	EB Docket No. 04-296
)	
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)	
)	
Randy Gehman Petition for Rulemaking)	

PETITION FOR RECONSIDERATION



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I. INTRODUCTION

Pursuant to 47 C.F.R. § 1.429, ACA respectfully requests that the Commission reconsider its decision in the *EAS Fifth Report and Order*¹ requiring operators of cable systems lacking physical wireline broadband Internet connections to seek waivers under the Commission's standard procedures. As an alternative for cable systems that serve fewer than 501 subscribers, ACA urges the Commission to establish a streamlined waiver process. ACA further urges the Commission to rule that waivers obtained through this new streamlined process last at least one year.

In the *EAS Fifth Report and Order*, the Commission continued the process of revising its Part 11 Emergency Alert System ("EAS") rules to specify the manner in which EAS Participants must receive alert messages formatted in the Common Alert Protocol ("CAP").² Recognizing that CAP messages will be primarily distributed via broadband Internet connections, the Commission addressed whether it "should take account whether EAS Participants located in rural or underserved areas had access to broadband Internet access or whether such situations should be addressed on a case-by-case basis through the standard waiver process."³

During the rulemaking process, ACA provided evidence demonstrating that there are systems that do not have physical broadband Internet connections at their headends, and that obtaining connectivity would require the special construction of wireline broadband facilities.⁴ To mitigate the overall burden of monitoring, receiving, and processing CAP-formatted messages, and the specific costs related to receiving wireline broadband service for the first

¹ *In the Matter of Review of the Emergency Alert System*, Fifth Report and Order, 27 FCC Rcd 642 (rel. Jan. 10, 2012) ("*EAS Fifth Report and Order*").

² *Id.*, ¶ 3.

³ *Id.*, ¶ 144.

⁴ *EAS Fifth Report and Order*, EB Docket No. 04-296, Reply Comments of the American Cable Association at 13 (filed Aug. 4, 2011) ("*ACA Reply Comments*").

time, ACA requested that the Commission exempt cable systems with fewer than 501 subscribers from EAS compliance, and waive CAP-compliance for any cable system where physical Internet access is not available at the headend.⁵

In its Order, the Commission decided not to adopt any form of blanket exemption from the basic obligations of monitoring for, receiving, and processing CAP-formatted messages.⁶ Instead, the Commission stated that it will review waivers from these requirements on a case-by-case basis under its standard waiver process.⁷ With specific respect to cable systems that lack physical availability of broadband Internet access, the Commission stated that the physical unavailability of broadband Internet service would offer a presumption in favor of a waiver.⁸ The Commission further observed that because physical broadband Internet connections could become available after a waiver has been granted, and that alternative means of distributing CAP messages could be developed, “any waiver based on the physical unavailability of broadband Internet access likely would not exceed six months, with the option of renewal if circumstances are not changed.”⁹

ACA appreciates the Commission’s recognition that the physical unavailability of wireline broadband for an EAS Participant offers a presumption in favor of a waiver. At the same time, ACA submits that requiring operators to use the standard waiver process to obtain relief for systems with fewer than 501 subscribers would be unduly burdensome. The costs required to prepare and file such waivers are significant for operators of these system, particularly because they have smaller subscriber bases upon which to recover regulatory expenses. Moreover, the cost to seek a waiver might exceed the construction costs from which these small system operators seek relief, and

⁵ *EAS Fifth Report and Order*, EB Docket No. 04-296, Comments of the American Cable Association at 10-11 (filed July 20, 2011).

⁶ *EAS Fifth Report and Order*, ¶ 153.

⁷ *Id.*, ¶ 152.

⁸ *Id.*

⁹ *Id.*

expecting operators of these small systems to renew their waivers every six months further adds to the overall cost. As a result, requiring operators of systems with fewer than 501 subscribers that lack physical broadband Internet access to obtain waivers for these systems through the standard waiver process would significantly limit the relief that Commission intended.

As an alternative, ACA proposes that the Commission establish a streamlined waiver process, similar to those it has created in other instances. This streamlined waiver process would be available to cable systems with fewer than 501 subscribers that meet the specified criteria that the Commission has already declared “offers a presumption in favor of a waiver.” ACA proposes that such streamlined waivers be granted for at least one year with the opportunity for renewal.

In summary, ACA seeks reconsideration of the *EAS Fifth Report and Order* for the limited purpose of urging the Commission to establish such a streamlined waiver process for small systems serving fewer than 501 subscribers that physically lack availability to wireline broadband Internet at the system’s headend.

