

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 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 )

To Chief, Public Safety and Homeland Security Bureau:

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**PETITION FOR PARTIAL RECONSIDERATION  
OF SOUTHERN COMMUNICATION VOLUNTEERS, INC.**

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Southern Communication Volunteers, Inc., licensee of WEVL-FM, Memphis, Tennessee (“SCV”), pursuant to Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405 and Section 1.106 of the Commission’s rules, 47 C. F. R. § 1.106, hereby petitions the Public Safety and Homeland Security Bureau (“PSHSB” or “Bureau”) of the Federal Communications Commission (“FCC”) for reconsideration of the denial of its request for waiver of Section 11.56 of the FCC’s rules<sup>1</sup>, 47 C.F.R. § 11.56, filed July 2, 2012, and supplemented on August 24, 2012.<sup>2</sup>

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<sup>1</sup> The Bureau denied SCV’s request by Order, on July 15, 2013. *Review of the Emergency Alert System*, EB Docket No. 04-296, Order, DA 13-575 (rel. July 15, 2013).

<sup>2</sup> See Letter from Marjorie K. Conner to Thomas J. Beers, August 24, 2012.

## **I. Background**

### **A. The Rule**

In 2007, the FCC mandated that all Emergency Alert System ("EAS") Participants be able to receive Common Alerting Protocol (CAP) formatted EAS messages<sup>3</sup> issued by the Federal Emergency Management Agency ("FEMA") no later than one hundred eighty (180) days after FEMA adopted technical standards for CAP. FEMA published the CAP technical standards and requirements on September 30, 2010.<sup>4</sup> On November 10, 2010, the Commission extended the deadline by which EAS Participants had to be in compliance with the CAP-related obligations until September 30, 2011.<sup>5</sup> Before expiration of the extension set forth in the *Waiver Order*, on September 16, 2011, the Commission again extended the compliance deadline by amending Section 11.56 of the Commission's rules, 47 C.F.R. § 11.56, to establish a compliance deadline of June 30, 2012.<sup>6</sup>

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<sup>3</sup> EAS is a hierarchical alert message distribution system that delivers alerts initiated by federal, state, and local authorities utilizing the transmission facilities of broadcast radio and television, cable operators, satellite radio and television service providers, and wireline video service providers, collectively, "EAS Participants". See Section 11.2(c) of the Commission's rules, 47 C.F.R. § 11.2. CAP is an open, interoperable XML-based standard that allows an alert initiator to deliver information-rich alerts to multiple devices. See Review of the Emergency Alert System; Independent Spanish Broadcasters Association, the Office of Communication of the United Church of Christ, Inc., and Minority Media and Telecommunications Council, Petition for Immediate Relief; Randy Gehman Petition for Rulemaking, EB Docket 04-296, *Fifth Report and Order*, 27 FCC Rcd 642, 648 (2012) ("*Fifth Report and Order*").

<sup>4</sup> See 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; Randy Gehman Petition for Rulemaking, EB Docket 04-296, *Fourth Report and Order*, 26 FCC Rcd 13710, 13713 (2011) ("*EAS Fourth Report and Order*").

<sup>5</sup> See Review of the Emergency Alert System, Order, EB Docket No. 04-296, 25 FCC Rcd 16476 (2010) ("*Waiver Order*").

<sup>6</sup> *EAS Fourth Report and Order*, 26 FCC Rcd 13811-2.

## **B. SCV's Actions**

SCV is the licensee of WEVL-FM. WEVL-FM is a non-commercial, educational FM ("NCE-FM") station licensed to serve Memphis, Tennessee. SCV is an almost all-volunteer organization which serves the Memphis community with a full schedule of volunteer-created programming seven days a week, between 6 AM and 12 Midnight. It operates on a minimal budget with two full time employees, each of whom has worked with the station for decades.

Since its inception, SCV has ordered necessary equipment from Broadcast Supply Worldwide ("BSW"). In every instance until the order for the CAP-compliant EAS equipment, BSW delivered the ordered equipment in a matter of days.<sup>7</sup> SCV had no reason to believe the order for CAP-compliant EAS equipment would be any different.

SCV ordered the CAP-compliant EAS equipment on Thursday, May 24, 2012, a full five weeks before the deadline for compliance. SCV was told at that time that the equipment was out of stock, but still believed it would arrive in time to install and activate it before the June 30, 2012, deadline. SCV's belief was based on 26 years of experience with its vendor. SCV expected to have its new EAS equipment fully operational well in advance of the June 30, 2012 deadline.

On June 28, 2012, BSW informed SCV that the equipment had arrived and would be shipped immediately. It was delivered the next week. Because of the 4th of July holiday, it was delayed until the 5th.

