

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

In the Matter of)	
)	
SM Radio Productions, Inc.)	File No.: EB-IHD-14-00014934
Westin, Connecticut)	

CITATION AND ORDER

MISUSE OF EAS TONES

Adopted: December 9, 2014

Released: December 9, 2014

By the Chief, Enforcement Bureau:

I. NOTICE OF VIOLATION

1. The Emergency Alert System (EAS) is a national public warning system designed to supply the communications capability to the President of the United States to address the public during a national emergency. Federal, state, and local authorities also may use the EAS to deliver other types of emergency information, such as AMBER alerts and weather information to targeted areas. The specific sounds comprising the EAS tones, which are defined in our rules, are well-known warning signals to the American public and are designed to alert the public and to activate the emergency communication system when necessary. To preserve the unique purpose of the EAS tones, the Federal Communications Commission (Commission) enforces laws prohibiting any person from using the tones, or simulations of them, except in actual emergencies or authorized tests of the EAS. Misuse of actual or simulated EAS tones undermines the system by desensitizing the public to the significance of the tones in a real emergency.

2. In this **CITATION AND ORDER** (Citation), we notify SM Radio Productions, Inc. (SM Radio) that it willfully and repeatedly violated the Communications Act and Commission rules by transmitting or causing the transmission of the EAS codes or Attention Signal, or simulations thereof (EAS Tones), in the absence of an actual emergency or authorized test of the EAS. We therefore direct SM Radio to take immediate steps to comply with FCC rules and statutory requirements that prohibit such misuse of EAS Tones. If SM Radio fails to comply with these laws, it may be liable for significant fines.

3. We issue this Citation pursuant to Section 503(b)(5) of the Communications Act of 1934, as amended (the Communications Act or Act), which prohibits the Commission from imposing monetary forfeitures against non-regulatees who violate Commission rules or the Act unless and until the Commission (a) issues a citation to the violator; (b) provides the violator a reasonable opportunity to respond; and (c) the violator subsequently engages in conduct described in the citation.¹ Accordingly, SM Radio is hereby on notice that if it subsequently engages in any conduct of the type described in this Citation, and specifically any violation of Section 11.45 of the Rules or Section 325(a) of the Act, it may be subject to civil penalties, including but not limited to, substantial monetary forfeitures. In assessing

¹ 47 U.S.C § 503(b)(5).

such forfeitures, the Commission may consider both the conduct that led to this Citation and the conduct following it.²

II. BACKGROUND

4. To ensure that the EAS Attention Signal remains uniquely associated with actual emergency announcements, and thus retains its ability to instantly command the public's attention, the Commission prohibits misuse of the EAS Tones by any person.³ Frivolous, casual, or other uses of EAS Tones for reasons other than their defined purpose can desensitize listeners to the warning tones and thereby undermine the effectiveness of the system in the event of an actual emergency.

5. Specifically, Section 11.45 of the Commission's rules (Rules) states in relevant part that "No person may transmit or cause to transmit the EAS codes or Attention Signal, or a recording or simulation thereof, in any circumstances other than in an actual emergency or authorized test of the EAS."⁴ In addition, Section 325(a) of the Act states, in relevant part, that "No person within the jurisdiction of the United States shall knowingly utter or transmit, or cause to be uttered or transmitted, any false or fraudulent signals of distress or communications relating thereto."⁵

6. According to a complaining listener of Sirius XM Radio, Inc. (Sirius), SM Radio transmitted or caused the transmission of "the EAS warning signal" —not in connection with an emergency or EAS test, but rather as part of a commercial promoting a comedy tour (Promotion). The listener claims to have heard the Promotion on Sirius Channel 127 during the December 4, 2013 episode of "The Stephanie Miller Show" (Program).⁶

7. Because the complaint suggested a violation of the EAS rules by Sirius, a satellite radio provider and Commission regulatee, the Enforcement Bureau directed Sirius to address the allegations.⁷ Sirius did so and provided a recording and transcript of the Promotion, as well a declaration from an

² See S. Rep. No. 95-580, 95th Cong., 1st Sess. at 9 (1977) (If a person or entity that has been issued a citation by the Commission thereafter engages in the conduct for which the citation of violation was sent, the subsequent notice of apparent liability "would attach not only for the conduct occurring subsequently but also for the conduct for which the citation was originally sent.") (emphasis added).

³ See, e.g., *Emergency Alert System False, Fraudulent or Unauthorized Use of the Emergency Alert System Attention Signal and Codes is Strictly Prohibited*, FCC Enforcement Advisory, Public Notice, 28 FCC Rcd 15438 (Enf. Bur. 2013).

⁴ 47 C.F.R. § 11.45.

⁵ 47 U.S.C. § 325(a).

⁶ See Complaint, FCC Form 2000E, 13-C00545888-1 (submitted Dec. 4, 2013) (on file in EB-IHD-14-00014934).