II. THE COMMISSION SHOULD PROVIDE A STREAMLINED WAIVER PROCESS FOR SMALL CABLE SYSTEMS SERVING FEWER THAN 501 SUBSCRIBERS

The *EAS Fifth Report and Order* fails to address effectively the unique burdens that the Commission’s standard waiver process places on cable systems that serve fewer than 501 subscribers. To rectify this problem, ACA submits that the Commission should establish a streamlined waiver process. Adopting a streamlined waiver process will greatly reduce compliance burdens for very small systems without compromising the Commission’s goals in establishing the CAP-compliance program.

Congress has long recognized that advancing the public interest requires the Commission to take steps to reduce regulatory compliance costs for small cable system operators.¹⁰ With regard to EAS compliance, as far back as 1994 the Commission

¹⁰ See 47 USC § 543(i) (“In developing and prescribing regulations pursuant to this section, the

acknowledged cable commenters' concerns that the projected cost of EAS compliance would be financially burdensome for small cable operators.¹¹ In recognition of this burden, over the ensuing years, the Commission structured its EAS rules to ease EAS compliance burdens on small cable operators.¹²

In the *EAS Fifth Report and Order*, the Commission acknowledged the burdens that obtaining physical broadband Internet access will place on small system operators, and provides a presumption in favor of a waiver, for systems that lack physical broadband Internet access, through the standard waiver process.¹³ However, a presumption in favor of a waiver does not provide meaningful relief for these small operators because of the burden of applying for waivers through the standard waiver process. As a result, the waiver process significantly diminishes the ameliorative benefit the Commission intended to create.

Under the Commission's standard waiver procedures, a waiver applicant must show "good cause."¹⁴ To meet the "good cause" standard, cable systems under the approach in the *EAS Fifth Report and Order* would need to devote significant administrative resources to preparing waiver requests, including the production of appropriate documentation, drafting, and placing evidence in a formal pleading for Commission review. Then, after the Commission

Commission shall design such regulations to reduce the administrative burdens and cost of compliance for cable systems that have 1,000 or fewer subscribers."); Section 301(c) 1996 Telecommunications Act (providing greater deregulation for small systems), *codified at* 47 U.S.C. § 543(m).

¹¹ *In the Matter of Amendment of Part 73, Subpart G, of the Commission's Rules Regarding the Emergency Broadcast System, Report and Order and Further Notice of Proposed Rule Making*, 10 FCC Rcd 1786, ¶ 115 (1994).

¹² *Id.*; see also *In the Matter of Section 257 Triennial Report to Congress*, Report, 19 FCC Rcd 3034, ¶ 5 (2004) (reporting to Congress that the Enforcement Bureau has complied with its mandate under 47 U.S.C. § 257 by issuing more than 280 orders granting temporary waivers of the EAS requirements to small cable systems).

¹³ *EAS Fifth Report and Order*, ¶ 152.

¹⁴ See 47 C.F.R. § 1.3 ("The provisions of this chapter may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission....").

places the request on public notice, any comments or oppositions filed would require additional submissions by the cable system operator.

Many cable systems serving fewer than 501 subscribers are financially constrained and disproportionately burdened by new regulatory mandates – even by the filing of waivers from such requirements – because the systems have smaller subscriber bases upon which to spread these expenses. Cable systems with fewer than 501 subscribers who also lack physical broadband Internet access often contend with an even more difficult financial situation because these systems often are located in rural and low-density markets. Unlike larger cable systems, operators of small systems need to spread the higher fixed costs of regulatory compliance over a smaller customer base and generally face higher expenses in serving less densely populated areas.¹⁵

For operators of cable systems that serve fewer than 501 subscribers whose systems would qualify for the presumption in favor of a waiver due to a lack of a physical broadband Internet access, the time and resources needed to put together a formal waiver request would be significant. It is unduly burdensome to require operators of these systems to obtain outside legal assistance for regulatory matters such as these, particularly when the Commission has already presumed that these systems would qualify for such waivers. The requirement to renew the waiver every six months further multiplies the burden placed on these small systems, despite the Commission's statements in the *EAS Fifth Report and Order* that new costs and

