
BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1222

MULTICULTURAL MEDIA, TELECOM AND INTERNET
COUNCIL, ET AL.,

PETITIONERS,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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1. Parties.

Petitioners are the Multicultural Media, Telecom, and Internet Council, Inc. (“MMTC”) and the League of United Latin American Citizens, Inc. (“LULAC”). Respondents are the Federal Communications Commission (“FCC”) and the United States of America.

Asian Americans Advancing Justice, et. al. (“AAJC”) and Former FCC Officials are *amici curiae* in support of Petitioners. The National Association of Broadcasters is an *amicus curiae* in support of Respondents. There are no intervenors in this case.

2. Rulings under review.

The ruling at issue is *Review of the Emergency Alert System*, 31 FCC Rcd. 2414 (2016) (“*Order*”)(JA __). A summary of the *Order* was published in the Federal Register on May 6, 2016. *See* 81 Fed. Reg. 27, 342 (May 6, 2016).

3. Related cases.

Respondents are not aware of any related cases pending in this Court or any other court.

TABLE OF CONTENTS

Table of Authorities.....	iii
Glossary.....	vii
Jurisdiction	1
Questions Presented	2
Statutes and Regulations	2
Counterstatement.....	2
A. The Emergency Alert System	2
1. CAP	6
2. WEA.....	8
B. MMTC’s Petition and Procedural History	9
C. Order on Review	14
Summary of Argument.....	18
Standard of Review	22
Argument.....	23
I. THE COMMISSION REASONABLY DETERMINED NOT TO ADOPT THE PROPOSALS IN MMTC’S PETITION.....	23
A. The Commission Has No Authority To Mandate the President To Issue Alerts in Spanish.....	24
B. The Commission Does Not Regulate State and Local EAS Systems and the Relevant Factors in Disseminating Multilingual EAS Alerts are Largely Localized.	28
C. MMTC’S Designated Hitter Proposal is Technically and Practically Unfeasible.	30

II. SECTION 1 OF THE COMMUNICATIONS ACT IS A
STATEMENT OF POLICY THAT DOES NOT CREATE
SPECIFIC MANDATES FOR AGENCY ACTION.....34

III. THE FCC’S ORDER WAS NOT ARBITRARY AND
CAPRICIOUS.....44

IV. THE COMMISSION DID NOT IGNORE THE RECORD.....48

Conclusion.....52

TABLE OF AUTHORITIES

CASES

<i>Alianza Federal de Mercedes v. FCC</i> , 539 F.2d 732 (D.C. Cir. 1976).....	45
<i>Ass’n of Private Sector Colleges & Univs. v. Duncan</i> , 681 F.3d 427 (D.C. Cir. 2012).....	49
* <i>Bartholdi Cable v. FCC</i> , 114 F.3d 274 (D.C. Cir. 1997).....	45, 46
* <i>Busse Broad. Corp. v. FCC</i> , 87 F.3d 1456 (D.C. Cir. 1996).....	36
<i>Cablevision Sys. Corp. v. FCC</i> , 649 F.3d 695 (D.C. Cir. 2011).....	22, 38
<i>Cellco P’ship v. FCC</i> , 357 F.3d 88 (D.C. Cir. 2004).....	22
<i>Cellular Phone Taskforce v. FCC</i> , 217 F.3d 72 (2d Cir. 2000).....	40
* <i>Comcast Corp. v. FCC</i> , 600 F.3d 642 (D.C. Cir. 2010).....	37
<i>Consumer Elec. Ass’n v. FCC</i> , 347 F.3d 291 (D.C. Cir. 2003).....	22
<i>FERC v. Elec. Power Supply Ass’n</i> , 136 S.Ct. 760 (2016)	22
<i>Gary v. FTC</i> , 526 Fed.Appx. 146 (3d Cir. 2013).....	39
<i>Halim v. Donovan</i> , 951 F.Supp.2d 201 (D.D.C. 2013).....	39
<i>KPMG v. SEC</i> , 289 F.3d 109 (D.C. Cir. 2002).....	36
<i>Millar v. FCC</i> , 707 F.2d 1530 (D.C. Cir. 1983)	49
<i>Motion Picture Ass’n of Am. v. FCC</i> , 309 F.3d 796 (D.C. Cir. 2002).....	37
<i>Northwestern IN. Tel. Co. v. FCC</i> , 824 F.2d 1205 (D.C. Cir. 1987).....	45
<i>Primosphere Limited P’ship v. FCC</i> , 2003 WL 472239 (D.C. Cir. Feb. 21, 2003).....	36

<i>Prometheus Radio Project v. FCC</i> , 652 F.3d 431 (3d Cir. 2011)	38
<i>Pub. Citizen, Inc. v. Fed. Aviation Admin.</i> , 988 F.2d 186 (D.C. Cir.1993).....	49
<i>Soberal–Perez v. Heckler</i> , 717 F.2d 36 (2d Cir. 1983), <i>cert. denied</i> , 466 U.S. 929 (1984).....	40
<i>Washington Ass’n for Television & Children v. FCC</i> , 712 F.2d 677 (D.C. Cir. 1983).....	45

ADMINISTRATIVE DECISIONS

<i>1994 Report & Order, Amendment of Part 73, Subpart G, of the Commission’s Rules Regarding the Emergency Broadcast System</i> , 10 FCC Rcd. 1786 (1994)	46
<i>2014 Public Notice</i> , 29 FCC Rcd. 2682 (2014)	13, 14
* <i>Fifth Report & Order, Review of the Emergency Alert System</i> , 27 FCC Rcd. 642 (2012)	4, 5, 6, 7, 26, 48
<i>First Report and Order and Further Notice of Proposed Rulemaking, Review of the Emergency Alert System</i> , 20 FCC Rcd. 18625 (2005)	11, 35
<i>Notice of Proposed Rulemaking, Review of the Emergency Alert System</i> , 19 FCC Rcd. 15775 (2004)	5, 9
<i>Part 11 Public Notice</i> , 25 FCC Rcd. 2845 (2010)	13
<i>Report & Order, Wireless Emergency Alerts</i> , 2016 WL 5636963 (Sept. 29, 2016)	8, 9, 42
<i>Second Report & Order, Review of the Emergency Alert System</i> , 22 FCC Rcd. 13275 (2007)	11
<i>Sixth Report & Order, Review of the Emergency Alert System</i> , 30 FCC Rcd. 6520 (2015)	47

STATUTES

5 U.S.C. § 706(2)(A)	22
28 U.S.C. § 2342(1)	1
28 U.S.C. § 2344	1

	42 U.S.C. § 12131(1)	40
	42 U.S.C. § 12132	40
*	47 U.S.C. § 151	2, 19, 20, 36, 38, 39
	47 U.S.C. § 402(a).....	1
*	47 U.S.C. § 405(a).....	19, 34, 45
*	47 U.S.C. § 606	3, 24, 29, 48

REGULATIONS

*	47 C.F.R. § 11.1	4, 24
	47 C.F.R. § 11.2(b).....	25
	47 C.F.R. § 11.2(d).....	3
	47 C.F.R. § 11.31	4, 5
	47 C.F.R. § 11.33(a)(10)	32
	47 C.F.R. § 11.33(a)(9)	4, 32
*	47 C.F.R. § 11.51(m).....	25
	47 C.F.R. § 11.51(m)(2).....	4
	47 C.F.R. § 11.51(n).....	4
	47 C.F.R. § 11.52(d).....	32
	47 C.F.R. § 11.54	4
*	47 C.F.R. § 11.55(a)	4
	47 C.F.R. § 11.55(c)(4)	6, 41
	47 C.F.R. § 11.56	7

OTHER AUTHORITIES

	David Goodman, <i>Cell Phone Alerts Used in New York To Search for Bombing Suspect</i> , N.Y. TIMES, (Sept. 19, 2016)	8
*	Exec. Order No. 13407, 71 Fed Reg. 36975 (June 26, 2006).....	3, 24, 25
	Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 18, 2011).....	51

<i>Guidance to State and Local Governments and Other Federally Assisted Recipients Engaged in Emergency Preparedness, Response, Mitigation, and Recovery Activities on Compliance with Title VI of the Civil Rights Act of 1964, U.S. Dep't of Justice (Aug. 16, 2016).....</i>	<i>40</i>
<i>US State LEP Maps, https://www.lep.gov/maps/2012/national/US_state_LEP_descr.ACS_5yr.2012.htm (last visited Dec. 1, 2016)</i>	<i>28</i>

** Cases and other authorities principally relied upon are marked with asterisks.*

GLOSSARY

CAP	Common Alerting Protocol
EAS	Emergency Alert System
FCC	Federal Communications Commission
FEMA	Federal Emergency Management Agency
IPAWS	Integrated Public Alert Warning System
LP-M	Local Primary Multilingual
LP-S	Local Primary Spanish
MMTC	Multicultural Media, Telecom, and Internet Council
PEP	Primary Entry Point
WEA	Wireless Emergency Alerts

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BRIEF FOR RESPONDENTS

JURISDICTION

The *Order* (JA __) was released on March 30, 2016 and published in the Federal Register on May 6, 2016. Petitioners MMTC and LULAC (hereafter “MMTC”) timely filed their petition for review of the *Order* on July 1, 2016, within the sixty-day filing period prescribed by 28 U.S.C. § 2344. This Court has jurisdiction pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

QUESTIONS PRESENTED

1. Whether the Commission reasonably declined to adopt MMTC's proposals to modify the Emergency Alert System to require the dissemination of emergency alerts in languages other than English.
2. Whether the Commission's decision not to require multilingual alerts to be disseminated through the Emergency Alert System violates Section 1 of the Communications Act of 1934, 47 U.S.C. § 151.
3. Whether the Commission's decision not to require multilingual emergency alerts to be disseminated through the Emergency Alert System arbitrarily treats persons with limited proficiency in English differently than persons with auditory disabilities.
4. Whether the Commission's decision not to require multilingual emergency alerts to be disseminated through the Emergency Alert System was otherwise arbitrary and capricious.

STATUTES AND REGULATIONS

An addendum to this brief sets forth the relevant statutes and rules.

COUNTERSTATEMENT

A. The Emergency Alert System

The Emergency Alert System ("EAS") is a national public warning system through which television broadcasters, radio stations, and other entities that participate in the EAS deliver alerts to the public to warn them of impending

emergencies. The EAS is the successor to two prior national warning systems: CONELRAD (Control of Electromagnetic Radiation), established by President Harry Truman as the first national warning system in 1951, and the Emergency Broadcast System (EBS), established by President John F. Kennedy in 1963. In 1994, the Commission adopted rules replacing the Emergency Broadcast System with EAS. The EAS is grounded, *inter alia*, on the President's power to "suspend or amend" the rules governing radiofrequency stations and devices during a "state of public peril or disaster or other national emergency." 47 U.S.C. § 606; *Order* ¶ 3 (JA ___).

All television broadcasters, cable systems, and radio stations are required to participate in the EAS. 47 C.F.R. § 11.2(d). The Federal Emergency Management Agency ("FEMA") is chiefly responsible for "administer[ing] the [EAS] as a critical component of the public alert and warning system." Exec. Order No. 13407, 71 Fed Reg. 36975, at § 2(a)(ix) (June 26, 2006). The Commission serves in a supporting role to FEMA by "adopt[ing] rules to ensure that communications systems have the capacity to transmit alerts and warnings to the public," pursuant to the Communications Act. *Id.* § 3(b)(iii).

The primary purpose of the EAS is to provide the President with the "capability to provide immediate communications and information to the general public at the National, State and Local area levels during periods of national

emergency,” 47 C.F.R. § 11.1, such as in the event of a nuclear attack or other national catastrophe. In practice, however, the EAS has been used almost exclusively to distribute alerts issued by state and local governments, primarily regarding weather emergencies. *Fifth Report & Order, Review of the Emergency Alert System*, 27 FCC Rcd. 642, 646 ¶ 6 (2012) (“*Fifth Report & Order*”).

