



Aviation Communications

Comments on the Notice of Proposed Rulemaking published at
78 Fed. Reg. 6276 (January 30, 2013).

Submitted to the Federal Communications Commission online at <http://apps.fcc.gov/ecfs/>

[WT Docket No. 01-289, FCC 13-2]

**Submitted by the
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March 26, 2013

Ms. Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Dear Ms. Dortch:

Please accept these comments in response to Aviation Communications, Notice of Proposed Rulemaking, which was published for public comment at 78 Fed. Reg. 6276 (January 30, 2013). The comment period for this NPRM closes April 1, 2013, pursuant to the Public Notice extending the Comment Period that was published by the FCC on February 27, 2013.

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Who is ASA?

Founded in 1993, ASA represents the aviation parts distribution industry, and has become known as an organization that fights for safety in the aviation marketplace.

ASA and ASA's members are committed to safety and seek to give input to the United States Government regarding government policies so that the aviation industry and the government can work collaboratively to create the best possible guidance for the industry and the flying public.

ASA is an active participant in efforts to increase and support safety. ASA has a number of programs designed to support aviation safety, like the ASA-100 accreditation program which is coordinated with the Federal Aviation Administration's Advisory Circular 00-56A. ASA works with the FAA and other US regulatory authorities, as well as non-US regulatory authorities, to develop and maintain programs designed to support aviation safety as it relates to distribution, maintenance and installation of aircraft parts.

ASA has over 500 members. A substantial number of members distribute avionics equipment, like Emergency Locator Transmitters as well as parts for such equipment.

ASA's members are typically small businesses. Most of them employ between 2 and 20 employees.

Summary of Comments

The Commission proposes to further its regulatory goals by prohibiting the certification, manufacture, importation, sale, or use of 121.5 MHz Emergency Locator Transmitters (ELTs). ASA opposes the FCC's proposed rule because it does not enhance safety, it adversely affects the property interests of those who own and use ELTs, it contradicts existing statutory authority, and it exceeds the Commission's regulatory authority.

121.5 MHz ELTs Pre-Date the Cospas-Sarsat Satellite System and are Monitored Independently

Issue

The primary reason the FCC states for the proposed rule is that the Cospas-Sarsat satellite system stopped monitoring the 121.5 MHz frequency on February 1, 2009. See 78 Fed. Reg. 6276, 6276 (Jan. 30, 2013). The cessation of monitoring by the satellite is unrelated to the original purpose of the 121.5 MHz ELTs.

Analysis

The primary reason the FCC offers for the proposed prohibition on 121.5 MHz ELTs is that the Cospas-Sarsat satellite system no longer monitors the 121.5 MHz frequency. Id. Cospas-Sarsat ceased monitoring the frequency on February 1, 2009. However, the use of the 121.5 MHz international distress frequency pre-dates the use of the Cospas-Sarsat system to monitor that frequency. The 121.5 MHz frequency was monitored independently of the satellite system

before the satellite system existed, and it continues to be monitored independently of the satellite system today.

Electronic Locator Transmitters were first required to be installed on aircraft in 1971. See Occupational Health and Safety Act of 1970, Pub. L. No. 91-596, § 31 (1970). These ELTs were required to meet the standards of FAA TSO-C91. See generally 14 C.F.R. § 91.207. The standard called for ELTs to operate on the 121.5 MHz frequency. See FAA TSO-C91A.¹ The Cospas-Sarsat satellite system was not declared operational until 1985. See History of Cospas-Sarsat.² Prior to the operation of the Cospas-Sarsat system, the 121.5 MHz frequency was monitored by the civil aviation community largely from air traffic control towers.

Just as prior to the use of the Cospas-Sarsat system the 121.5 MHz frequency was monitored by the civil aviation community, so today the civil aviation community (Civil Air Patrol) continues to monitor the frequency. As the FCC observed in the preamble to the proposed rule, the 121.5 MHz frequency is still monitored by the search and rescue community, including the Civil Air Patrol. See 78 Fed. Reg. at 6276. Many general aviation aircraft remain legally equipped with ELTs transmitting on the 121.5 MHz frequency. Prohibiting the use of a still-monitored emergency frequency does not contribute to or enhance aviation safety.

Recommendation

Because the 121.5 MHz frequency is still monitored independently, the proposal to prohibit the use of the 121.5 MHz spectrum should be withdrawn.