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<sup>7</sup> In fact, on its website, BSW promises "Fast Shipping from our Ohio Warehouse". <http://www.bswusa.com/> The "BSW Ground Transit Time map shows clearly, that Memphis customers can expect shipment of orders within three (3) business days. <http://www.bswusa.com/assets/images/groundtransit.gif>.

SCV received the equipment on July 5, 2012. SCV's volunteer engineer worked on installation within a week after delivery and worked through the next two weeks, involving the station's volunteer computer expert to ensure reliable Internet access. The new CAP-compliant EAS equipment was tested and operating appropriately on July 23, 2012.

In the end, as reported to the Commission on August 24, 2012, SCV needed the Commission's grace for a mere twenty-four (24) days.

**C. The Bureau Denied the Waiver Request.**

Thirty-five (35) EAS Participants filed for waivers of the deadline. Many others, faced with late equipment delivery did not petition for waiver. They simply determined that the equipment would arrive before the Commission could inspect the station.<sup>8</sup> They quietly received late delivery of the CAP-compliant EAS equipment deployed it and went about their business. Those who followed the rules, and asked for a waiver of the rules when they realized they would be out of compliance suffered one of two fates: 1) the Bureau prevailed upon them to withdraw their request for waiver of the rule or 2) the Bureau denied the requested waiver.

Sixteen EAS Participants requested waiver of the compliance deadline because of vendor delays. The Bureau successfully prevailed upon eleven of the petitioners to withdraw their petitions for waiver.<sup>9</sup> A review of the Docket No. 04-296 shows that the Bureau has a practice of dismissing waiver requests as moot because licensee came into compliance with Section 11.51.<sup>10</sup>

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<sup>8</sup> The temporal proximity of the Fourth of July holiday to the CAP deadline was noted by many as a convenient safe harbor.

<sup>9</sup> Windstream Lakedale, Inc., Uno Radio Group, Baja Broadband, Rainbow Communications, Blanchard Communications, Valley Public Television, Metrocast of Mississippi, Port Lucie Broadcasters and Treasure Coast Broadcasters Pene Broadcasting Co., Inc., Muzzy Broadcast Group, LLC, Venite Adoremus, and Opus all withdrew requests for waiver. Interestingly, Muzzy Broadcasting Group amended its withdrawal to correct the character of the "instruction" from the Commission that the licensee withdraw its waiver request to a "suggestion". (Letter from Denise  
(continued...))

Someone purporting to be Bureau staff contacted counsel for SCV and “suggested” that SCV withdraw the waiver request.<sup>11</sup> Concerned about the perils of relying on informal advice of Commission staff, and cognizant that SCV was out of compliance with the rules, for a short period of time, SCV elected to allow its waiver request be processed.

The Bureau made good on its threat. SCV's petition was denied. *En masse*, the Commission denied the petitions for waiver of five different petitioners, including SCV. Based on the text of footnote 2 of the Order, the Bureau lumped the petitioners together because each of them asked for the waiver based on vendor delay. Of the five, only one other, Applegate, was an FM broadcaster, like SCV. SCV was the only NCE- FM station included in the Order.<sup>12</sup>

## **II. SCV's Waiver Request was Improperly Denied.**

In its Request for Waiver, SCV asked that the FCC grant a limited waiver to allow its equipment supplier, BSW time to deliver equipment ordered five weeks earlier. SCV specifically articulated how its circumstances met the criteria for waiver set forth in FCC Rule 1.925, which requires than either that “(i) [t]he underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the

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B. Moline, Esq. to Gregory Cooke, Policy and Licensing Division, PSHSB, April 17, 2013.) Having received the same call, SCV's counsel can attest it was a suggestion coupled with a threat of denial of the waiver request, regardless of the merit of the waiver request.

<sup>10</sup> Review of Emergency Alert Service, Order, 22 FCC Rcd 13191 (PSHSB 2007).