EAS Participants are required to broadcast Presidential and other federal alerts. 47 C.F.R. § 11.54; *Order* ¶ 3 (JA ___). By contrast, participants voluntarily decide whether to opt into broadcasting state and local EAS alerts. 47 C.F.R. § 11.55(a). Presidential alerts must be broadcast “immediately” upon receipt, and are not limited in duration. *Id.* §§ 11.51(m)(2), (n); 11.33(a)(9). Participants that have elected to broadcast state and local alerts must do so within 15 minutes of receipt, and such alerts are typically limited to two minutes. *See id.* §§ 11.51(n), 11.33(a)(9).

EAS alerts provide very basic information about an emergency, such as the identity of the entity originating the alert (*e.g.* FEMA, National Weather Service), the type of alert (*e.g.* hurricane warning), the areas affected, the duration of the alert, the time the alert was issued, and the call sign of the EAS Participant transmitting the alert. 47 C.F.R. § 11.31. Initiating an EAS message—whether at the national, state or local level—requires the initiator to enter certain codes into dedicated EAS equipment. All EAS alerts consist of four components: (1)

preamble and header codes (which identify the basic information described above); (2) audio attention signal; (3) audio message, if the alert originator chooses to include one; and (4) an “end of message” code. *Id.* The EAS system is designed to operate *automatically*, both to minimize the risk of operator error and to facilitate EAS operation at stations that are unattended, of which there are many.

EAS alerts are disseminated through a “hierarchical, trickle down distribution system.” *Notice of Proposed Rulemaking, Review of the Emergency Alert System*, 19 FCC Rcd. 15775, 15780 ¶ 16 (2004). First, the sender creating the alert message—also known as an alert originator—converts a message containing the four parts described above into coded form. For a nationwide Presidential alert, FEMA is responsible for sending the message to Primary Entry Point (“PEP”) stations, a group of geographically diverse, high power radio stations designated by FEMA. *Fifth Report & Order*, 27 FCC Rcd. at 647 ¶ 7. The PEP stations in turn broadcast the EAS alert to Local Primary stations, a more numerous group of stations which monitor designated PEP stations for the national EAS alert. *Id.* The Local Primary stations rebroadcast national alerts to local EAS Participants. *Id.* Ultimately, the alert is relayed until all relevant EAS Participants have received the alert and have delivered it to the public. *Id.*

The alert distribution process for state and local alerts is similar. Specifically, the alert originators—such as state and local emergency management

authorities—initiate an EAS alert at State Primary Stations and State Relay Stations. These stations in turn transmit the alert to other EAS Participants in the affected areas. *Id.* This top-down system of distributing national, state, and local EAS alerts has been in place since the inception of the emergency alert system, and is therefore often referred to as the “legacy EAS.” *Order* ¶ 4 (JA __).

EAS Participants do not *create* the content of EAS alert messages, but merely pass along the content they receive from the alert originator. Thus, if the alert originator issues an EAS alert in English and Spanish, EAS Participants will broadcast the alert in both languages. In addition, FCC rules permit EAS Participants that provide non-English language programming to translate EAS alerts and broadcast them in the primary language of the EAS Participant. *Id.* ¶ 7 (JA __); 47 C.F.R. § 11.55(c)(4).

In addition to the measures to disseminate non-English alerts through the legacy EAS architecture, there are two other mechanisms the Commission has implemented to transmit emergency alerts to communities with limited English proficiency: the Common Alerting Protocol and Wireless Emergency Alerts.

1. **CAP**

The Common Alerting Protocol (“CAP”) is an open, interoperable format for distributing emergency alerts across multiple information networks, public safety alerting systems, and personal communications devices. It incorporates a

language developed and widely used for web documents, and therefore can be accepted by a variety of devices and systems, including over the Internet. *Fifth Report & Order*, 27 FCC Rcd. at 648 ¶ 10.

CAP alerts have the capacity to include a broad scope of information, including audio, video and data files, images, and links providing more detailed information about the emergency, such as streaming audio or video. *Id.* CAP alerts also provide alert originators the ability to translate alerts in multiple languages. *Id.* Thus, CAP offers an important way for persons with limited English proficiency to have access to emergency alerts.

On September 30, 2010, FEMA announced that it would adopt the CAP format for its Integrated Public Alert Warning System (“IPAWS”)¹, which in turn led the Commission to adopt rules requiring that all EAS Participants be able to receive CAP-formatted alerts.² The Commission also permits EAS Participants to

¹ IPAWS is a FEMA-administered network that encompasses four different emergency alerting systems including EAS.

² As a technical matter, enhanced information in CAP alerts such as video or data files cannot be encoded for transmittal through the legacy EAS architecture. The only portions of a CAP message that are encoded for the benefit of downstream monitoring stations through the legacy EAS system are the EAS header codes and any accompanying audio message. 47 C.F.R. § 11.56. CAP alerts that are delivered directly over the Internet, however, have none of these technical limitations.

utilize text-to-speech software to generate multiple language audio translations of enhanced text contained in a CAP alert message. *Order* ¶ 7 (JA ___).

2. WEA

Wireless Emergency Alerts (“WEA”) allow customers who own certain wireless phones and other enabled mobile devices to receive geographically-targeted, text-like messages alerting them of imminent threats to safety in their area.³ *Report & Order, Wireless Emergency Alerts*, 2016 WL 5636963 * 2 ¶ 6-7 (Sept. 29, 2016) (“*Wireless Emergency Alerts Order*”). In recent months, the most high-profile use of the WEA system was in alerting New York City residents of a bomb explosion in the Chelsea neighborhood, and urging them to be on the lookout for the terrorist suspect. *See* David Goodman, *Cell Phone Alerts Used in New York To Search for Bombing Suspect*, N.Y. TIMES, (Sept. 19, 2016), www.nytimes.com/2016/09/20/nyregion/cellphone-alerts-used-in-search-of-manhattan-bombing-suspect.html?_r=0.

The Commission recently adopted rules requiring WEA participants to support the transmission of Spanish-language alert messages, having concluded that “the record demonstrates that it is technically feasible” to do so. *Wireless*

³ EAS and WEA are separate alerting systems. EAS alerts are disseminated through television, radio, and satellite services, whereas WEA alerts are sent to mobile devices. WEA is a collaborative partnership that includes the cellular industry, the FCC, FEMA, and the Department of Homeland Security.

Emergency Alerts Order, 2016 WL 5636963 * 16 ¶¶ 40, 41. Thus, in the event of an emergency, text alerts in Spanish will be sent to all WEA-capable mobile devices where subscribers have specified Spanish as their preferred language. *Id.* The Commission explained that the emergency managers generating the WEA alerts—not the providers transmitting the message—would be responsible for translating alerts in Spanish. *Id.*

B. MMTC’s Petition and Procedural History

On August 4, 2004, the Commission issued a *Notice of Public Rulemaking* seeking comment on whether EAS was the most effective system for warning the American public about an impending emergency, and if not, how the EAS could be improved. 19 FCC Rcd. at 15775 ¶ 1. In so doing, the Commission explained that it “should also consider the needs of people with primary languages other than English when considering the best method of contacting the public during an emergency.” *Id.* ¶ 40.

A year later, in the wake of Hurricane Katrina, MMTC and others filed with the Commission a petition for immediate interim relief with six proposals to “provide non-English speaking persons in the United States with access to emergency information during times of local, state and national emergencies.” MMTC Petition for Immediate Interim Relief, EB Docket No. 04-296 at 3-4 (Sept. 22, 2005) (“MMTC Petition”) (JA ___).

Specifically, MMTC asked the Commission to: (1) require PEP stations to “air all Presidential level messages in both English and Spanish”; (2) create a Local Primary Spanish station (LP-S) designation and require state and local EAS plans to “designate” one or more EAS Participants as an LP-S station, in areas with substantial Spanish speaking populations; (3) create a Local Primary Multilingual station (LP-M) designation and require state and local EAS plans to “designate” one or more EAS Participants as an LP-M station, in areas where a “substantial proportion of the population has its primary fluency in a language other than English or Spanish”; (4) require that “at least one broadcast station in every market monitor and rebroadcast emergency information carried by local LP-S and LP-M stations”; (5) require that another station transmit non-English emergency information “if during an emergency a local LP-S or LP-M station” goes off the air; and (6) “encourage all broadcasters to assist LP-S or LP-M stations that have been damaged during an emergency to return to the air as soon as possible.” *Id.* at 13-15 (JA __). Under MMTC’s proposals, LP-S and LP-M stations would bear the responsibility of translating EAS alerts, if the alert originator did not itself issue an alert in Spanish or another language spoken by a significant portion of the community. *Id.* at 15 (JA __).

Two months later, the FCC formally sought comment on MMTC’s petition. *First Report and Order and Further Notice of Proposed Rulemaking, Review of the*

Emergency Alert System, 20 FCC Rcd. 18625 (2005). Among other things, the FCC asked how MMTC's proposals could be implemented and invited comment on any other proposals regarding how best to provide alerts to non-English speakers. The Commission also "encourage[d] that multilingual emergency information be provided in areas where a significant proportion of the population has its primary fluency in languages other than English." *Id.* ¶ 81. The majority of commenters contended that alert originators—not EAS Participants who simply transmit the alert they receive—should be responsible for generating multilingual alerts. *Order* ¶ 12 (JA ___). Commenters argued that it would be impractical and unduly burdensome for EAS Participants to translate or transcribe alerts in multiple languages at their facilities. *Id.*

In its *Second Report & Order, Review of the Emergency Alert System*, 22 FCC Rcd. 13275, 13295 ¶ 40 (2007), the Commission reiterated that non-English speakers should have access to EAS alerts and explained that the "first step" was requiring all EAS Participants to receive CAP alerts, which would allow alert originators to translate alerts in multiple languages. As for the proposals in MMTC's petition, the Commission noted that "Petitioner's request is broader than the formal EAS structure," *id.* ¶ 41, and sought more general comment on the technical, economic, practical, and legal issues involved in making emergency information accessible to non-English speaking communities. *Order* ¶ 13 (JA ___).

The majority of commenters opposed any obligation on EAS Participants to generate non-English alerts, contending that the responsibility for issuing multilingual alerts should rest with alert originators. *Id.*

On June 14, 2007, at the direction of the Commission, the Public Safety and Homeland Security Bureau (“Bureau”) convened a meeting with MMTC and other key stakeholders to discuss ways in which to transmit emergency alert information to non-English speakers. *Id.* n.46 (JA ___). Among the various topics was a discussion of MMTC’s so-called “designated hitter” plan. *Id.* Under the plan, MMTC envisioned that local English language broadcast stations would volunteer in advance to transmit multilingual emergency information before, during, and after an emergency at regular intervals. *Id.* Several of the participating stakeholders discussed developing joint approaches to multilingual alerting, including a plan to test the designated hitter model in Florida. *Id.* As a result, MMTC submitted a request to the FCC to defer action on the multilingual broadcasting issues in the *Second Report & Order* until December 31, 2008. *Id.* The designated hitter test was ultimately unsuccessful, according to MMTC, “due to the unwillingness of rank and file broadcasters to volunteer to be designated hitters.” *Id.* As a result, MMTC reiterated that the FCC “will have to adopt rules requiring these plans.” *Id.*

On March 25, 2010, the Bureau released the *Part 11 Public Notice*, 25 FCC Rcd. 2845 (2010), which sought comment on how the EAS rules would need to be changed to fully implement the obligation to process CAP-formatted alerts.