¹⁵ See, e.g., *In the Matter of Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, 15 FCC Rcd 6453, ¶ 118 (2000) (“The Commission has recognized that small systems serve areas that are far less densely populated areas than the areas served by large operators. A small rural operator might serve half of the homes along a road with only 20 homes per mile, but might need 30 poles to reach those 10 subscribers.”); *In the Matter of Caribbean Communications Corp., Petition for Special Relief*, Memorandum Opinion and Order, 17 FCC Rcd. 7092, ¶ 14 (2002) (noting that systems with more than 15,000 subscribers average 68.7 subscribers per mile, while small systems service on average only 35.3 subscribers per mile.).

obligations would be minimal.¹⁶

In the face of the costs associated with seeking a waiver of the CAP-compliance requirement, the relief mechanism created in the *EAS Fifth Report and Order* places operators with systems that lack physical broadband Internet access in a situation without a clear avenue for resolution. These operators must either incur relatively significant expenses to bring physical broadband Internet access to their headends, or pay considerable fees in engaging attorneys to seek semi-annual waivers. Faced with this quandary, some operators may simply shut down a non-compliant system.¹⁷

As ACA explained in its reply comments, cable systems, in many areas, provide the only access to broadcast television due to distance or terrain.¹⁸ Adopting ACA's streamlined waiver process will not compromise the goals of EAS, as these systems will continue to carry broadcast channels that will be EAS and CAP-compliant. Conversely, loss of the cable system will deprive those subscribers of broadcast signals transmitting EAS alerts. As a result, in order to provide meaningful relief for systems serving fewer than 501 subscribers, and to preserve cable access to broadcast station EAS alerts, the Commission should adopt a streamlined waiver process.

III. THE COMMISSION SHOULD ADOPT A STREAMLINED WAIVER PROCESS THAT AFFORDS MEANINGFUL RELIEF FOR VERY SMALL SYSTEMS

To afford more meaningful relief to those very small system operators most requiring it, the Commission should adopt a waiver process similar to others the Commission has designed to provide relief for small providers subject to other burdensome regulatory requirements. To

¹⁶ *EAS Fifth Report and Order*, ¶ 5 (Because the order does not impose new obligations but primarily details the manner in which EAS participants must implement the CAP requirement, the rules we adopt today will impose minimal new costs, particularly as many EAS Participants have already purchased and installed CAP-compatible EAS equipment.”).

¹⁷ See *ACA Reply Comments* at 11, n.20 (Attachment A, Declaration of Roy Sheppard, President, Cable Services, Inc.).

¹⁸ *Id.* at 12.

that end, ACA proposes a streamlined waiver process for systems serving fewer than 501 subscribers, based on: (i) operator-certified statements attesting to the physical unavailability of wireline broadband Internet access at the cable head; and (ii) an expedited filing and decision-making process that presumes the waiver is granted. ACA suggests that these streamlined waivers should last at least one year, with the opportunity for renewal.

In order to obtain the waiver, applicants should first be required to certify that they qualify to receive the waiver with the relevant Bureau, likely the Public Safety and Homeland Security Bureau. Systems with fewer than 501 subscribers that are subject to the streamlined waivers should include those systems that currently do not have physical access to a wireline broadband connection at the system headend, and where obtaining physical access to a wireline broadband connection will cost more than a provider's normal installation drop fee (i.e. special construction costs or line extension fees). A waiver request certification should be signed by a company representative or officer responsible for its truthfulness, and should include the following:

- Physical System Identification Number.
- A statement that the system serves fewer than 501 subscribers.
- A statement that the cable operator currently does not have physical access to a wireline broadband connection at the system head-end.
- A statement that obtaining physical access to a wireline broadband connection would require costs in excess of a provider's normal installation drop fee (i.e. special construction costs or line extension fees).
- An affirmation that the operator understands it must continue to operate its legacy EAS equipment.

In addition, the waiver certification should not require the operator to submit any proof of financial condition.

Second, if the Commission believes it necessary, once a cable operator has filed its waiver request, the Commission should direct the Bureau to release a public notice seeking comment on the certification for a period of ten calendar days. The Commission should create a presumption that once the operator has submitted a complete CAP-compliance waiver

request, the waiver is deemed granted unless opposed. After the ten calendar days, if the request is in order and if no evidence is presented refuting the certified assertions, the Bureau will expeditiously grant the waiver. If other issues preclude an immediate grant of the waiver, the Bureau should grant the operator the opportunity to address these issues. The Bureau should then expeditiously take other appropriate action to resolve the matter.