Use of the 121.5 MHz Spectrum is Specifically Authorized in the United States Code

Issue

The FCC's proposed regulation would prohibit the manufacture, importation, and sale of ELTs that operate only on the 121.5 MHz frequency.

Analysis

49 U.S.C. § 44712 requires, with some exceptions, that an “emergency locator transmitter must be installed on a fixed-wing powered civil aircraft for use in air commerce.” 49 U.S.C. 44712(a). In 2000, § 44712 was amended to add subsection (d). That subsection states that an aircraft satisfies the ELT requirement if it is equipped with a transmitter that transmits on either the 121.5/243 MHz frequency or the 406 MHz frequency. See 49 C.F.R. § 44712(d).

¹ available online at

[http://www.airweb.faa.gov/Regulatory_and_Guidance_Library/rgTSO.nsf/0/e2b1e589c98200f886256dc900695b8c/\\$FILE/C91a.pdf](http://www.airweb.faa.gov/Regulatory_and_Guidance_Library/rgTSO.nsf/0/e2b1e589c98200f886256dc900695b8c/$FILE/C91a.pdf)

² available online at <http://www.cospas-sarsat.org/en/about-cospas-sarsat/about-the-programme-g/history>.

The proposed rule would prohibit the use of a statutorily authorized method of compliance with the requirement of 49 U.S.C. § 44712(a). When the intent of Congress is clear, an agency “must give effect to the unambiguously expressed intent of Congress.” Chevron U.S.A. v. NRDC, Inc., 467 U.S. 837, 842 (1984).

In this case, Congress specifically authorized two different frequencies—121.5/243 MHz and 406 MHz—to satisfy the ELT requirement. The intent of Congress in this case is unambiguous. Had Congress intended for discretion in determining the frequencies at which ELTs may transmit, they would have stated so in the Statute, or made no statement at all. The fact that Congress explicitly included the 121.5 MHz frequency in the statute indicates their unambiguous intent.

Recommendation

ELTs transmitting at the 121.5 MHz frequency are a statutorily authorized method of complying with a congressionally enacted statute. Because the proposed rule directly contradicts the unambiguous authorization of the statute, it should be withdrawn.

Lack of Jurisdiction

Issue

The FCC has purported to take its action in order to enhance the safety of flight. The FAA, and not the FCC, has jurisdiction over aviation safety. The agency with jurisdiction, the FAA, has unambiguously stated that this action is not necessary to support safety of flight.

Analysis

The preamble to the rule states that one of the FCC’s goals in this rulemaking activity is to “enhance the safety of flight.” 78 Fed. Reg. at 6276. The regulation purports to do this by prohibiting the future sale and use of ELTs transmitting on the 121.5 MHz frequency. In response to the proposed rule, the FAA requested that the FCC not implement the rule, observing that the 121.5 MHz frequency still provided a beneficial means of locating aircraft as well as questioning the cost of replacing the 121.5 MHz ELTs. Id.

One of the FAA’s primary purposes is to promote and enhance safety in aviation. In consideration of general safety, the Administrator of the FAA is required to consider both the requirements of national defense and commercial and general aviation, as well as the public right of freedom of transit through navigable airspace. 49 U.S.C. § 40101(c). The Administrator is also commanded to consider “assigning, maintaining, and enhancing safety and security as the highest priorities in air commerce.” Id. at § 40101(d)(1).

The FCC’s mandate reads as follows:

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of

the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the “Federal Communications Commission”, which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

47 U.S.C. § 151. Although the FCC has authority with respect to regulation of spectrum, the FAA maintains responsibility for the promotion and assurance of aviation safety.

Notwithstanding the fact that the proposed rule relates to use of spectrum, Congress has spoken clearly in delegating the responsibility for aviation safety to the FAA. Additionally, as stated in the preceding section, Congress has also specifically mandated in title 49 of the United States Code the permissible frequencies for compliance with the safety requirement that civil aircraft be equipped with ELTs. See 49 U.S.C. § 44712.

Recommendation

Because Congress has specifically delegated to the FAA the promotion and regulation of safety, the FCC should defer to the request of the FAA in this matter.

No FCC Priority is Adversely Affected by the Continuing Use of 121.5 MHz

Issue

The FCC has not indicated any priority that is adversely affected by the continuing use of the 121.5 MHz emergency frequency.