Although the public notice did not request comment specifically on MMTC's petition, the Bureau asked generally "what rule changes, if any, are necessary to our Part 11 rules to ensure access to a CAP-based EAS by people . . . who do not speak English." *Id.* As in the previous round of comments, the majority of commenters addressing the issue argued that alert message originators—not EAS Participants—must be responsible for issuing EAS alerts in languages other than English. *Order* ¶ 14 (JA ___). As for MMTC, it contended that CAP alerts did not go far enough in reaching communities with limited English proficiency in that they did not "provide the comprehensive information people need in an emergency – how to seek shelter; where to find food; when it is safe to return" *Id.* Therefore, MMTC requested that the Commission implement its petition. *Id.*

On March 11, 2014, the Bureau released the *2014 Public Notice*, 29 FCC Rcd. 2682 (2014), in an effort to refresh the record on MMTC's petition by, among other things, requesting updates on the state of multilingual EAS alerts and other potential solutions to facilitate multilingual alerts. The Bureau also sought updated comment on the specific proposals in MMTC's initial petition as well as a request that had not been included in the original petition. Specifically, MMTC asked that

broadcast stations within any given market be required to enter into emergency communications plans to support each other in the case of an emergency. *Id.* at 2686. Although all respondents generally supported the goals of MMTC's petition to provide emergency alerts to non-English speakers, EAS Participants opposed the methods MMTC proposed to achieve them.⁴ *Order* ¶ 15 (JA __). A number of entities that did not participate in the EAS supported MMTC's general goal but for the most part either did not address or did not directly support the methods requested by the petition.⁵ *Id.* (JA __).

C. Order on Review

In March 2016, the Commission adopted EAS rules in the *Order* under review. In doing so, the agency reaffirmed its commitment to helping ensure that EAS alerts are delivered “to as wide an audience as technically feasible, including

⁴ For example, the National Association of Broadcasters contended that “[r]equirements for EAS Participants to evaluate, edit or translate EAS alerts could undermine the accuracy, timeliness and uniformity of the information. Such a duty would increase the risk of imprecise translations of EAS messages and potential delays in alert dissemination.” Comments of the National Association of Broadcasters at 10-11 (May 28, 2014) (JA __).

⁵ For example, AAJC, amicus in support of MMTC, asserted that “it is the primary responsibility of message originators to make every effort to provide EAS alerts in multiple languages.” *Order* n.61 (JA __). This is at odds with MMTC's proposal that LP-S and LP-M stations bear the responsibility of translating EAS alerts, in the event the alert originator does not issue a multilingual alert. *See* Opening Brief for Petitioners at 42, n.8 (“an LP-S or LP-M . . . could easily be designated as an ‘alert originator’ for purposes of translating multilingual EAS alerts”) (“Pet. Br.”).

to those who communicate in a language other than English” *Order* ¶ 1 (JA ___). Under the new rules, the agency requires all EAS Participants to submit information describing: (1) any actions taken, either “individually, in conjunction with other EAS Participants in the geographic area, and/or in consultation with state and local emergency authorities[] to make EAS alert content available in languages other than English”; (2) “any future actions” planned . . . “in consultation with state and local emergency authorities, to provide EAS alert content in languages other than English”; and (3) any other pertinent information the EAS Participant wishes to provide, “including state-specific demographics on languages other than English spoken within the state, and identification of resources used or necessary to originate current or proposed multilingual EAS alert content.” *Id.* ¶ 22 (JA ___). The Commission explained that this rule was necessary to gather “sufficient and accurate information” on the existing state and local mechanisms to distribute multilingual alerts, to ensure that EAS Participants had examined their own efforts to disseminate multilingual EAS alerts and, if none were in place, to spur future action. *Id.* ¶ 21 (JA ___). To the extent that EAS Participants were not issuing multilingual alerts, the agency explained that this information could “provide insight into structural impediments that might be ameliorated by future Commission or federal action, if appropriate.” *Id.* ¶ 23 (JA ___).

The Commission found “scant support,” however, for MMTC’s proposals. *Id.* ¶ 32 (JA ___). The agency explained that “the vast majority” of commenters had maintained consistently that the state and local authorities that generate EAS alerts—not EAS Participants, as MMTC proposed—were in the best position to translate such alerts. *Id.* The agency observed that the record supports reliance on “voluntary arrangements” between EAS Participants and other parties on how best to “achieve multilingual solutions” tailored to the needs of respective communities. *Id.* While acknowledging that “MMTC has objected to reliance on voluntary mechanisms,” the Commission pointed out that “state involvement in the EAS is itself voluntary, as is participation in state and local EAS systems by EAS Participants.” *Id.* ¶ 28 (JA ___).

As for MMTC’s “designated hitter” plan, the Commission found that MMTC’s proposed methods for implementing the plan “within the EAS architecture lack specificity” and therefore made it “difficult to determine whether or how such implementation could be effected from the federal level.” *Id.* ¶ 33 (JA ___). *See id.* n.85 (finding it “unclear . . . how a designated hitter station would know whether an LP-S or LP-M station . . . had become incapacitated,” or how the station “could effect a translation of the EAS alert content within the framework of the EAS architecture without significant local consent and coordination”).

The agency also pointed to the concerns of commenters that the petition “implicate[d] technical problems that could compromise the operation of the EAS.” *Id.* ¶ 33 (JA __). As the agency explained, an EAS Participant seeking to broadcast a translation of an a EAS alert would have to “manually (1) ensure the entire length of the alert, including the translated audio portion, did not exceed two minutes, and (2) complete the translation and insertion processes within 15 minutes,” *id.* ¶ 6 (JA __), which is contrary to the EAS’ design “to operate automatically.” *Id.* ¶ 5 (JA __). Nor could the EAS Participant simply evade the 15 minute window by generating a new alert. Such an alert would be “rejected as a duplicate alert by EAS equipment . . . where the original version of such alert had previously been received . . .” *Id.* n.21 (JA __). *See id.* n.86 (JA__) (referring to NCTA’s observation “that the two-minute duration of state and local EAS alert messages constrains the number of translations that can practically be included in any legacy EAS alert,” and that “multiple alerts, each in a separate language,” would likely result in the rejection of all but the initial alert as duplicates).

“Against this backdrop, and given that options for effectuating multilingual EAS alerts at the local level necessitates voluntary solutions tailored to the relevant multilingual needs of the community served,” the Commission decided against “moving forward with the [MMTC] Petition’s specific proposals.” *Id.* ¶ 34 (JA __). The Commission therefore granted MMTC’s petition only insofar as its

actions were consistent with MMTC's general goal of facilitating the dissemination of multilingual EAS alerts, but otherwise denied MMTC's requests.

Id.

SUMMARY OF ARGUMENT

1. The Commission reasonably determined not to adopt the proposals in MMTC's petition. *First*, the agency has no authority to compel the President to issue national EAS alerts in Spanish (or any particular language), a fact which MMTC conceded in the proceeding below. In addition, the Commission reasonably declined to require EAS Participants—which serve as passive conduits of alerts—to also be responsible for generating multilingual alerts. Doing so would in many cases require EAS Participants to manually translate alerts, leading to a higher risk of error and delays. Such an approach would also undermine the automated design of EAS.

Second, the Commission declined to require state and local EAS systems to designate stations that would be responsible for generating multilingual alerts. The Commission does not regulate state and local use of the EAS, except to ensure that they meet the basic requirements for monitoring and broadcasting *national* EAS messages. Moreover, because the factors in disseminating multilingual EAS alerts vary by locality, depending on local area population demographics, the Commission reasonably concluded that the decision to issue multilingual alerts is

best rendered by the EAS Participants and state and local emergency authorities that originate alerts.

Third, the Commission determined that MMTC's designated hitter plan was technically unfeasible and impractical. A translated version of an EAS alert might be rejected by monitoring stations as a duplicate of the original English-language message. In addition, because the versions of the alert would be broadcast by any stations receiving it in the relevant geographic area, defined by the EAS header codes, a monitoring station would run the risk of broadcasting a message in a language not representative of any segment of that station's viewers or listeners.

2. MMTC's contention that the Commission violated Section 1 of the Communications Act, 47 U.S.C. § 151, by refusing to require multilingual EAS alerts is barred at the outset by Section 405(a) of the Communications Act, 47 U.S.C. § 405(a). Before the Commission, MMTC asserted that Section 1 embodied policy goals. Before this Court, MMTC contends that Section 1 imposes—and the Commission has violated—mandatory duties. The Commission had no opportunity to address that latter contention below.

In any event, MMTC's argument fails on the merits. This Court has held that Section 1 is a statement of policy that does not by itself authorize, much less compel, the Commission to take any particular action. Moreover, Section 1 states that the Commission should endeavor to make available a nationwide

communications network to all people of the United States without discrimination only “so far as possible.” 47 U.S.C. § 151. The Commission is thereby given broad discretion to take account of technical and practical constraints in determining how best to execute Congress’ statutory goals. Finally, the Commission has made significant efforts, outside the contours of the legacy EAS system, to advance the dissemination of non-English alerts to communities with limited English proficiency. The Commission’s actions are therefore entirely consistent with Section 1.

3. The Commission’s *Order* also does not arbitrarily distinguish between persons with auditory disabilities and those with limited proficiency in the English language.

Like its Section 1 argument, MMTC’s disparate treatment argument is barred under Section 405(a) because it was not sufficiently raised before the Commission. Nowhere in its comments or letters to the agency did MMTC allege that persons with disabilities and those with limited English proficiency were similarly situated, and that treating them differently would be arbitrary and capricious.

MMTC’s claim also fails on the merits. In a separate and unrelated order, the Commission amended the rules for visual captioning and audio of EAS alerts to assist persons with disabilities, but these actions simply clarified requirements that

had long been in place. More importantly, unlike MMTC's proposals—which would have required an overhaul of the EAS architecture—the changes to the existing EAS rules to assist persons with disabilities did not require altering the functional operation of the EAS itself.

4. MMTC's remaining arguments are unavailing. The Commission did not ignore the majority of comments supportive of MMTC's petition. On the contrary, the agency readily acknowledged that all commenters supported MMTC's general goal of disseminating non-English EAS alerts to communities with limited English proficiency. However, the Commission correctly pointed out that the vast majority of commenters did not endorse MMTC's proposal requiring EAS Participants to bear the responsibility of generating multilingual EAS alerts. In addition, the Commission reasonably chose not to assess the costs and benefits of MMTC's proposals because it had already determined that they could not be implemented within the existing EAS architecture. Finally, the Commission's decision not to adopt MMTC's proposals was not "manifestly unreasonable." The Commission reasonably determined that it was not possible to implement the proposals to facilitate the dissemination of multilingual alerts within the technical constraints of the EAS architecture.

STANDARD OF REVIEW

MMTC bears a heavy burden to establish that the *Order* on review is “arbitrary, capricious [or] an abuse of discretion.” 5 U.S.C. § 706(2)(A). Under this “highly deferential” standard, the order is entitled to a presumption of validity. *E.g.*, *Cellco P’ship v. FCC*, 357 F.3d 88, 93 (D.C. Cir. 2004). A court is not to ask “whether a regulatory decision is the best one possible or even whether it is better than the alternatives.” *FERC v. Elec. Power Supply Ass’n*, 136 S.Ct. 760, 782 (2016). Instead, the court must uphold a rule if the Commission “examine[d] the relevant [considerations] and articulate[d] a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made.” *Id.* The order must be affirmed unless the agency failed to consider relevant factors or made a clear error in judgment. *E.g.*, *Consumer Elec. Ass’n v. FCC*, 347 F.3d 291, 300 (D.C. Cir. 2003). Finally, APA review is especially deferential where, as here, “the decision under review requires expert policy judgment of a technical, complex, and dynamic subject.” *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 714 (D.C. Cir. 2011) (citation omitted).