⁷ See Letter from Jeffrey J. Gee, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, to Patrick L. Donnelly, Executive Vice President, Sirius XM Radio Inc. (April 4, 2014).

officer of SM Radio.⁸ According to SM Radio, it inserted the EAS Tone into programming that SM Radio “then transmitted to Sirius.”⁹

8. The record before us establishes that SM Radio violated both Section 11.45 of the Rules and Section 325(a) of the Act by transmitting or causing the transmission of the EAS Tones in the absence of an EAS test or actual emergency. The Promotion contains “the EAS Attention Signal for less than a second and a half” and is clearly audible at the beginning of the Promotion.¹⁰ The Promotion advertised a performance of “The Sexy Liberal Comedy Tour,” and the EAS Attention Signal embedded therein was not associated with an actual emergency or authorized test of the EAS.¹¹

9. SM Radio produces the Program and provides it to Sirius for transmission to its subscribers. SM Radio, however, did not produce the Promotion but acquired it from an independent contractor. An SM Radio employee reviewed the Promotion before inserting it into the Program, acting under the mistaken belief that the EAS Tone in the Promotion was an outdated tone associated with the precursor to the EAS, and too brief to be of concern.¹² SM Radio then transmitted the Program—with the Promotion containing the EAS Attention Signal embedded therein—via satellite to Sirius for simultaneous retransmission to Sirius subscribers. This transmission aired six times between December 4, 2013, and January 28, 2014.¹³

10. Based on this sequence of events, we find that SM Radio knowingly inserted promotional material containing the EAS Attention Signal into programming that it intentionally transmitted to Sirius for retransmission to members of the public. In this way, SM Radio violated Section 11.45 of the Rules by transmitting or causing the transmission of an EAS Attention Signal in the absence of an EAS test or actual emergency. Moreover, the transmission of the EAS Attention Signal, absent an actual emergency or authorized test of EAS, also constitutes a false distress communication.¹⁴ Thus, we further find that SM Radio violated Section 325(a) of the Act.

III. RESPONDING TO THIS CITATION

11. SM Radio may respond to this Citation and challenge the factual and legal findings herein within 30 calendar days from the release date of this Citation either through (1) a written statement,

⁸ See Letter from Patrick L. Donnelly, Executive Vice President, General Counsel, and Secretary, Sirius XM Radio Inc., to Marlene H. Dortch, Secretary, FCC (Apr. 28, 2014). Sirius requested confidential treatment of its entire response, to include material contained in the accompanying declarations. Sirius subsequently amended and narrowed the scope of its request, following discussions with Commission staff. See Letter from James S. Blitz, Vice President, Regulatory Counsel, Sirius XM Radio, Inc., to Marlene H. Dortch, Secretary, FCC (October 10, 2014) and redacted response (Response). Because this Citation does not disclose material identified as confidential under Sirius’s amended request, we defer ruling on the amended request unless and until necessary. See 47 C.F.R. § 0.459(d)(3) (the Commission may defer acting on requests for confidential treatment of materials submitted to the Commission until a request for inspection has been made pursuant to § 0.460 or § 0.461. Such materials will be accorded confidential treatment until the Commission acts on the confidentiality request and all subsequent appeal and stay proceedings have been exhausted).

⁹ See *id.* at 3 and SM Radio Declaration at 1, para. 4 (SM Radio Declaration).

¹⁰ See *id.* and CD containing a recording of the Promotion.

¹¹ Response at 3, SM Radio Declaration at 1, para. 3.

¹² SM Radio Declaration at 1, para. 7.

¹³ See *id.* at 1, para. 5.

¹⁴ See 47 U.S. § 325(a); see also *Turner Broadcasting System, Inc.*, Notice of Apparent Liability, 28 FCC Rcd 15455, 15458–59, paras. 9–10 (Enf. Bur. 2013) (fining cable provider \$25,000 for its transmission of promotional material containing EAS tones or simulations thereof absent an emergency or test, in violation of both Section 11.45 of the Rules and Section 325(a) of the Act) (forfeiture paid).

(2) a teleconference interview, or (3) a personal interview at the Commission Field Office nearest to SM Radio's place of business.

12. If SM Radio would like to arrange a teleconference or personal interview, it may contact Dana Leavitt at (202) 418-1420. We note that the Commission Field Office nearest SM Radio is located in New York City. We further note that such teleconference or interview must take place within 30 calendar days of the date of this Citation. If SM Radio prefers to submit a written response with supporting documentation, it must send the response within 30 calendar days of the date of this Citation to the contact and address provided in paragraph 13, below.