Analysis

The preamble to the rule explains that on February 1, 2009, the Cospas-Sarsat satellite system ceased monitoring the 121.5 MHz emergency frequency. 78 Fed. Reg. at 6276. The preamble further states under the heading “Need for, and Objectives of, the Proposed Rules” that the purpose of the rule is to “address the appropriate regulatory treatment of 121.5 MHz emergency locator transmitters (ELTs) now that they are no longer monitored by the Cospas-Sarsat satellite system.” Id. at 6277.

The proposed rule does not describe any use of spectrum with which the continuing use of 121.5 MHz currently interferes. Nor does it describe a future intended public use of the 121.5 MHz frequency. The rule does not articulate any reason or purpose behind prohibiting the use of

121.5 MHz ELTs other than the fact that Cospas-Sarsat no longer monitors the frequency. As mentioned above, however, the frequency is still monitored by other means, and still serves an important safety function in the location of missing aircraft.

At this point, the need to prohibit use of 121.5 MHz ELTs because of lack of Cospas-Sarsat monitoring does not appear valid because the 121.5 MHz ELTs are still monitored by alternative sources. The FCC has articulated no priority with which the continuing use of the 121.5 MHz spectrum interferes. While the 121.5 MHz ELTs can be, and are, used for their intended purpose, there appears to be no need to address the future of their use.

Recommendation

Because the continued use of the 121.5 MHz ELTs does not interfere with any FCC priority, prohibiting their use because Cospas-Sarsat no longer monitors the frequency is inappropriate. The proposed rule should therefore be withdrawn.

Prohibiting the Use and Sale of 121.5 MHz ELTs Adversely Affects the Property Interests of Those Who Own Such Units

Issue

The prohibition on the future use and sale of 121.5 MHz ELTs would adversely affect the property interests of distributors who have such units in their inventory by rendering the units valueless. It would also similarly affect the value of such units that are currently installed in the civil aviation fleet.

Analysis

The proposed rule would “prohibit the certification, manufacture, importation, sale or use of 121.5 MHz ELTs.” 78 Fed. Reg. at 6276. Some distributors of aviation articles maintain 121.5 MHz ELTs in their inventories in order to replace existing permitted ELTs as necessary. The promulgation of this proposed rule as a Final Rule would render those inventories worthless effectively working a regulatory taking against these businesses in violation of the Fifth Amendment.

The Takings Clause of the Fifth Amendment states, “nor shall private property be taken for public use without just compensation.” U.S. Const. amend. V. Although generally applied to takings of real property, the takings clause can also apply to takings of personal property. This is known as a regulatory taking. The Supreme Court has articulated a multi-part test for determining whether a regulatory taking has occurred. The Court will consider (1) the economic impact on the claimant, (2) the extent to which the regulation interferes with the claimant’s reasonable investment-backed expectation, and (3) the nature of the government regulation or action. See Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124-25 (1978).

In this case, the economic impact of the FCC’s proposed rule on distributors with inventories of 121.5 MHz ELTs would be severe. The rule would effectively make each ELT worthless. As stated previously, 121.5 MHz ELTs were operated prior to the existence of the Cospas-Sarsat system, and continue to be monitored by traditional methods after Cospas-Sarsat ceased monitoring. The distributors who purchased

these ELTs had a reasonable expectation that they would continue to be a legal method of compliance with 49 U.S.C. § 44712, and that the ELTs would therefore retain economic value. The proposed regulation substantially interferes with that expectation.

Although the Supreme Court observed in Penn Central that “[a] ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good,” Penn Central, 438 U.S. at 124, in this case the FCC has not articulated any public purpose that is served by prohibiting the use of 121.5 MHz ELTs. There has been no assertion that the use of the 121.5 MHz frequency interferes with other uses of the spectrum, or that the FCC has future intended uses for the spectrum.

Based on the foregoing analysis, the proposed rule would appear to work a taking on the owners of 121.5 MHz ELTs, and would do so without any articulated public purpose, and without adequate compensation. This is an unconstitutional taking under the Fifth Amendment.

Recommendation

The prohibition of sale and use of 121.5 MHz ELTs would destroy the value of 121.5 MHz units held by distributors as well as those units installed in the civil aviation fleet. The FCC has not justified this destruction of value with an adequate government interest. Because the rule would work an unconstitutional taking, the rule should be withdrawn.

Conclusion

ASA looks forward to working with the FCC to better promote appropriate use of the 121.5 MHz frequency. Your consideration of these comments is greatly appreciated.

Respectfully Submitted,

A handwritten signature in black ink that reads "Jason Dickstein". The signature is written in a cursive style with a large, looped initial "J".

Aviation Suppliers Association