ARGUMENT

I. THE COMMISSION REASONABLY DETERMINED NOT TO ADOPT THE PROPOSALS IN MMTC'S PETITION.

In the *Order* under review, the Commission adopted a reporting requirement for EAS Participants to ensure that the agency has accurate information on existing mechanisms to distribute multilingual alerts at the state and local levels, as well as to prompt EAS Participants to examine their own efforts to disseminate multilingual EAS alerts and if none were in place, to spur future action. However, the Commission declined to adopt MMTC's specific proposals, which involved: (1) requiring PEP stations to "air all Presidential level messages in both English and Spanish"; (2) creating a Local Primary Spanish station (LP-S) designation and requiring state and local EAS plans to "designate" one or more EAS Participants as an LP-S station, in areas with substantial Spanish speaking populations; (3) creating a Local Primary Multilingual station (LP-M) designation and requiring state and local EAS plans to "designate" one or more EAS Participants as an LP-M station, in areas where a "substantial proportion of the population has its primary fluency in a language other than English or Spanish"; (4) requiring that "at least one broadcast station in every market monitor and rebroadcast emergency information carried by local LP-S and LP-M stations"; (5) requiring that another station transmit non-English emergency information "if during an emergency a local LP-S or LP-M station" goes off the air; and (6) "encourag[ing] all

broadcasters to assist LP-S or LP-M stations that have been damaged during an emergency to return to the air as soon as possible.” MMTC Petition at 13-15 (JA ___).

The agency’s decision not to adopt MMTC’s proposals was a reasonable exercise of its broad authority in determining how best to effectuate the goals of the EAS within the technical constraints of the EAS architecture.

A. The Commission Has No Authority To Mandate the President To Issue Alerts in Spanish.

First, the Commission declined to revise its rules to require that “PEP stations [] air all Presidential level messages in both English and Spanish.” *Order* ¶ 10 (JA ___). The President, through FEMA—not the Commission—exercises sole authority over the content of Presidential alerts. The fundamental purpose of the EAS is to provide the President with “the capability to provide immediate communications and information to the general public at the National, State and Local Area levels during periods of national emergency.” 47 C.F.R. § 11.1; *see also* 47 U.S.C. § 606 (providing the President with a means to temporarily take over facilities under the Commission’s jurisdiction in a national emergency). To that end, FEMA is responsible for “administer[ing] the [EAS] as a critical component of the public alert and warning system.” *See Exec. Order* No. 13407, 71 Fed. Reg. 36975 at § 2(a)(ix).

The Commission acts in support of FEMA by “adopt[ing] rules to ensure that communications systems have the capacity to transmit alerts and warnings to the public as part of the public alert and warning system.” *Id.* at § 3(b)(iii). The FCC has no authority to dictate the content of the Presidential EAS alert, including whether the message is translated in Spanish or any other language. Indeed, MMTC previously conceded in comments to the agency that “[t]he Commission cannot direct the President to provide translations.” *See* Initial Reply Comments of MMTC at 3 n.9 (Oct. 18, 2005) (JA ___).

Under the EAS rules, PEP stations are required to encode and broadcast Presidential alerts in whichever form the President chooses to use. 47 C.F.R. § 11.2(b). Therefore, if the Presidential EAS alert is delivered to PEP stations in English, Spanish, and Chinese, then the entire audio—including all translations—would be broadcast. Nothing needs to be implemented at the PEP stations to enable such multilingual messages. The purpose of the EAS is to ensure that Presidential alerts are broadcast “unchanged,” *see* 47 C.F.R § 11.51(m), and the EAS architecture has been designed to achieve that result.

To require EAS Participants to translate Presidential alerts into other languages would be “difficult if not impossible to do within the existing EAS architecture.” *Order* ¶ 2 (JA ___). PEP stations, along with all other EAS Participants, are required to broadcast Presidential alerts, unaltered, over an open

audio channel in *real time*. 47 C.F.R. § 11.51(m). Specifically, FEMA—upon receiving the EAS alert from the President—transmits the alert to PEP stations. These PEP stations in turn transmit the alert to other EAS Participants, effectively taking control of their facilities and opening up an audio channel to FEMA’s facilities for the Presidential alert. The alert message ends with the transmission of an End of Message code, which terminates the EAS transmission. *Fifth Report & Order*, 27 FCC Rcd. at 713 ¶ 201. Because PEP stations transmit the Presidential audio message in real time, they have no opportunity to insert a translation of the Presidential alert directly after the audio message, but before the End of Message code. *Order* ¶ 6 (JA ___).

Even if it were possible for a PEP station to insert a translation of the Presidential alert at the time the alert is transmitted, the translation would have to be manually performed by each PEP station, which could lead, as the Commission explained, to several problems. *Id.* First, each station would have to employ a translator or a translation service on a 24 hour-a-day, seven day-a-week basis, and there would be a significant risk that the translations would differ widely. Requiring a person on staff to translate alerts at every station would also impose

significant costs on EAS Participants, a concern that several commenters raised before the Commission.⁶

Moreover, because EAS Participants are required to broadcast Presidential alerts “immediately” upon receipt, *see* 47 C.F.R. § 11.51(m), stations would not have a window in which to translate the alert. Finally, manual translation runs counter to the original intent of EAS, which was designed to be a largely automated system that would enable EAS alerts to be transmitted quickly and efficiently without the need for human intervention. *Order* ¶ 5 (JA ___).

Nor would automatic translation software technology provide a solution to the problem. As some commenters pointed out, the accuracy of translation technology is insufficient to support automated translation for EAS purposes. *Order* n.72 (JA ___) (comments of AAJC explaining that language translation equipment is not typically effective for translating Asian languages); *CSRIC, Working Group 5A, Final Report* at 21 (JA ___) (“[W]hile there is software (or

⁶ *See, e.g.*, Comments of Adrienne Abbott-Gutierrez, Chair of the Nevada State Emergency Coordination Council at 1 (May 27, 2014) (explaining that none of the 32 foreign-language broadcasters in Nevada broadcast EAS alerts in their broadcast language—even when directly advised that they have this ability—because doing so would require “staff[ing] 24/7/365 to carry EAS tests and messages in their language and that is beyond their budgets.”) (JA ___); Comments of the Community Broadcasters Association at 4 (Jan. 24, 2006) (“Individuals stations cannot possibly have simultaneous translation staff on call 24 hours a day.”) (JA ___).

machine-based) language translation technology available, the state of the art is such that the meaning or intent of emergency alert messages may be mis-translated or confused”). Indeed, MMTC itself argued that translation technology “is not yet capable of capturing the nuances of language through which critical information is transmitted, making it essential that a real person convey lifesaving information in a variety of languages.”⁷ *Order* ¶ 18 (JA ___).

B. The Commission Does Not Regulate State and Local EAS Systems and the Relevant Factors in Disseminating Multilingual EAS Alerts are Largely Localized.

Next, the Commission reasonably declined to adopt MMTC’s proposal to require state and local EAS Plans to include a designated LP-Spanish station in each local area with a substantial Spanish speaking population, and a designated

⁷ To illustrate the difficulties in imposing a translation requirement on EAS Participants, consider the fifteen states in the United States with the highest percentage of individuals with limited English proficiency. *US State LEP Maps*, https://www.lep.gov/maps/2012/national/US_state_LEP_descr.ACS_5yr.2012.htm (last visited Dec. 1, 2016). All of these states host communities where multiple non-English languages are spoken. *Id.* For example, in the state of Massachusetts, 39% of Limited English Proficiency individuals speak Spanish, 15% speak Portuguese, 10% speak Chinese, 5% speak French Creole, 5% speak Vietnamese, and 26% speak other foreign languages. *Id.* The number of languages spoken in various communities increases the burden on EAS Participants, the majority of which lack the staff and resources to accurately translate alerts in foreign languages in the first place. *See Order* ¶ 5 (JA ___).

LP-Multilingual station in local areas where a substantial proportion of the population speaks a language other than English or Spanish.

In describing this proposal, MMTC explained that LP-S stations would, in addition to broadcasting Presidential alerts, “serve as the entry point for state and local authorities and the NWS [National Weather Service] to distribute emergency information in Spanish in accordance with local area EAS plans.” MMTC Petition at 14-15 (JA __). MMTC explained that it anticipated that existing Spanish and other non-English language stations would volunteer to serve as LP-S and LP-M designated stations and would be responsible for translating EAS alerts issued by the alert originator. *Id.* MMTC further recommended that the Commission could extract state compliance by withholding approval of state and local EAS plans that lacked such designations. *See* Initial Reply Comments of MMTC at 3 (JA __).

The Commission does not regulate state and local use of the EAS other than by ensuring that national alerts are transmitted. Section 706 of the Communications Act vests the Commission with authority to regulate emergency broadcasting, but it applies only to broadcasts of *national* emergencies. 47 U.S.C. § 606. Because Section 706 is silent as to the federal government’s authority to regulate state and local (*i.e.* non-national) emergency warnings, “state involvement in the EAS is itself voluntary, as is participation in state and local EAS systems by EAS Participants.” *Order* ¶ 28 (JA __). Accordingly, the Commission concluded

that “any action we take with respect to state and local EAS alert information is inherently voluntary in nature.” *Id.*

Moreover, as the *Order* explained, “the determinative factors in disseminating non-English EAS alert content are largely localized (*e.g.* local area population demographics) and contingent upon EAS Participants and state and local EAS facility capabilities.” *Id.* As such, any decisions on whether and how to disseminate non-English alerts are best rendered “by the EAS Participants and state and local emergency authorities that occupy this space.” *Id.* Not only would a “one-size-fits-all mandate” to issue non-English alerts be impractical given the technical constraints of the legacy EAS, the Commission stated, but it would also “undermine state and local efforts to administer their state and local EAS systems in ways” most useful to their respective communities. *Id.*

C. MMTC’S Designated Hitter Proposal is Technically and Practically Unfeasible.

MMTC’s petition also asked the Commission to revise the EAS rules to (i) “provide that at least one broadcast station in every market would monitor and rebroadcast emergency information carried by local LP-S and LP-M stations” and (ii) specify that if during an emergency a local LP-S or LP-M station loses its transmission capability, “stations remaining on the air should broadcast emergency information in the affected languages . . . until the affected LP-S or LP-M station

is restored in the air.” MMTC Petition at 15 (JA __). In subsequent filings to the Commission, MMTC described these proposals as its designated hitter plan.

As the *Order* explained, because MMTC’s designated hitter plan “lack[ed] specificity,” it was “difficult to determine whether or how” the proposal “could be effected from the federal level.” *Order* ¶ 33 (JA __). For example, the Commission questioned how a station that volunteered to serve as a designated hitter would know whether an LP-S or LP-M station in its geographic area had gone off the air in an emergency, or how the designated hitter station could generate a multilingual alert within the existing EAS architecture “without significant local consent and coordination.” *Id.* n.85 (JA __).

Although LP-S and LP-M stations theoretically could encode a translated version of the audio portion of a state or local EAS message and broadcast such an alert for the benefit of downstream monitoring stations, the Commission identified a number of technical and practical obstacles to doing so. First is the likelihood that a translated version of an emergency alert generated by an LP-S or LP-M station would be rejected by monitoring stations as a duplicate of the original

English-language message.⁸ *Order* n.21 (JA ___). Second, the LP-S and LP-M versions of the alert would be broadcast by any station receiving it in the relevant geographic area, defined by the EAS header codes. Depending on the relevant demographics, this could result in a monitoring station broadcasting in a language not representative of any segment of that station's listeners or viewers. Finally, state and local EAS audio messages are limited, in practice, to two minutes. 47 C.F.R. § 11.33(a)(9). As the *Order* describes, if EAS Participants aired an alert in both English and Spanish (or in multiple languages), stations might be hard-pressed to ensure that the combined audio could be contained in that two-minute window. *Order* n.86 (JA ___).