13. All written communications should be sent to the address below.

Dana E. Leavitt, Special Counsel, Investigations and Hearings Division
Federal Communications Commission
445 12th Street, SW
Room 4-C330
Washington, DC 20554

Re: EB- IHD-14-00014934

14. Upon request, the Commission will make reasonable accommodations for persons with disabilities. If applicable, SM Radio should provide a description of the accommodation required, and include as much detail as possible, and also provide contact information. SM Radio should allow at least five (5) business days advance notice; last minute requests will be accepted, but may be impossible to fill. SM Radio should send an e-mail to fcc504@fcc.gov or call the FCC's Consumer & Governmental Affairs Bureau:

For sign language interpreters, CART, and other reasonable accommodations:

202-418-0530 (voice), 202-418-0432 (tty);

For accessible format materials (braille, large print, electronic files, and audio format):
202-418-0531 (voice), 202-418-7365 (tty).

15. We advise SM Radio that it is a violation of Section 1.17 of the Rules (47 C.F.R. § 1.17) for any person to make any false or misleading written or oral statement of fact. Specifically, no person shall:

(1) In any written or oral statement of fact, intentionally provide material factual information that is incorrect or intentionally omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading; and

(2) In any written statement of fact, provide material factual information that is incorrect or omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading without a reasonable basis for believing that any such material factual statement is correct and not misleading.¹⁵

16. Further, the knowing and willful making of any false statement, or the concealment of any material fact, in reply to this Citation is punishable by fine or imprisonment under 18 U.S.C. § 1001.

¹⁵ 47 C.F.R. § 1.17.

17. Violations of Section 1.17 of the Rules or the criminal statute referenced above may result in further legal action, including monetary forfeitures pursuant to Section 503 of the Communications Act.¹⁶

18. Finally, we warn SM Radio that, under the Privacy Act of 1974, 5 U.S.C. § 552a(e)(3), Commission staff will use all relevant material information before it, including information disclosed via interviews or written statements, to determine what, if any, enforcement action is required to ensure SM Radio's compliance with the Communications Act and the Commission's rules.

IV. FUTURE VIOLATIONS

19. If, after receipt of this Citation, SM Radio again violates Section 11.45 of the Commission's rules, or Section 325(a) of the Communications Act, by engaging in conduct of the type described herein, the Commission may impose monetary forfeitures for each such violation.¹⁷ For example, the base forfeiture for violations of Section 11.45 violation and Section 325(a) is \$8,000.¹⁸ The Commission may further adjust the forfeiture based on enumerated statutory factors, which include the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.¹⁹ In particular, when evaluating the circumstances, extent, and gravity of an EAS violation, the Commission may take into consideration (1) the number of networks over which the transmissions occurred; (2) the number of repetitions (i.e., the number of individual transmissions); (3) the duration of the violation (i.e., the number of days over which the violation occurred); (4) the audience reach of the transmissions (e.g., nationwide or local); and (5) the extent of the public safety impact (e.g., whether an EAS activation is triggered).²⁰ Further, as discussed above, the Commission may assess forfeitures on both the conduct that led to this Citation and the conduct following it.²¹

V. ORDERING CLAUSES

20. **IT IS ORDERED** that pursuant to Sections 4(i) and 4(j) of the Communications Act of 1934, as amended, SM Radio Productions, Inc., must cease and desist from misusing the EAS Tones.²²

¹⁶ 47 U.S.C. § 503.

¹⁷ See 47 U.S.C. § 503; 47 C.F.R. § 1.80. Base forfeiture amounts are subject to adjustment for inflation (*see* 47 C.F.R. § 1.80(b)(9)), and the forfeiture amount applicable to any violation will be determined based on the statutory amount designated at the time of the violation.

¹⁸ See 47 C.F.R. §§ 1.80(a), (b) (listing \$8,000 base forfeiture for false distress communications).

¹⁹ See 47 U.S.C. § 503(b)(2)(E); 47 C.F.R. § 1.80(b)(8).

²⁰ See, e.g., *Turner Broadcasting System, Inc.*, Notice of Apparent Liability for Forfeiture, 29 FCC Rcd 752, 757, paras. 12–13 (2014) (\$200,000 forfeiture for misuse of EAS tones) (forfeiture paid); *Viacom, Inc., et al.*, Notice of Apparent Liability for Forfeiture, 29 FCC Rcd 2548, 2565–66, paras. 36–37 (2014) (proposing \$1,930,000 in fines against three companies for misusing EAS tones).

²¹ See paragraph 2, *supra*.

²² See 47 U.S.C. §§ 154(i), 154(j).

21. **IT IS FURTHER ORDERED** that a copy of this Citation shall be sent both by First Class U.S. Mail and Certified Mail, Return Receipt Requested, to SM Radio Productions, Inc., 31 Hemlock Ridge Road, Westin, CT 06883, and its counsel, Lanny J. Davis, Lanny J. Davis & Associates, LLC, 1900 M Street NW, Suite 300, Washington, DC 20036.

FEDERAL COMMUNICATIONS COMMISSION

Travis LeBlanc
Chief, Enforcement Bureau