<sup>11</sup> Counsel for SCV received a call suggesting that the SCV petition be withdrawn or it would be denied. When counsel attempted to reconnect with the individual who called, she found that he was not listed in the FCC's directory and that no one in the FCC's Media Bureau knew the individual by the name he provided. Unable to confirm the provenance of the suggestion that SCV withdraw a petition for waiver of a rule during a period of time when it was out of compliance, and in an abundance of caution and cognizant of the Commission's often restated mantra that licensees may not rely on informal advice of Commission staff, SCV did not withdraw its petition.

public interest; or (ii) [i]n view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.”<sup>13</sup>

In its Request for Waiver, SCV demonstrated how it qualified under either of the two prongs of the waiver test enunciated in *WAIT Radio*. Specifically, SCV demonstrated that it took the steps necessary to raise the money to buy compliant EAS equipment, and immediately upon reaching the needed amount, SCV ordered and tendered payment for the equipment -- five weeks before the deadline for implementation. The fact that, despite its long history of being able to order and install equipment from its supplier within a week or two, the necessary equipment could not be obtained and installed for more than a month despite the best-efforts of SCV clearly qualifies as “unusual factual circumstances . . . [such that] application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest.”<sup>14</sup>

Rather than articulate any basis for its judgment that five weeks -- or even nearly eight weeks<sup>15</sup> -- was not sufficient lead time for ordering CAP-compliant EAS equipment, the Bureau just makes summary statements. As SCV explained in its Request for Waiver, SCV faced significant financial and technical hurdles not faced by commercial EAS Participants in bringing its station into compliance. There is a direct connection between the Bureau's lack of support for its denial of the

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<sup>12</sup> As an NCE-FM licensee, SCV operates *only* in the public interest. It does not earn a profit. It has no shareholders to whom it is beholden.

<sup>13</sup> 47 C.F.R. § 1.925; *see also* *WAIT Radio v. F.C.C.*, 418 F.2d 1153 (D.C. Cir. 1969); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990)

<sup>14</sup> *Id.*

<sup>15</sup> Petitioner, Applegate Media ordered its equipment two and a half weeks before SCV did. Even that earlier order did not pass muster with the Bureau.

waiver requests and the Commission's failure to explore the impact of the new EAS rules on NCE-FM stations.<sup>16</sup>

SCV stated specifically that based on its experience with its equipment vendor, it expected the equipment to be delivered within a few days after ordering. To the best of its knowledge, informed by 26 years of experience, SCV took every necessary action to ensure its timely compliance with Section 11.56 of the Commission's rules.

In the Order, in a single sentence, the Bureau provides its full basis for its decision: SCV "chose to wait until very close to the deadline to order equipment." The Bureau does not explain why or how it determined that five weeks is "very close" to the deadline,<sup>17</sup> and it does not explain why SCV's experience with its vendor is not relevant to SCV's actions. If the Commission had considered the impact of the new EAS rules on NCE-FM stations,<sup>18</sup> it would have a record on which to assess

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<sup>16</sup> Section 604 of the Administrative Procedure Act, 5 U.S.C. § 604(a)(6), requires the FCC to describe the steps the agency has taken to minimize the significant economic impact on small entities Commission is required to assess the impact on small businesses when it adopts rules. Throughout the EAS Review proceeding, which led to the imposition of the CAP rules, in attempting to discharge its obligation under Section 604(a)(4) of the Administrative Procedure Act ("APA"), the Commission discussed commercial radio stations, but said not a single word about the more than three thousand NCE-FM stations that would be affected by the rules implementing the CAP requirement.

<sup>17</sup> Petitioner, Applegate Media ordered its equipment two and a half weeks before SCV did. Even that earlier order did not pass muster with the Bureau.

<sup>18</sup> The lack of attention to the impact of the new EAS rules is obvious from a review of the various orders in this proceeding. *See, Fifth Report and Order, 27 FCC Rcd 765. See also, 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; Randy Gehman Petition for Rulemaking, EB Docket 04-296, Third Further Notice of Proposed Rulemaking, 26 FCC Rcd 8149 (2011). The EAS Fourth Report and Order did not discuss Regulatory Flexibility, neither did the Order on Reconsideration, 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; Randy Gehman Petition for Rulemaking, EB Docket 04-296, Order on Reconsideration, 27 FCC Rcd 4029 (2012). In the Third Report and Order in the proceeding, the Commission mentioned "religious" broadcasters in its Regulatory Flexibility analysis, but failed to contemplate the impact on that class of sometimes non-commercial broadcaster. 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; Randy* (continued...)

SCV's actions -- and perhaps even find them reasonable. As it is, because the Commission failed its duties under Section 604(a) of the APA, with respect to NCE-FM stations, there is no basis for the Bureau's substitution of its judgment for SCV's.

Throughout its history, the Commission has been loathe to substitute its business judgment for a licensee's, particularly when the subject matter is specifically within the licensee's experience.<sup>19</sup> Here, the Bureau does not explain why it deviates from past precedent, or why its judgment here is superior to the licensee's. It merely claims that five weeks before the deadline is "very close" and so not reasonable.<sup>20</sup> This determination is also belied by the Commission's own June 11, 2012 reminder that EAS Participants must have deployed operational equipment that is capable of receiving and processing CAP-formatted EAS alerts in a manner consistent with the Commission's EAS rules.<sup>21</sup> The reminder was of little value if the Commission believed there was not time to order, receive, install, and test equipment in the time between June 11, 2012 and June 30, 2012.