Finally, it is unclear whether MMTC's designated hitter proposal contemplates that EAS Participants would transmit EAS alerts (which generally only provide *notice* of an impending emergency) or more comprehensive emergency information. MMTC's brief as well as its previous comments to the agency suggest the latter approach. *See, e.g.*, Pet. Br. at 41 (Stations would "transmit emergency information before, during, and after an emergency at regular

⁸ All EAS Participants are required to monitor two sources for EAS alerts. *See* 47 C.F.R. § 11.52(d). Because translating audio will take more time to process than merely transmitting the original alert, a monitoring station in most cases will have received the original version of the alert prior to receiving the translated version. Its EAS device may therefore reject the translated version as duplicative. *Id.* § 11.33(a)(10).

intervals.”); Letter from MMTC to Marlene H. Dortch, Secretary, FCC at n.1 (Aug. 23, 2012) (JA __) (“A radio station serving as a designated hitter would air *programming* in another language during regular segments throughout the hour (e.g. ‘on the eights’) in cooperation, where possible, with other radio stations in the market which broadcast in that language (utilizing, for example, their staffs) when, during or in the wake of the emergency, there is no other source of emergency radio programming in the covered language.”) (emphasis added); Letter from MMTC to Marlene H. Dortch, Secretary, FCC (Aug. 4, 2010) (JA __) (“Since the Petition was filed in 2005, *the issue of notice of an emergency has been largely solved by the wireless industry* [T]he problem today is receiving information in-language during and after an emergency.”) (emphasis added); Reply Comments of MMTC at 2 (June 14, 2010) (JA __) (describing emergency information as “information about how and where to evacuate, where to find medical assistance, food and shelter, how to locate loved ones, and when it is safe to return home.”).

To the extent that MMTC is defining “emergency information” as ongoing information about an emergency such that is normally broadcast on a local news station, the EAS is not designed to serve as a platform for localized news programming. Any information other than the EAS header and end of message

codes and if present, an audio message, is not information that has ever been contemplated to be distributed via the legacy EAS system.⁹

II. SECTION 1 OF THE COMMUNICATIONS ACT IS A STATEMENT OF POLICY THAT DOES NOT CREATE SPECIFIC MANDATES FOR AGENCY ACTION.

MMTC contends that the “FCC’s failure to provide emergency alerts in languages other than English violates Section 1 of the Communications Act.” Pet. Br. at 25. This contention fails on the merits. This Court has held that Section 1 is a statement of policy, not an affirmative obligation on the agency to take any particular action. In addition, Section 1 affords the Commission considerable discretion in determining how best to execute Congress’ goals under the statute, taking into account technical and practical limitations. At the outset, however, MMTC did not sufficiently raise this issue before the Commission and is therefore barred from doing so before the Court. *See* 47 U.S.C. § 405(a).

1. MMTC alleges that it raised “the Section One issue” in comments to the agency in 2006. *See* Pet. Br. at 32 n.6. But MMTC in those comments simply made a passing reference in the background section to FCC Commissioner

⁹ MMTC also asked the Commission to “encourage” (by what means it did not explain) all broadcasters to assist LP-S or LP-M stations that have been damaged during an emergency to return to the air as soon as possible. MMTC Petition at 4. This proposal was encompassed in MMTC’s proposals for designating LP-S and LP-M stations, which the Commission reasonably rejected. *See* pp. 30-33 *supra*.

Adelstein's statement in the *First Report & Order* that the Commission had an "obligation" to address the problem of multilingual EAS alerts "[a]s set forth in Section 1 of the Communications Act." See Comments of MMTC, Independent Spanish Broadcasters Association, and United Church of Christ at 4 (Jan. 24, 2006) (JA __). Subsequently, MMTC argued that Section 1 was "relevant but not sufficient, on [its] own to enable the Commission to adopt and implement multilingual emergency . . . regulations." See Comments of MMTC at 2 (Dec. 12, 2011) (JA __). MMTC at that time described Section 1 as a "*general policy* to regulate communications to ensure that all citizens have access to service, without discrimination." *Id.* n.4 (emphasis added). As such, MMTC explained that "while [Section 1] can determine the scope of authority, this general policy does not reflect a specific delegation of power." *Id.*

Despite that pronouncement before the agency, MMTC now contends before this Court that the "FCC has an obligation not to discriminate" under Section 1, see Pet. Br. at 25-26, that the FCC's actions in the *Order* "contravene the demands of Section One," *id.* at 27, and that the Commission's decision to maintain the legacy EAS architecture "violates the FCC's duties under Section One." *Id.* at 29.

As this Court has consistently held, where a party has "seemed to abandon its argument . . . by taking inconsistent positions, the agency did not have a fair opportunity to address this argument" and Section 405 is not satisfied. *Busse*

Broad. Corp. v. FCC, 87 F.3d 1456, 1461 (D.C. Cir. 1996); *see also Primosphere Limited P'ship v. FCC*, 2003 WL 472239 * 2 (D.C. Cir. Feb. 21, 2003)

(petitioners' position in the appeal was the "exact opposite of the position that it took before the Commission and therefore it is not properly before the court, never having been presented to the Commission."); *KPMG v. SEC*, 289 F.3d 109, 121 (D.C. Cir. 2002) ("[W]e cannot conclude that KPMG's passing reference to an issue that was later abandoned gave the Commission that opportunity" to address petitioner's claims). Before the agency, MMTC abandoned its claim that Section 1 imposes specific mandatory obligations to require multilingual EAS alerts, instead characterizing the terms of that section as mere "policy." It is therefore barred by Section 405 from pressing the argument in this Court that Section 1 imposes mandatory obligations.

2. MMTC's argument also fails on the merits.

a. Section 1 states that the FCC was created "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 . . . radio communications service . . . for the purpose of promoting safety of life and property through the use of wire and radio communications . . ." 47 U.S.C. § 151. The terms of the statute are aspirational and general; they are not reasonably read to impose an affirmative obligation on the agency to take any particular action. In

a case arising outside the context of the EAS, this Court held that Section 1 is a “statement[] of congressional policy,” *Comcast Corp. v. FCC*, 600 F.3d 642, 654 (D.C. Cir. 2010), that “can help delineate the contours of statutory authority,” but does not “by itself create statutorily mandated responsibilities.” *Id.* at 654-55.¹⁰

In the *Order*, the Commission took account of Section 1’s policy goals. The agency first “reaffirm[ed] [its] commitment to promoting the delivery of [the] Emergency Alert System (EAS) alerts to as wide an audience as technically feasible, including to those who communicate in a language other than English or may have a limited understanding of the English language.” *Order* ¶ 1 (JA__). It also expressed its “support [for] the general goal of making emergency alert content distributed over the EAS more accessible to persons whose primary language is not English.” *Id.* ¶ 19 (JA __). And the Commission found that the reporting requirements it adopted might spur expanded access to non-English EAS alerts. *Id.* ¶¶ 27-28 (JA __). However, the agency determined that MMTC’s

¹⁰ Likewise, although this Court in *Motion Picture Ass’n of Am. v. FCC*, 309 F.3d 796, 804 (D.C. Cir. 2002) stated that Section 1 “authorizes the agency to ensure that all people of the United States, without discrimination, have access to wire and radio communications,” and that “[u]nder [section 1, Congress delegated authority to the FCC to expand radio and wire transmissions, so that they would be available to all U.S. citizens,” it nowhere suggested that the provision imposed any sort of mandatory duty on the agency.

proposals were an impractical means of furthering the dissemination of multilingual EAS alerts.¹¹ *Id.* ¶¶ 2, 5-6, nn. 85, 86.

MMTC's insistence that Section 1 mandates multilingual alerts also ignores the fact that the statute requires only that the Commission regulate "so as to make available, *so far as possible*" a rapid, efficient nationwide communications network to all people of the United States without discrimination. 47 U.S.C. § 151 (emphasis added). The Commission is thereby vested by the Communications Act with broad discretion to determine how Section 1's goals are best achieved. The Commission reasonably determined in the *Order* that it was not possible to achieve, within the architecture of the EAS, the goal of providing multilingual EAS alerts to communities with limited English proficiency by the means MMTC proposed. This determination, which "requires expert policy judgment of a technical, complex, and dynamic subject," deserves great deference. *Cablevision Sys. Corp.*, 649 F.3d at 714.

¹¹ In *Prometheus Radio Project v. FCC*, 652 F.3d 431, 466 (3d Cir. 2011), upon which MMTC relies, *see* Pet. Br. at 25, the Third Circuit remanded for further consideration the Commission's decision to repeal a rule affecting minority television station ownership because the Commission had failed to "consider[] the repeal's effect on minority ownership." 652 F.3d at 466. Here, however, the Commission did consider the impact of the policy, expressed in Section 1, to help facilitate the dissemination of non-English EAS alerts, and adopted rules in the *Order* in furtherance of that goal.

MMTC contends that Section 1 “should not be interpreted as being any less demanding than Title VI [of the Civil Rights Act of 1964] or the ADA [American with Disabilities Act].” Pet. Br. at 32. But MMTC provides no support for its contention that these two statutes and Section 1—which provides that the actions to be taken are only those “so far as” they are “possible,” 47 U.S.C. § 151—should be interpreted equivalently.

Even if Section 1 were interpreted in parallel with Title VI and the ADA, MMTC’s argument would fail. As courts have consistently held, “Title VI does not apply to programs conducted directly by federal agencies.” *Halim v. Donovan*, 951 F.Supp.2d 201, 207 (D.D.C. 2013); *see also Gary v. FTC*, 526 Fed.Appx. 146, 149 (3d Cir. 2013) (concluding that the district court properly dismissed the appellant’s claim because “Title VI does not apply to federal agencies such as the FTC.”). Significantly, the statutory definitions of “program or activity” do not include federal agencies. *Halim*, 951 F.Supp.2d at 207. Instead, Title VI “was meant to cover only those situations where federal funding is given to a *non-federal entity* which, in turn, provides financial assistance to the ultimate

beneficiary.” *Soberal–Perez v. Heckler*, 717 F.2d 36, 38 (2d Cir. 1983), *cert. denied*, 466 U.S. 929 (1984) (emphasis added).¹²

For similar reasons, MMTC’s attempt to analogize the ADA with Section 1 is without merit. MMTC refers to Title II of the ADA, which prohibits a public entity from discriminating against an individual with a disability, or denying that individual the benefits of its services, programs, or activities. 42 U.S.C. § 12132. The ADA defines “public entity” to include state and local governments and their instrumentalities, but not the federal government and its instrumentalities. 42 U.S.C. § 12131(1). The ADA is therefore inapplicable to the Commission. *See Cellular Phone Taskforce v. FCC*, 217 F.3d 72, 73 (2d Cir. 2000). Indeed, all the

¹² MMTC cites to a document issued by several government agencies, *see* Pet. Br. at 29-30, explaining that “[f]ederal agencies have [] obligations to take reasonable steps to ensure that their federally conducted [emergency management and preparedness] programs and activities are accessible to [limited English proficiency] individuals . . .” *See Guidance to State and Local Governments and Other Federally Assisted Recipients Engaged in Emergency Preparedness, Response, Mitigation, and Recovery Activities on Compliance with Title VI of the Civil Rights Act of 1964*, U.S. Dep’t of Justice (Aug. 16, 2016),

<https://www.justice.gov/crt/file/885401/download>. Among the examples given to fulfill this obligation are providing “documents such as public service announcements, media advisories, flyers, guides, and letters related to disaster assistance in non-English languages” and ensuring that other “critical materials were available to [limited English proficiency] individuals. . .” *Id.* at 10. But it is one thing for a federal agency to provide translations of a document in multiple languages—a relatively simple task—and quite another to require EAS Participants, who simply pass along EAS messages, to translate and transmit an emergency alert in multiple languages within 15 minutes, under the narrow technical parameters of the legacy EAS architecture.

cases MMTC cites (*see* Pet. Br. at 31) concern an alleged failure of a city or county—not a federal entity—to include persons with disabilities in their emergency preparedness plans.

b. Even if Section 1 were a relevant statutory constraint, the Commission has reasonably exercised its broad authority to carry out Section 1's policy goals. Separate and apart from the *Order* under review, the agency has adopted several measures to disseminate non-English alerts to communities with limited English proficiency to inform them of impending emergencies. *Order* ¶ 7 (JA __). *First*, the EAS architecture is designed so that if the President opts to broadcast a message in English, Spanish or any other language, all EAS Participants will automatically transmit that message in its entirety.¹³ *Second*, FCC rules permit EAS Participants that provide non-English language programming to broadcast state and local EAS alerts in the primary language of the EAS Participant. *Id.* ¶ 7 (JA __); 47 C.F.R. § 11.55(c)(4). For example, non-English language EAS Participants may broadcast visual crawl alerts (the text that scrolls at the bottom of a television screen to relay information) in their primary language and include in such crawls translations of other languages, if their equipment permits. *Third*,

¹³ For an alert originating at the state and local level, EAS Participants that elect to transmit such an alert are free to do so in its entirety, including in other languages if the alert originator provides translations.

