

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

In the Matter of
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 No. 04-296

ORDER

Adopted: July 15, 2013

Released: July 15, 2013

By the Chief, Public Safety and Homeland Security Bureau:

I. Introduction

1. In this Order we address the petitions for waiver of Section 11.56 of the Commission's rules, filed by Southern Communications Volunteers, Inc. (SCV), Applegate Media, Inc. (Applegate), Telecommunications Management, LLC and Avenue Broadband Communications, Inc., (New Wave), Lakeview Cable, Inc. (Lakeview), RB3, LLC and Arklaoktex, LLC, d/b/a Reach Broadband (Reach), (collectively, the Petitioners). Section 11.56 requires Emergency Alert System (EAS) Participants to have installed operational equipment that can receive and process EAS alerts in the Common Alerting Protocol (CAP) by June 30, 2012. For the reasons set out herein, we deny these petitions.

1 47 C.F.R. § 11.56.

2 New Wave, Lakeview and Reach each filed requests for waivers of the Commission's June 30, 2012 CAP deadline on behalf of multiple cable systems, each of which stated separate bases for the requests. Thus, we are able to separate those requests for waiver that are based solely on vendor delay. Accordingly, this order resolves:

- New Wave's request for waiver of the June 30, 2012 deadline on the basis of vendor delay for its Ashdown, Arizona; Brazil and Clinton, Indiana; and Westville and Coatesville, Illinois systems;
Lakeview's request for waiver of the June 30, 2012 deadline on the basis of vendor delay for its Cache/Indiahoma, Oklahoma system; and
Reach's request for waiver of the June 30, 2012 deadline on the basis of vendor delay for its Eufala, Hondo, and Kenedy, systems.

This Order does not address any other requests for waiver of the June 30, 2012 deadline contained in the filings of New Wave, Lakeview and Reach.

3 See Request for Waiver, EB Docket No. 04-296 (filed July 2, 2012) (SCV Petition); Request for Waiver, EB Docket No. 04-296 (filed June 29, 2012) (New Wave Petition); Request for Waiver, EB Docket No. 04-296 (filed June 29, 2012) (Lakeview Petition); Request for Waiver, EB Docket No. 04-296 (filed June 28, 2012) (Reach Petition); Letter, Lindsey Riggs to FCC, EB Docket No. 04-296 (filed June 28, 2012) (Applegate Petition).

4 The EAS is a hierarchical alert message distribution system that delivers alerts initiated by federal, state and local alerting authorities utilizing the transmission facilities of radio and television broadcast stations, cable operators,

II. Background

2. In its 2007 *EAS Second Report and Order*, the Commission, among other things, mandated that EAS Participants be able to receive a CAP-formatted EAS alert message issued by the Federal Emergency Management Agency (FEMA) no later than 180 days after FEMA adopted technical standards for CAP.⁵ On September 30, 2010, FEMA published the technical standards and requirements for CAP-formatted EAS alerts, triggering the 180-day clock for EAS Participants to be able to receive CAP-formatted alerts.⁶ On November 18, 2010, the Commission adopted the *Waiver Order*, which extended the 180-day deadline for EAS Participants to meet the CAP-related obligations it adopted in the *Second Report and Order* until September 30, 2011.⁷ Finally, on September 16, 2011 the Commission extended the deadline a final time, amending section 11.56 of the Commission's EAS rules to require EAS Participants to be able to receive CAP-formatted EAS alerts as required by Part 11 no later than June 30, 2012.⁸

3. SCV, New Wave, Lakeview, Reach, and Applegate filed petitions seeking temporary waiver of section 11.56 on the basis that they could not meet the June 30, 2012 deadline due to vendor delay.⁹

III. Discussion

4. The Commission has authority to waive its rules if there is “good cause” to do so.¹⁰ The Commission generally finds such good cause where special circumstances warrant a deviation from the

satellite radio and television service providers, and wireline video service providers, collectively referred to as “EAS Participants.” See 47 C.F.R. §11.2(c). 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 the 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 ¶ 10 (2012) (*Fifth Report and Order*).

⁵ 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, ET Docket No. 04-296, *Second Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 13275 ¶ 26 (2007) (*EAS Second Report and Order*).

⁶ 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 ¶ 4 (2011) (*EAS Fourth Report and Order*).

⁷ See Review of the Emergency Alert System, Order, EB Docket No. 04-296, 25 FCC Rcd 16376 ¶ 1 (2010) (*Waiver Order*).