Waivers granted pursuant to this process should be granted for at least a period of one year, with renewal years available, or until the operator: (i) obtains broadband Internet service at the system headend; or (ii) can obtain broadband Internet service without incurring additional construction or set-up fees, such as line extension charges. Cable operators should have the opportunity to submit waiver requests online in the EAS rulemaking docket.¹⁹

Ample Commission precedent exists to support ACA's proposed streamlined waiver process. The Commission has adopted streamlined waiver processes in analogous situations, including where small companies faced financial hardship,²⁰ where companies could not obtain equipment before an enforcement deadline,²¹ and for other competitive reasons.²² ACA's proposed streamlined waiver process is consistent with this prior Commission action. ACA's proposal would require that the applicant file a certification, signed by an applicant's

¹⁹ The Commission established a similar process for CALM Act waivers. See, e.g., *In the Matter of Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, Report and Order, 2011 FCC LEXIS 5171, FCC 11-182, ¶¶ 52- 54 (2011) ("CALM Act Order"). Alternatively, submission of the waiver request by letter to the appropriate PSHSB Division Chief would also minimize submission costs for small providers. See *In the Matter of Tandy Corporation, Walker Equipment Company, Ameriphone, Inc. and Ultratec, Inc., Request for Waiver of Volume Control Reset*, 47 C.F.R. § 68.317(f), Memorandum Opinion and Order, 16 FCC Rcd 5253, ¶¶ 13-15 (2001) ("Tandy Waiver").

²⁰ *CALM Act Order*, ¶¶ 52-54.

²¹ See, e.g., *In the Matter of Bend Cable Communications, LLC, d/b/a BendBroadband, Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, Memorandum Opinion and Order, 22 FCC Rcd 209, ¶ 10 (2007).

²² See, e.g., *In the Matter of Evolution Broadband, LLC's; Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules; Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, 24 FCC Rcd 7890, ¶ 15 (2009) ("Evolution Order").

representative or officer, that the company meets certain conditions.²³ Similar to the Commission's CALM Act streamlined waiver process, an applicant would have the opportunity to file the request in the rulemaking docket and no proof of the applicant's financial condition would be required.²⁴ ACA proposes a ten-day public notice and comment period, also in accordance with prior Commission proceedings.²⁵ Additionally, expedited Commission approval of a waiver request is consistent with Commission precedent.²⁶

Failure to provide a streamlined waiver process would result in a significant burden for many small cable systems that need a waiver due to the lack of physical broadband Internet access. Costs associated with the Commission's standard waiver process could, inadvertently, increase the likelihood that small systems would cease operations earlier than they would otherwise do so. This could eliminate an important source of national EAS messages that are already available on these at-risk systems. This will not serve the purpose of the EAS rules, which is "to provide immediate communications and information to the general public at the National, State and Local Area levels during periods of national emergency."²⁷

²³ See *Tandy Waiver*, ¶¶ 13-15 (developing a streamlined approach for manufacturers of telephones with volume control over 18 dB through submission of a letter to Division Chief certifying that the equipment meets safety conditions specified by FCC.).

²⁴ *CALM Act Order*, ¶ 52.

²⁵ *Evolution Order*, ¶ 15 (providing an expedited process to receive a waiver to employ low-cost integrated navigation devices that are no more advanced than Evolution boxes via submission of a certification to the Media Bureau that is put out for comment for a 10-day period).

²⁶ See *CALM Act Order*, ¶ 52 ("Small broadcast stations and small MVPDs may consider the waiver granted when they file this information online and receive an automatic "acknowledgement of request," unless the Media Bureau notifies them of a problem or question concerning the adequacy of the certification."); *Tandy Waiver*, ¶ 15 ("If the request is in order and if no other issues are present that preclude a grant, the Division will issue an order granting the waiver request.").

²⁷ See 47 C.F.R. § 11.1.

IV. CONCLUSION

The Commission can better ease the burden of EAS compliance by establishing a streamlined waiver process for small cable systems serving fewer than 501 subscribers that lack physical connectivity to broadband Internet access. ACA proposes a streamlined waiver process based on (i) operator-certified statements attesting to the physical unavailability of wireline broadband Internet access at the cable headend; and (ii) an expedited filing and decision-making process that presumes the waiver granted. ACA also suggests that these streamlined waivers last at least one year, with the opportunity for renewal. This streamlined waiver process will afford more meaningful relief for cable systems serving fewer than 501 subscribers and will better address the unique burdens these system operators face in complying with the EAS CAP requirement. For the reasons outlined above, the Commission should adopt ACA's proposal.

Respectfully submitted,



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