CAP alerts are an important way for persons with limited English proficiency to have access to emergency alerts, as CAP provides alert originators with the ability to translate alerts in multiple languages. The Commission also permits EAS Participants to utilize text-to-speech software to generate multiple language audio translations of enhanced text contained in a CAP alert message. *Id.* ¶ 7 (JA __).

Apart from the EAS, the Commission requires participants of Wireless Emergency Alerts to support the transmission of Spanish-language alert messages. *Wireless Emergency Alerts Order*, 2016 WL 5636963 * 16 ¶¶ 40, 41. Thus, in the event of an emergency, text alerts in Spanish will be sent to all WEA-capable mobile devices where subscribers have specified Spanish as their preferred language. *Id.* Given the ubiquity of mobile devices in the United States, the Commission's WEA rules will significantly increase access to emergency alerts to Spanish speaking communities, the largest group of limited English proficiency individuals in the country. Indeed, MMTC appears to have recognized as much. *See* Letter from MMTC to Marlene H. Dortch, Secretary, FCC (Aug. 4, 2010) (JA __) ("Since the Petition was filed in 2005, the issue of notice of an emergency has been largely solved by the wireless industry")

Finally, the Commission in the *Order* adopted additional reporting rules intended to help facilitate multilingual alerting by requiring EAS Participants to submit information describing: (1) current actions, either individually or in

conjunction with other EAS Participants and/or state and local emergency authorities, to make EAS alert content available in languages other than English; (2) future actions to provide EAS alerts in languages other than English, along with an explanation for the EAS Participant's decision to plan or not plan such actions; and (3) any other relevant information that the EAS Participant may wish to provide, including state-specific demographics on languages other than English spoken within the state, resources used or necessary to originate multilingual EAS alerts, and any pilot projects or other initiatives to provide non-English emergency alerts to the public. *Order* ¶ 22 (JA ___).

MMTC insists that the “FCC has made this same request for information at least three times.” Pet. Br. at 54. But those prior requests sought the voluntary submission of information, which turned out to be incomplete. EAS Participants are now mandated to provide such information. As the Commission explained, the reporting requirements will allow the Commission to “ensure that any existing multilingual EAS alerting activities are consistent with the Part 11 rules, and may provide insight into what mechanisms may work best.” *Order* ¶ 23 (JA ___).

In addition, the reporting requirements may provide insight into “structural impediments” hindering multilingual EAS alerts, that the Commission could help resolve. *Id.* They will also assist “states, EAS Participants, non-governmental organizations, and other interested parties” in their efforts, if any, to create

mechanisms to disseminate multilingual EAS alerts and other emergency information during and after an emergency. *Id.* As the Commission explained, “the mere process of examining this issue in coordination with state and local emergency authorities may lead to implementation of mechanisms that would expand access to EAS alert content, if appropriate.” *Id.* ¶ 24 (JA __). Taken together, the Commission reasonably determined that its actions would advance the goals of Section 1.

III. THE FCC’S ORDER WAS NOT ARBITRARY AND CAPRICIOUS.

MMTC claims that the *Order* “treated two similarly situated parties in need of accommodation—listeners with auditory disabilities and those who are [of limited English proficiency]—quite differently, without any reasoned explanation.” Pet. Br. at 33. Once again, because MMTC failed to raise this argument before the Commission, it is barred from doing so here. In any event, the measures adopted by the Commission do not arbitrarily differentiate between those with limited proficiency in English and those with auditory disabilities.

1. Nowhere in its comments or letters to the agency did MMTC contend that it would be arbitrary and capricious for the Commission to treat listeners with auditory disabilities and those with limited English proficiency differently with regard to EAS alerts. The closest that MMTC came was a complaint that the agency, in asking for comments on ““how any next generation digitally-based alert

and warning system can be developed in a manner that assures persons with disabilities will be given equal access,” did not ask “how such a system will ensure non-English speakers will be warned in a digital environment,” even though “[t]his question is equally important.” *See* Comments of MMTC, Independent Spanish Broadcasters Association, and United Church of Christ at 6 (JA __). To say that one question is of “equal[] importan[ce]” with another, however, is not to assert that the answers must be the same.

To preserve an argument on appeal under 47 U.S.C. § 405(a), the issue must be brought to the Commission’s attention distinctly; the Commission “‘need not sift pleadings and documents to identify’ arguments that are not ‘stated with clarity’ by a petitioner.” *Bartholdi Cable v. FCC*, 114 F.3d 274, 279 (D.C. Cir. 1997) (citation omitted). The petitioner is required to “assume[] at least a modicum of responsibility for flagging the relevant issues which its documentary submissions presented.” *Id.* at 280. Even if an issue has been mentioned, it does not satisfy Section 405 unless it was actually argued. *See Northwestern Ind. Tel. Co. v. FCC*, 824 F.2d 1205, 1210 n.8 (D.C. Cir. 1987) (appellant “point[ed] out” a circumstance but did not make an argument); *Washington Ass’n for Television & Children v. FCC*, 712 F.2d 677, 681 (D.C. Cir. 1983) (appellant “never explicitly” made its argument); *Alianza Federal de Mercedes v. FCC*, 539 F.2d 732, 739 (D.C. Cir. 1976) (“the grist [of appellant’s argument] was there, but nothing was

made of it”). Under these circumstances, the Commission was not fairly “afforded the opportunity to pass on the issue,” and MMTC is therefore barred from doing so here. *Bartholdi Cable*, 114 F.3d at 279.

2. MMTC’s argument also fails on the merits. As the Commission found, MMTC’s proposals to facilitate the distribution of non-English EAS alerts “would be difficult if not impossible to do within the existing EAS architecture.” *Order* ¶ 2 (JA ___). This was in part because “EAS Participants currently have limited capacity to alter the alert message content they receive,” including translations of messages in other languages. *Id.* ¶ 7 (JA ___). Furthermore, adopting MMTC’s proposals would require EAS Participants to “manually” translate and disseminate the alert, leading to potential delays and a higher risk of error, as well as negating the automated design of the system. *Id.* ¶ 6 (JA ___).

By contrast, the measures the Commission has adopted to make EAS alerts accessible to persons with auditory disabilities have long been part of the EAS structure. Indeed, when the Commission established the EAS in 1994, it adopted rules mandating that EAS Participants deliver EAS alerts in both audio and visual formats. *1994 Report & Order, Amendment of Part 73, Subpart G, of the Commission’s Rules Regarding the Emergency Broadcast System*, 10 FCC Rcd. 1786, 1802 ¶ 41 (1994). Subsequently, in response to feedback from the first nationwide EAS test in 2011, the Commission “amend[ed]” these rules by

requiring that visual messages be “displayed in a size, color, contrast, location, and speech that is readily readable and understandable,” and that both the visual and audio portion of an EAS alert be played in their entirety at least once during any EAS message, to avoid any potential miscommunication. *Sixth Report & Order, Review of the Emergency Alert System*, 30 FCC Rcd. 6520, 6538-39 ¶ 39 (2015). The subsequent changes to the existing EAS rules to assist persons with disabilities represented a tightening of existing requirements and were thus easily accommodated within the constraints of the existing EAS architecture.

Indeed, the Commission observed that the amended rules “should have little impact on the operations of EAS equipment manufacturers whose equipment already produces a legible, complete and appropriately placed EAS visual message, and on EAS Participants who deploy certified EAS equipment at their facilities.” *Sixth Report and Order*, 30 FCC Rcd. at 6541 ¶ 46. Therefore, the Commission concluded that the amended rules would not “impose significant costs and burdens upon the majority of EAS Participants.” *Id.* Nor would the amended rules on visual and audio alerts interfere with the automated mechanism in which EAS alerts are transmitted. *Id.* n.149 (“The EAS [visual message] is often automatically generated by the encoder/decode device based on data contained in the EAS message.”).

MMTC argues that the legacy EAS is “outdated.” Pet. Br. at 29. But the Commission previously determined that the system should be retained, a decision which MMTC did not comment on or otherwise challenge. The Commission explained that “in emergencies that result in outages of power, cellular telephone service, or Internet connectivity, IP-based services like CAP-based alerting systems may not be available, and the broadcast-based legacy EAS may be the only reliable means of disseminating emergency alerts to the public, because messages can be received on battery-powered radios and televisions.” *See Fifth Report & Order*, 27 FCC Rcd. 654 ¶ 27. In addition, the simple and straightforward configuration of the legacy EAS renders it extremely durable and effective for serving its primary purpose—to enable the President to communicate to the entire country within a matter of minutes in the event of a national emergency. 47 U.S.C. § 606; *Order* ¶ 3 (JA ___). For these reasons, the Commission concluded that it was necessary to maintain the legacy EAS architecture, notwithstanding its technical limitations. *Order* ¶ 26 (JA___).

IV. THE COMMISSION DID NOT IGNORE THE RECORD.

Next, MMTC contends that the Commission “ignored substantial—and vital—submissions in the record” and “overlooked letters of support” from various organizations in support of MMTC’s petition. Pet. Br. at 36. This assertion is baseless. “A regulation will be deemed arbitrary and capricious, if the issuing

agency failed to address significant comments raised during the rulemaking.”

Ass’n of Private Sector Colleges & Univs. v. Duncan, 681 F.3d 427, 441 (D.C. Cir. 2012). An agency’s obligation to respond, however, is not “particularly demanding.” *Pub. Citizen, Inc. v. Fed. Aviation Admin.*, 988 F.2d 186, 197 (D.C. Cir.1993). The Court reviews the Commission’s factual findings for substantial evidence, “which means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Millar v. FCC*, 707 F.2d 1530, 1540 (D.C. Cir. 1983) (citation omitted).

Here, the *Order* acknowledged that “all respondents generally supported the goals of the Petition,” *Order* ¶ 15 (JA ___), and cited a number of supportive comments.¹⁴ However, the vast majority of commenters did not support MMTC’s “methods proposed to achieve” its goals, nor did they support the idea that EAS

¹⁴ For example, the *Order* explained that FEMA supported “the work of MMTC to extend alerting to the non-English speaking Population,” *see Order* ¶ 17 (JA ___); the California Public Utilities Commission and the California Office of Emergency Services supported “the FCC’s further efforts to address the broader request made by [MMTC] to expand EAS to provide for multilingual EAS messages,” *id.* n.47 (JA ___); and AAJC supported “MMTC’s goal for broadcasters and authorities to develop plans to ensure that all Americans have a greater chance of receiving lifesaving information.” *Id.* ¶ 17 (JA ___).

Participants should be required to translate EAS alerts.¹⁵ *Order* n. 50 (JA __).

Indeed, AAJC, an amicus appearing in this Court in support of MMTC, argued before the agency that “it is the primary responsibility of message originators to make every effort to provide EAS alerts in multiple languages.” *Id.* n.61 (JA __).