⁸ See *Fourth Report and Order*, 26 FCC Rcd at 13711-12 ¶¶ 1 (2011).

⁹ See SCV Petition at 1, New Wave Petition at 3, Lakeview Petition at 1, Reach Petition at 2, Applegate Petition at 1.

¹⁰ 47 C.F.R. § 1.3. See *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

general rule, and such deviation will serve the public interest.¹¹ The waiver applicant faces a high hurdle and must plead with particularity the facts and circumstances that warrant a waiver.¹²

5. We find that the Petitioners have failed the first prong of the Commission's waiver analysis. Vendor delay alone does not ordinarily constitute the "special circumstances" that would justify a waiver.¹³ In order to constitute "special circumstances" justifying a waiver, the delay must have arisen from some event or events that occurred despite Petitioner's diligent business operations, and not as a result of Petitioner's actions.¹⁴

6. The SCV, New Wave, Lakeview, and Reach waiver requests, however, show that they chose to wait until very close to the deadline to order equipment, and thus any delay in receiving equipment was entirely attributable to each company's business decisions. SCV states that it did not order the equipment until May 24, 2012 because it had a long-standing relationship with its equipment vendor who normally "delivered the ordered equipment within a matter of days each time SCV ordered."¹⁵ SCV also says it only ordered the equipment after its fund drive ended, which provided the money necessary to purchase the equipment.¹⁶ New Wave stated that it contacted its vendor in April, 2012, and was told the equipment was on back order and would not be delivered in time to meet the June 30, 2012 deadline.¹⁷ According to New Wave, it attempted unsuccessfully to obtain the required

¹¹ *Northeast Cellular*, 897 F.2d at 1166 (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir.1969), *aff'd*, 459 F.2d 1203 (1973), *cert. denied*, 409 U.S. 1027 (1972)).

¹² *WAIT Radio*, *supra*, 418 F.2d at 1157.

¹³ See, e.g., Wendell & Associates Request to Waive the Period to Construct Unbuilt Station WKNJ (AM) Harriman, New York, File No. BMAP-200001023ACF, *Memorandum Opinion and Order*, 17 FCC Rcd 18576, 18578 ¶ 7 (2002) ("vendor problems, whatever their cause, are ordinary risks for which businesses should prudently plan, and would not generally form the basis for a waiver"). See also Application for Review of Specialized Mobile Radio Station WZZ-545, licensed to Motek Engineering San Jose, California, *Memorandum Opinion and Order*, 98 F.C.C.2d 323 ¶¶ 4, 10 (1984) ("delays in the manufacture or shipment of equipment provide no basis for an extension ... The nature of [the licensee's] relationship with its supplier is the result of [its] independent business judgment and may not be used to absolve [it] or any other licensee from the ... requirements [of] our rules."); Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, *Order*, 16 FCC Rcd 18330, 18354 Statement of Commissioner Michael Copps (2001) ("waivers will not be granted merely ... because of delays by a vendor").

¹⁴ See, e.g. Winnebago Cooperative Telephone Association, File No. EB-02-TS-663, *Order*, 18 FCC Rcd 14332, 14333 ¶ 4 (EB 2003) (*Winnebago*) (Commission grants waiver where petitioner ordered equipment but after installing it, "found certain components of the EAS system missing [and] its vendor's delivery of the missing components has been delayed."); D&P Cable, Inc., File No. EB-02-TS-673, *Order*, 18 FCC Rcd 14336, 14337 ¶ 3 (EB 2003) (*D&P Cable*) (Commission grants waiver where petitioner installed the equipment and "once installed [found that the] equipment did not work properly ... and submits that although its vendor promised prompt delivery of replacement EAS equipment, there has been a delay").

¹⁵ See Letter, Marjorie Conner, Counsel to Southern Communications Volunteers, Inc., to Thomas Beers, Chief, Policy and Licensing Division, Public Safety and Homeland Security Bureau, Federal Communications Commission (dated Aug. 24, 2012) (SCV Letter), at 1.

¹⁶ *Id.* at 2.