The Bureau's armchair quarterbacking stands without rationale or support in the Order or in the proceeding imposing the CAP requirement. The Bureau did not attempt to explain why SCV's

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*Gehman Petition for Rulemaking, EB Docket 04-296, Third Report and Order, 26 FCC Rcd 1460, 1501 (2011). See also, 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; Randy Gehman Petition for Rulemaking, EB Docket 04-296, Second Further Notice of Proposed Rulemaking, 25 FCC Rcd 564, 581 (2010), 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, 18712 (2005).*

<sup>19</sup> See, e.g., *Elijah Broadcasting Corporation c/o Lauren A. Colby*, 16 FCC Rcd 21561, 21570-21571 (2001). See also, *Victory Media*, 3 FCC Rcd 2073, 2075 (1988) (we are reluctant to second-guess an applicant's business judgment -- so long as it is, in fact, a good faith business decision.").

<sup>20</sup>The Bureau never provided any guidance as to what lead time would have been reasonable.

<sup>21</sup> *Public Safety and Homeland Security Bureau Reminds Emergency Alert System Participants That They Must Be Able To Receive And Process Common alerting Protocol-Formatted EAS Alerts by June 30, 2012*, EB Docket No. 04-296, Public Notice, DA 12-916 (rel. June 11, 2012).

years of prior experience -- or the vendor's public proclamations about delivery dates -- were unreliable or why SCV should have known them to be unreliable.

**III. SCV is Materially Different From The Other Petitioners.**

SCV is the only Petitioner that operates exclusively in the public interest. It does not earn money from its operation of the station. To the contrary, it raises money to stay on the air. The station doesn't support the licensee; the licensee supports the station. When the Commission imposes new obligations on NCE-FM licensees, it requires more fundraising concerts, spaghetti dinners, telethons, and whatever other innovative means of fundraising the licensee can devise, before the licensee can order compliant equipment. SCV is the only NCE-FM Petitioner.

**IV. Denial of SCV's Waiver Request Should Be Reconsidered.**

The Bureau incorrectly denied SCV's waiver request. It substituted its judgment for SCV's without giving any basis for that substitution. SCV exercised reasonable business judgment based on its experience and its vendor's stated delivery dates. SCV demonstrated that grant of the waiver request would (a) not undermine the rule as a whole, and (b) that the request was occasioned by circumstances beyond its control. Further, Bureau should also consider SCV's role as a community-oriented, NCE-FM licensee in determining whether grant of the requested waiver is in the public interest.

SCV takes its responsibility as a Commission licensee very seriously. For that reason it followed counsel's advice and requested a waiver for a period of time when it knew it would be out of compliance. The Commission's casual denial of the request for waiver sends a message to SCV and all other NCE-FM licensees that following the rules is a perilous course of action. Surely, the Commission does not wish to send that message.

The Commission's rules allow for grant of a petition for reconsideration if the petitioner states with particularity the respects in which petitioner believes the action taken by the Commission or the designated authority should be changed. The Bureau inappropriately substituted its business judgment for SCV's business judgment, supplanting its own inexperienced opinion for SCV's. SCV asks that the Bureau reconsider its action and grant the requested waiver for the 24 days SCV was out of compliance.

Respectfully submitted,

**SOUTHERN COMMUNICATION VOLUNTEERS, INC.**

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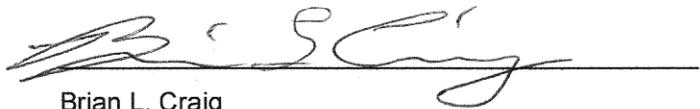
*Counsel for Southern Communication Volunteers, Inc.*

August 14, 2013

Declaration of Brian L. Craig  
Program Director  
Southern Communication Volunteers, Inc.,  
Licensee of WEVL-FM

I, Brian L. Craig, am the Program Director for Southern Communication Volunteers, Inc., licensee of WEVL-FM, serving Memphis, Tennessee. I have held this position at all times since 1992.

I have reviewed the Petition for Partial Reconsideration ("Petition") to which this Declaration is appended. I have personal knowledge of the facts asserted in the Petition. I affirm that the facts asserted in the Petition are true and correct to the best of my personal knowledge, information and belief.

A handwritten signature in black ink, appearing to read 'Brian L. Craig', is written over a solid horizontal line.

Brian L. Craig  
Program Director

August 14, 2013