In its brief, MMTC highlights several snippets of comments to support its claim that the Commission ignored support for its position in the record, but these comments do not go so far as MMTC would have it. For example, although AT&T supported MMTC’s general goal to expand multilingual EAS alerts, it was careful to explain that it would be open to “retransmitting alerts in English and Spanish (*to the extent government authorities originate alerts in both languages*).” Comments of AT&T, Inc. at 1 (Dec. 3, 2007) (emphasis added) (JA __). MMTC omitted this parenthetical in its brief. Similarly, EchoStar Satellite was supportive of MMTC’s general goals, but pointed out that “[t]he originator of EAS messages should create all necessary message content. Under no circumstances should a

¹⁵ MMTC points out that Consumers Union submitted reply comments in support of MMTC’s petition. Pet. Br. at 49. But Consumers Union submitted a one-page reply that simply parroted MMTC’s proposals; it offered no substantive comments addressing MMTC’s petition.

distribution platform be required to create any EAS message content.”¹⁶

Comments of Echostar Satellite at 5 (Dec. 3, 2007) (JA __). In short, none of the commenters MMTC cites in its brief—and indeed, no commenters in the entire agency proceeding—explicitly endorsed MMTC’s proposal that the responsibility for translating EAS alerts should rest with EAS Participants. The Commission therefore accurately characterized these commenters as “oppos[ing] any obligation on EAS Participants to supply [*i.e.* generate] non-English alerts.”¹⁷ *Order* ¶ 13 (JA __).

¹⁶ The other commenters MMTC cites in its brief expressed similar misgivings about imposing a translation requirement on EAS Participants. *See* Comments of California Public Utilities Commission at 2 (Dec. 3, 2007) (recommending that the FCC “[r]equire EAS Participants to receive and transmit [multilingual] alerts initiated by local and state government entities per the state EAS plan, in addition to the state governor.”) (JA __); Comments of National Cable & Telecommunications Association at 9 (Dec. 3, 2007) (“The government entity originating the emergency information, often state governors and state and local emergency managers, is best suited to provide the message in a language other than English.”) (JA __); Comments of FEMA at 1 (Mar. 31, 2014) (“During the course of conveying alert and warning messages FEMA does not alter, edit or translate the contents of any messages. In fact messages are digitally signed by authorized originators to ensure that no changes occur.”) (JA __).

¹⁷ MMTC also claims that the “the FCC failed to weigh the costs and benefits of the proposals on the record.” Pet. Br. at 56. But the agency is under no obligation to weigh the costs and benefits of proposals it determines not to adopt. Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 18, 2011) (cost-benefit analysis when regulation is “propose[d] or adopt[ed].”) In any event, the Commission determined that the costs of MMTC’s proposals outweighed their benefits. As the *Order* explained, “implementing them, even in modified form, would be difficult if not impossible to do within the existing EAS architecture.” *Order* ¶ 2 (JA __).

* * * * *

Based on its contention that the Commission’s refusal to adopt its proposals is “manifestly unreasonable,” MMTC asks the Court to “require additional action within a reasonable period of time.” Pet. Br. at 60. There is no basis for that request. The Commission’s decision not to adopt MMTC’s proposals was firmly grounded on the agency’s determination that the proposals were incompatible with the EAS system architecture, or otherwise impracticable. And the agency’s decision to adopt a reporting requirement for state and local authorities was well-justified. The Commission determined that it needed accurate information regarding the efforts being taken by EAS Participants to distribute multilingual EAS alerts if it was to appropriately evaluate the need for further federal action. *Order* ¶ 23 (JA ___). In addition, the agency concluded that the process of examining those efforts might spur the development of further multilingual emergency alert mechanisms by state and local authorities. *Id.* ¶ 24 (JA ___).

CONCLUSION

The petition for review should be denied.

Respectfully submitted,

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December 1, 2016

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MULTICULTURAL MEDIA, TELECOM AND
INTERNET COUNCIL, ET AL.,

PETITIONERS,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,

RESPONDENTS.

No. 16-1222

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying Brief for Respondents in the captioned case contains 12,057 words.

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times Roman font.

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Statutory Addendum

42 U.S.C. § 2000d	2
42 U.S.C. § 12111(5) and (7)	3
47 U.S.C. § 151	4
47 U.S.C. § 405(a)	5
47 U.S.C. § 606	7
47 C.F.R. § 11.1	10
47 C.F.R. § 11.2	11
47 C.F.R. § 11.31(a)	13
47 C.F.R. § 11.33(a)(9)	14
47 C.F.R. § 11.51(m) and (n)	15
47 C.F.R. § 11.54	16
47 C.F.R. § 11.55	17
47 C.F.R. § 11.56(a)(2)	20
Executive Order No. 13,407	21

42 U.S.C.A. § 2000d

§ 2000d Prohibition against exclusion from participation in, denial of benefits of, and discrimination under Federally assisted programs on ground of race, color, or national origin

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C.A. § 12111

§ 12111. Definitions

(5) Employer

(A) In general

The term “employer” means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions

The term “employer” does not include--

- (i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or
- (ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of Title 26.

* * * * *

(7) Person, etc.

The terms “person”, “labor organization”, “employment agency”, “commerce”, and “industry affecting commerce”, shall have the same meaning given such terms in section 2000e of this title.

47 U.S.C.A. § 151

§ 151. Purposes of chapter; Federal Communications Commission created

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.A. § 405(a)

§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided*, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to

which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

47 U.S.C.A. § 606

§ 606. War powers of President

(a) Priority communications

During the continuance of a war in which the United States is engaged, the President is authorized, if he finds it necessary for the national defense and security, to direct that such communications as in his judgment may be essential to the national defense and security shall have preference or priority with any carrier subject to this chapter. He may give these directions at and for such times as he may determine, and may modify, change, suspend, or annul them and for any such purpose he is authorized to issue orders directly, or through such person or persons as he designates for the purpose, or through the Commission. Any carrier complying with any such order or direction for preference or priority herein authorized shall be exempt from any and all provisions in existing law imposing civil or criminal penalties, obligations, or liabilities upon carriers by reason of giving preference or priority in compliance with such order or direction.

(b) Obstruction of interstate or foreign communications

It shall be unlawful for any person during any war in which the United States is engaged to knowingly or willfully, by physical force or intimidation by threats of physical force, obstruct or retard or aid in obstructing or retarding interstate or foreign communication by radio or wire. The President is authorized, whenever in his judgment the public interest requires, to employ the armed forces of the United States to prevent any such obstruction or retardation of communication: *Provided*, That nothing in this section shall be construed to repeal, modify, or affect either section 17 of Title 15 or section 52 of Title 29.

(c) Suspension or amendment of rules and regulations applicable to certain emission stations or devices

Upon proclamation by the President that there exists war or a threat of war, or a state of public peril or disaster or other national emergency, or in order to preserve the neutrality of the United States, the President, if he deems it necessary in the interest of national security or defense, may suspend or amend, for such time as he may see fit, the rules and regulations applicable to any or all stations or devices capable of emitting electromagnetic radiations within the jurisdiction of the United

States as prescribed by the Commission, and may cause the closing of any station for radio communication, or any device capable of emitting electromagnetic radiations between 10 kilocycles and 100,000 megacycles, which is suitable for use as a navigational aid beyond five miles, and the removal therefrom of its apparatus and equipment, or he may authorize the use or control of any such station or device and/or its apparatus and equipment, by any department of the Government under such regulations as he may prescribe upon just compensation to the owners. The authority granted to the President, under this subsection, to cause the closing of any station or device and the removal therefrom of its apparatus and equipment, or to authorize the use or control of any station or device and/or its apparatus and equipment, may be exercised in the Canal Zone.

(d) Suspension or amendment of rules and regulations applicable to wire communications; closing of facilities; Government use of facilities

Upon proclamation by the President that there exists a state or threat of war involving the United States, the President, if he deems it necessary in the interest of the national security and defense, may, during a period ending not later than six months after the termination of such state or threat of war and not later than such earlier date as the Congress by concurrent resolution may designate, (1) suspend or amend the rules and regulations applicable to any or all facilities or stations for wire communication within the jurisdiction of the United States as prescribed by the Commission, (2) cause the closing of any facility or station for wire communication and the removal therefrom of its apparatus and equipment, or (3) authorize the use or control of any such facility or station and its apparatus and equipment by any department of the Government under such regulations as he may prescribe, upon just compensation to the owners.

(e) Compensation

The President shall ascertain the just compensation for such use or control and certify the amount ascertained to Congress for appropriation and payment to the person entitled thereto. If the amount so certified is unsatisfactory to the person entitled thereto, such person shall be paid only 75 per centum of the amount and shall be entitled to sue the United States to recover such further sum as added to such payment of 75 per centum will make such amount as will be just compensation for the use and control. Such suit shall be brought in the manner provided by section 1346 or section 1491 of Title 28.

(f) Affect on State laws and powers

Nothing in subsection (c) or (d) of this section shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by any communication system or systems.

(g) Limitations upon Presidential power

Nothing in subsection (c) or (d) of this section shall be construed to authorize the President to make any amendment to the rules and regulations of the Commission which the Commission would not be authorized by law to make; and nothing in subsection (d) of this section shall be construed to authorize the President to take any action the force and effect of which shall continue beyond the date after which taking of such action would not have been authorized.

(h) Penalties

Any person who willfully does or causes or suffers to be done any act prohibited pursuant to the exercise of the President's authority under this section, or who willfully fails to do any act which he is required to do pursuant to the exercise of the President's authority under this section, or who willfully causes or suffers such failure, shall, upon conviction thereof, be punished for such offense by a fine of not more than \$1,000 or by imprisonment for not more than one year, or both, and, if a firm, partnership, association, or corporation, by fine of not more than \$5,000, except that any person who commits such an offense with intent to injure the United States, or with intent to secure an advantage to any foreign nation, shall, upon conviction thereof, be punished by a fine of not more than \$20,000 or by imprisonment for not more than 20 years, or both.

47 C.F.R. § 11.1

§ 11.1 Purpose.

This part contains rules and regulations providing for an Emergency Alert System (EAS). The EAS provides the President with the capability to provide immediate communications and information to the general public at the National, State and Local Area levels during periods of national emergency. The rules in this part describe the required technical standards and operational procedures of the EAS for analog AM, FM, and TV broadcast stations, digital broadcast stations, analog cable systems, digital cable systems, wireline video systems, wireless cable systems, Direct Broadcast Satellite (DBS) services, Satellite Digital Audio Radio Service (SDARS), and other participating entities. The EAS may be used to provide the heads of State and local government, or their designated representatives, with a means of emergency communication with the public in their State or Local Area.

47 C.F.R. § 11.2

§ 11.2 Definitions.

The definitions of terms used in part 11 are:

(a) Emergency Action Notification (EAN). The Emergency Action Notification is the notice to all EAS Participants and to the general public that the EAS has been activated for a national emergency. EAN messages that are formatted in the EAS Protocol (specified in § 11.31) are sent from a government origination point to broadcast stations and other entities participating in the PEP system, and are subsequently disseminated via EAS Participants. Dissemination arrangements for EAN messages that are formatted in the EAS Protocol (specified in § 11.31) at the State and local levels are specified in the State and Local Area plans (defined at § 11.21). A national activation of the EAS for a Presidential message with the Event code EAN as specified in § 11.31 must take priority over any other message and preempt it if it is in progress.

(b) Primary Entry Point (PEP) System. The PEP system is a nationwide network of broadcast stations and other entities connected with government activation points. It is used to distribute EAS messages that are formatted in the EAS Protocol (specified in § 11.31), including the EAN and EAS national test messages. FEMA has designated some of the nation's largest radio broadcast stations as PEPs. The PEPs are designated to receive the Presidential alert from FEMA and distribute it to local stations.

(c) Local Primary One (LP-1). The LP-1 is a radio or TV station that acts as a key EAS monitoring source. Each LP-1 station must monitor its regional PEP station and a back-up source for Presidential messages.

(d) EAS Participants. Entities required under the Commission's rules to comply with EAS rules, e.g., analog radio and television stations, and wired and wireless cable television systems, DBS, DTV, SDARS, digital cable and DAB, and wireline video systems.

(e) Wireline Video System. The system of a wireline common carrier used to provide video programming service.