¹⁷ See Letter, James N. Moskowitz, Counsel to Telecommunications Management, LLC and Avenue Broadband Communications, Inc., to Thomas Beers, Chief, Policy and Licensing Division, Public Safety and Homeland Security Bureau, Federal Communications Commission (dated September 5, 2012) (New Wave Letter), at 2, 3.

equipment from other vendors, finally ordering the equipment from its initial vendor in June, 2012.¹⁸ Lakeview states that it first attempted to order its equipment in late May, 2012, and was told that the equipment would not be delivered until 6 to 8 weeks after the June 30, 2012 deadline.¹⁹ Reach states that it first attempted to order its equipment from the manufacturer in “spring, 2012,” and was told to order the equipment from the National Cable Television Cooperative, which Reach did on June 25, 2012.²⁰ None of these explanations show the kind of exogenous circumstances necessary to a showing of special circumstances. Applegate has also failed to make a showing of special circumstances in its waiver request because, despite a request for further information from the Commission, Applegate has not provided an explanation as to why it waited until May 7, 2012 to order CAP-compliant EAS equipment.²¹ Thus, in each of the petitions we consider today, the Petitioners have failed to show the special circumstances necessary to justify a deviation from section 11.56 of the Commission’s rules.

7. Moreover, we find that the lack of due diligence shown by the Petitioners to obtain the required equipment in a timely fashion is inconsistent with the public interest and thus offers no justification for the requested waiver. The Commission implemented the June 30 deadline for CAP compliance in order to ensure that “Next Generation EAS” would be transmitted in an efficient, rapid, and secure manner over a variety of formats.²² The Commission acknowledged EAS Participant concerns with the potential difficulties associated with the introduction of a new technology such as CAP, and provided EAS Participants with a series of compliance windows, the final one of which exceeded nine months.²³ Despite this, SCV did not order its equipment until May 24, 2012,²⁴ New Wave did not order its equipment until June, 2012,²⁵ Lakeview did not order its equipment until late May, 2012,²⁶ Reach did not attempt to order its equipment until late spring 2012 at the earliest,²⁷ and Applegate did not order its CAP-compliant equipment until May 7, 2012.²⁸ As we discuss in paragraph 6 above, this delay, to the extent it was explained, was not attributable to circumstances beyond the Petitioner’s business choice, and so does not provide justification for rule waiver.

¹⁸ *Id.*

¹⁹ See Letter, James N. Moskowitz, Counsel to Lakeview Cable, Inc., to Thomas Beers, Chief, Policy and Licensing Division, Public Safety and Homeland Security Bureau, Federal Communications Commission (dated September 7, 2012) (Lakeview Letter), at 1.

²⁰ See Letter, Scott C. Friedman, Counsel to RB3, LLC and Arklaoktex, LLC, d/b/a Reach Broadband, to Thomas Beers, Chief, Policy and Licensing Division, Public Safety and Homeland Security Bureau, Federal Communications Commission (dated September 7, 2012) (Reach Letter), at 3.

²¹ See Letter, Thomas Beers, Chief, Policy and Licensing Division, Public Safety and Homeland Security Bureau, Federal Communications Commission (dated June 28, 2012), to Lindsay Riggs, Applegate Media, Inc. (dated Oct. 5, 2012).

²² See *Fourth Report and Order*, 26 FCC Rcd at 13710, 13711-12 ¶¶ 1, 4.

²³ Indeed, EAS Participants have been on notice since 2007 that they would need to purchase CAP-compliant EAS equipment. See *Second Report and Order*, 22 FCC Rcd 13275, 13288 ¶ 26.

²⁴ See SCV Letter at 1.

²⁵ See New Wave Letter at 2.

²⁶ See Lakeview Letter at 1.

²⁷ See Reach Letter at 3.

²⁸ See Applegate Petition at 1.

8. In conclusion, we find that the Petitioners have failed to show special circumstances to justify departure from the requirements of section 11.56(a) of the Commission's rules, and that it is not in the public interest to grant waiver of Section 11.56(a) to Applegate and SCV. We therefore deny their waiver petitions.

IV. Ordering Clauses

9. Accordingly, IT IS ORDERED that pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Sections 1.3 and 1.8 of the Commission's Rules, 47 C.F.R. §§ 1.3, 1.8, the "Requests for Waiver," filed by Southern Communications Volunteers, Inc. and the Petitions for Waiver filed by Telecommunications Management, LLC and Avenue Broadband Communications, Inc.; Lakeview Cable, Inc.; RB3, LLC and Arklaoktex, LLC, d/b/a Reach Broadband; and Applegate Media, Inc., ARE DENIED.

10. This action is taken under delegated authority pursuant to Sections 0.191 and 0.392 of the Commission's rules, 47 C.F.R. §§ 0.191, 0.392.

FEDERAL COMMUNICATIONS COMMISSION

David Turetsky
Chief
Public Safety and Homeland Security Bureau