(f) Participating National (PN). PN stations are broadcast stations that transmit EAS National, state, or local EAS messages to the public.

(g) National Primary (NP). Stations that are the primary entry point for Presidential messages delivered by FEMA. These stations are responsible for broadcasting a Presidential alert to the public and to State Primary stations within their broadcast range.

(h) State Primary (SP). Stations that are the entry point for State messages, which can originate from the Governor or a designated representative.

(i) Intermediary Device. An intermediary device is a stand-alone device that carries out the functions of monitoring for, receiving and/or acquiring, and decoding EAS messages formatted in the Common Alerting Protocol (CAP) in accordance with § 11.56, and converting such messages into a format that can be inputted into a separate EAS decoder, EAS encoder, or unit combining such decoder and encoder functions, so that the EAS message outputted by such separate EAS decoder, EAS encoder, or unit combining such decoder and encoder functions, and all other functions attendant to processing such EAS message, comply with the requirements in this part.

47 C.F.R. § 11.31(a)

§ 11.31 EAS protocol.

(a) The EAS uses a four part message for an emergency activation of the EAS. The four parts are: Preamble and EAS Header Codes; audio Attention Signal; message; and, Preamble and EAS End Of Message (EOM) Codes.

(1) The Preamble and EAS Codes must use Audio Frequency Shift Keying at a rate of 520.83 bits per second to transmit the codes. Mark frequency is 2083.3 Hz and space frequency is 1562.5 Hz. Mark and space time must be 1.92 milliseconds. Characters are ASCII seven bit characters as defined in ANSI X3.4–1977 ending with an eighth null bit (either 0 or 1) to constitute a full eight-bit byte.

(2) The Attention Signal must be made up of the fundamental frequencies of 853 and 960 Hz. The two tones must be transmitted simultaneously. The Attention Signal must be transmitted after the EAS header codes.

(3) The message may be audio, video or text.

47 C.F.R. § 11.33(a)(9)

§ 11.33 EAS Decoder.

(a) An EAS Decoder must at a minimum be capable of providing the EAS monitoring functions described in § 11.52, decoding EAS messages formatted in accordance with the EAS Protocol described in § 11.31, and converting Common Alerting Protocol (CAP)-formatted EAS messages into EAS alert messages that comply with the EAS Protocol, in accordance with § 11.56(a)(2), with the exception that the CAP-related monitoring and conversion requirements set forth in §§ 11.52(d)(2) and 11.56(a)(2) can be satisfied via an Intermediary Device, as specified in § 11.56(b), provided that all other requirements set forth in this part are met. An EAS Decoder also must be capable of the following minimum specifications:

(9) Reset. There shall be a method to automatically or manually reset the decoder to the normal monitoring condition. Operators shall be able to select a time interval, not less than two minutes, in which the decoder would automatically reset if it received an EAS header code but not an end-of-message (EOM) code. Messages received with the EAN Event codes shall disable the reset function so that lengthy audio messages can be handled. The last message received with valid header codes shall be displayed as required by paragraph (a)(4) of this section before the decoder is reset.

47 C.F.R. § 11.51(m) and (n)

§ 11.51 EAS code and Attention Signal Transmission requirements.

(m) EAS Participants are required to transmit all received EAS messages in which the header code contains the Event codes for Emergency Action Notification (EAN) and Required Monthly Test (RMT), and when the accompanying location codes include their State or State/county. These EAS messages shall be retransmitted unchanged except for the LLLLLLLL-code which identifies the EAS Participant retransmitting the message. See § 11.31(c). If an EAS source originates an EAS message with the Event codes in this paragraph, it must include the location codes for the State and counties in its service area. When transmitting the required weekly test, EAS Participants shall use the event code RWT. The location codes are the state and county for the broadcast station city of license or system community or city. Other location codes may be included upon approval of station or system management. EAS messages may be transmitted automatically or manually.

(1) Automatic interrupt of programming and transmission of EAS messages are required when facilities are unattended. Automatic transmissions must include a permanent record that contains at a minimum the following information: Originator, Event, Location and valid time period of the message. The decoder performs the functions necessary to determine which EAS messages are automatically transmitted by the encoder.

(2) Manual interrupt of programming and transmission of EAS messages may be used. EAS messages with the EAN Event code, or the National Periodic Test (NPT) Event code in the case of a nationwide test of the EAS, must be transmitted immediately; Monthly EAS test messages must be transmitted within 60 minutes. All actions must be logged and include the minimum information required for EAS video messages.

(n) EAS Participants may employ a minimum delay feature, not to exceed 15 minutes, for automatic interruption of EAS codes. However, this may not be used for the EAN Event code, or the NPT Event code in the case of a nationwide test of the EAS, which must be transmitted immediately. The delay time for an RMT message may not exceed 60 minutes.

47 C.F.R. § 11.54

§ 11.54 EAS operation during a National Level emergency.

(a) Immediately upon receipt of an EAN message, or the NPT Event code in the case of a nationwide test of the EAS, EAS Participants must comply with the following requirements, as applicable:

(1) Analog and digital broadcast stations may transmit their call letters and analog cable systems, digital cable systems and wireless cable systems may transmit the names of the communities they serve during an EAS activation. State and Local Area identifications must be given as provided in State and Local Area EAS Plans.

(2) Analog and digital broadcast stations are exempt from complying with §§ 73.62 and 73.1560 of this chapter (operating power maintenance) while operating under this part.

(3) The time of receipt of the EAN shall be entered by analog and digital broadcast stations in their logs (as specified in §§ 73.1820 and 73.1840 of this chapter), by analog and digital cable systems in their records (as specified in § 76.1711 of this chapter), by subject wireless cable systems in their records (as specified in § 21.304 of this chapter), and by all other EAS Participants in their records as specified in § 11.35(a).

(b) EAS Participants originating emergency communications under this section shall be considered to have conferred rebroadcast authority, as required by section 325(a) of the Communications Act of 1934, 47 U.S.C. 325(a), to other EAS Participants.

(c) During a national level EAS emergency, EAS Participants may transmit in lieu of the EAS audio feed an audio feed of the President's voice message from an alternative source, such as a broadcast network audio feed.

47 C.F.R. § 11.55

§ 11.55 EAS operation during a State or Local Area emergency.

(a) The EAS may be activated at the State and Local Area levels by EAS Participants at their discretion for day-to-day emergency situations posing a threat to life and property. Examples of natural emergencies which may warrant state EAS activation are: Tornadoes, floods, hurricanes, earthquakes, heavy snows, icing conditions, widespread fires, etc. Man-made emergencies warranting state EAS activation may include: Toxic gas leaks or liquid spills, widespread power failures, industrial explosions, and civil disorders.

(1) DBS providers shall pass through all EAS messages aired on local television broadcast stations carried by DBS providers under the Commission's broadcast signal carriage rules to subscribers receiving those channels.

(2) SDARS licensees and DBS providers may participate in EAS at the state and local level and make their systems capable of receiving and transmitting state and local level EAS messages on all channels. If an SDARS licensee or DBS provider is not capable of receiving and transmitting state and local EAS message on all channels, it must inform its subscribers, on its website and in writing on an annual basis, of which channels are and are not capable of supplying state and local messages.

(b) EAS operations must be conducted as specified in State and Local Area EAS Plans. The plans must list all authorized entities participating in the State or Local Area EAS.

(c) Immediately upon receipt of a State or Local Area EAS message that has been formatted in the EAS Protocol, EAS Participants participating in the State or Local Area EAS must do the following:

(1) State Relay (SR) sources monitor the State Relay Network or follow the State EAS plan for instructions from the State Primary (SP) source.

(2) Local Primary (LP) sources monitor the Local Area SR sources or follow the State EAS plan for instructions.

(3) Participating National (PN) sources monitor the Local Area LP sources for instructions.

- (4) EAS Participants participating in the State or Local Area EAS must discontinue normal programming and follow the procedures in the State and Local Area Plans. Analog and digital television broadcast stations must transmit all EAS announcements visually and aurally as specified in § 11.51(a) through (e) and 73.1250(h) of this chapter, as applicable; analog cable systems, digital cable systems, and wireless cable systems must transmit all EAS announcements visually and aurally as specified in § 11.51(g) and (h); and DBS providers must transmit all EAS announcements visually and aurally as specified in § 11.51(j). EAS Participants providing foreign language programming should transmit all EAS announcements in the same language as the primary language of the EAS Participant.
- (5) Upon completion of the State or Local Area EAS transmission procedures, resume normal programming until receipt of the cue from the SR or LP sources in your Local Area. At that time begin transmitting the common emergency message received from the above sources.
- (6) Resume normal operations upon conclusion of the message.
- (7) The times of the above EAS actions must be entered in the EAS Participants' records as specified in §§ 11.35(a) and 11.54(a)(3).
- (8) Use of the EAS codes or Attention Signal automatically grants rebroadcast authority as specified in § 11.54(b).
- (d) Immediately upon receipt of a State or Local Area EAS message that has been formatted in the Common Alerting Protocol, EAS Participants must do the following:
- (1) EAS Participants participating in the State or Local Area EAS must follow the procedures for processing such messages in the State and Local Area Plans.
 - (2) Analog and digital television broadcast stations must transmit all EAS announcements visually and aurally as specified in § 11.51(a) through (e) and 73.1250(h) of this chapter, as applicable; analog cable systems, digital cable systems, and wireless cable systems must transmit all EAS announcements visually and aurally as specified in § 11.51(g) and (h); and DBS providers must transmit all EAS announcements visually and aurally as specified in § 11.51(j). EAS Participants providing foreign language programming should transmit all EAS announcements in the same language as the primary language of the EAS Participant.
 - (3) Resume normal operations upon conclusion of the message.

(4) The times of the above EAS actions must be entered in the EAS Participants' records as specified in §§ 11.35(a) and 11.54(a)(3).

47 C.F.R. § 11.56(a)(2)

§ 11.56 Obligation to Process CAP–Formatted EAS Messages.

(a) On or by June 30, 2012, EAS Participants must have deployed operational equipment that is capable of the following:

* * * * *

(2) Converting EAS alert messages that have been formatted pursuant to the Organization for the Advancement of Structured Information Standards (OASIS) Common Alerting Protocol Version 1.2 (July 1, 2010), and Common Alerting Protocol, v. 1.2 USA Integrated Public Alert and Warning System Profile Version 1.0 (Oct. 13, 2009), into EAS alert messages that comply with the EAS Protocol, such that the Preamble and EAS Header Codes, audio Attention Signal, audio message, and Preamble and EAS End of Message (EOM) Codes of such messages are rendered equivalent to the EAS Protocol (set forth in § 11.31), in accordance with the technical specifications governing such conversion process set forth in the EAS–CAP Industry Group's (ECIG) Recommendations for a CAP EAS Implementation Guide, Version 1.0 (May 17, 2010) (except that any and all specifications set forth therein related to gubernatorial “must carry” shall not be followed, and that EAS Participants may adhere to the specifications related to text-to-speech on a voluntary basis).

Executive Order No. 13407

Public Alert and Warning System

June 26, 2006

Sec. 2. Functions of the Secretary of Homeland Security.

(a) To implement the policy set forth in section 1 of this order, the Secretary of Homeland Security shall:

* * * * *

(ix) administer the Emergency Alert System (EAS) as a critical component of the public alert and warning system; and

Sec. 3. Duties of Heads of Departments and Agencies.

* * * * *

(b) In addition to performing the duties specified under subsection (a) of this section:

* * * * *

(iii) the Federal Communications Commission shall, as provided by law, adopt rules to ensure that communications systems have the capacity to transmit alerts and warnings to the public as part of the public alert and warning system; and

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

MULTICULTURAL MEDIA, TELECOM AND
INTERNET COUNCIL, ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

No. 16-1222

CERTIFICATE OF SERVICE

I, Thaila K. Sundaresan, hereby certify that on December 1, 2016, I electronically filed the foregoing Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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