

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.

\_\_\_\_\_  
RESPONDENTS' OPPOSITION TO PETITION FOR  
REHEARING EN BANC  
\_\_\_\_\_

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**GLOSSARY**

CAP	Common Alerting Protocol
EAS	Emergency Alert System
FCC	Federal Communications Commission
FEMA	Federal Emergency Management Agency
LP-M	Local Primary Multilingual
LP-S	Local Primary Spanish
MMTC	Multicultural Media, Telecom & Internet Council
PEP	Primary Entry Point

Respondents Federal Communications Commission (FCC) and the United States hereby submit this opposition to the petition for rehearing en banc filed by petitioners Multicultural Media, Telecom and Internet Council, Inc., *et al.* (MMTC). MMTC's petition should be denied.

The panel correctly rejected an arbitrary and capricious challenge to an FCC decision to seek further information regarding state and local efforts to provide emergency alerts in languages other than English. Its decision raises no issues of exceptional importance, and does not conflict with any decision of this Court or the Supreme Court. Rehearing en banc is therefore unwarranted. Fed. R. App. P. 35.

### **BACKGROUND**

This case concerns a proposal to restructure the Emergency Alert System (EAS) to require alerts to be transmitted in languages besides English.

1. The EAS is a national public warning system through which television and radio stations (EAS Participants) warn the public of impending emergencies. The system's original purpose was to allow the President to communicate immediately to the general public during a national emergency, such as a nuclear attack. 47 C.F.R. § 11.1. In practice, however, the EAS has been used almost exclusively to distribute state and local weather-related alerts. *Fifth Report & Order, Review of the Emergency Alert System*, 27 FCC Rcd. 642, 646 ¶ 6 (2012) (*Fifth Report & Order*).

EAS “alert originators”—such as the Federal Emergency Management Agency (FEMA), the National Weather Service, and state and local governments—are responsible for composing the alerts and sending them to EAS Participants. *See Multicultural Media, Telecom and Internet Council v. FCC*, 873 F.3d 932, 935 (D.C. Cir. 2017). Specifically, alert originators send alerts to Primary Entry Point (PEP) stations, or in some cases directly to State Primary stations. *Fifth Report & Order*, 27 FCC Rcd. at 647 ¶ 7. Those stations in turn transmit the alerts to two designated Local Primary (LP) stations in each EAS area, which send the alerts to downstream EAS Participants monitoring broadcasts from the LP stations; ultimately, these downstream EAS Participants transmit the message to the public. *Id.*

The entire EAS system is automated. 873 F.3d at 935. EAS Participants are “passive conduits” of the alerts who play no role in the creation of the alert itself. *Id.* In addition, because emergency alerts are necessarily time sensitive, *id.* at 938, FCC rules mandate that they be transmitted quickly. Presidential alerts must be broadcast “immediately” upon receipt. 47 C.F.R. § 11.51(m)(2). State and local alerts must be transmitted within 15 minutes of receipt. *Id.* §11.33(a)(9).

2. In the wake of Hurricane Katrina, MMTC submitted six proposals to the Commission requiring EAS alerts in languages other than English, and thereby promoting access to emergency alerts for those with limited English proficiency.

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.” MMTC Petition for Immediate Interim Relief, EB Docket No. 04-296 (Sept. 22, 2005) (JA 58-60) (MMTC Petition).

Under these proposals, LP-S and LP-M stations would themselves be responsible for translating EAS alerts in the event the alert originator did not issue an alert in Spanish or another language spoken by a significant portion of the community. *Id.* 15 (JA 60). MMTC later submitted a proposal, coined the

“designated hitter” plan, in which local English broadcast stations would volunteer in advance to transmit ongoing multilingual emergency information if a non-English speaking station was knocked off the air by a natural disaster. *Order* ¶ 11 (JA 7).

3. Over the next several years, the Commission devoted significant time and resources to grappling with how best to provide emergency alerts to non-English speakers. In 2007, the FCC’s Public Safety and Homeland Security Bureau (Bureau) met with MMTC and other key stakeholders to discuss how to transmit emergency alert information to those with limited English proficiency, *id.* n.46 (JA 8); the Bureau also had several follow up discussions with MMTC over the years. In addition, the agency formally sought public comment three times on the petition, how best to provide alerts to non-English speakers, and how EAS Participants and states are currently “providing EAS alert content in languages other than English.” *Id.* ¶¶ 12-15, n.74 (JA 7-10, 12). In each round of comments, the overwhelming majority of respondents—including FEMA and state emergency authorities that administered EAS—opposed MMTC’s proposals and emphasized that the responsibility for issuing multilingual alerts should rest with alert originators, and not EAS Participant broadcast stations. *Id.* ¶¶ 12-13, 15 (JA 7-10). The comments, however, did not provide “any significant account of how EAS



alert content is being disseminated in languages other than English.” *Id.* n.74 (JA 12).

4. In March 2016, the Commission adopted the *Order* under review. The Commission found “scant support” for MMTC’s specific proposals and denied them accordingly. *Id.* ¶ 32 (JA 16). The agency explained that the “vast majority” of commenters maintained that the state and local authorities that generate EAS alerts—over whom the Commission has no authority—and not EAS Participants, were in the best position to translate alerts. *Id.* The Commission also pointed to a number of practical concerns with MMTC’s proposals that could compromise the integrity of the EAS. *Id.* ¶¶ 5-6, 31, 33, n.21, n.86 (JA 4-5, 16-17).

The Commission nonetheless sought to further assess the efforts of state and local authorities, in conjunction with EAS Participants, to provide emergency alerts to non-English speaking audiences. *Id.* ¶ 22 (JA 13). The *Order* accordingly required all EAS Participants to submit to their state authorities (who would then forward to the Commission) information describing actions currently taken or planned to make EAS alerts available to non-English speakers. *Id.* The Commission explained that this requirement was necessary to gather “sufficient and accurate information” on the existing measures 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 further action. *Id.* ¶¶

21, 23 (JA 12, 13). In addition, the Commission explained that the information could “provide insight into structural impediments that might be ameliorated by future Commission or federal action, if appropriate.” *Id.* ¶ 23 (JA 13).

5. MMTC challenged the Commission’s *Order* as arbitrary and capricious. In an opinion written by Judge Kavanaugh, the panel (Henderson & Kavanaugh, JJ.; Millett, J., dissenting in part) upheld the Commission’s decision. *MMTC*, 873 F.3d at 935.

The panel held that it was reasonable for the FCC to “gather more information from relevant parties before deciding whether to compel broadcasters to translate emergency alerts and broadcast them in languages in addition to English.” *Id.* at 936. The panel pointed out that the Commission has no authority to compel alert originators to issue multilingual alerts, *id.* at 935, and that broadcasters “traditionally have not created or altered the content of emergency alerts transmitted to them by the alert originators,” *id.* at 937. Therefore, it was reasonable for the Commission to collect more information before “forcing broadcasters into a new role in the emergency alert system.” *Id.* at 938.

In addition, the panel explained, there were a host of “real practical and technological concerns” with MMTC’s proposals. *Id.* These problems include a lack of personnel at stations to translate alerts, *id.*, “stringent time constraints,” *id.*, the heightened risk of inaccuracy in translation due to “human error”, *id.*, and the

fact that MMTC’s proposal sought the translation of alerts not only in Spanish, but in many other languages—all of which would prove “difficult, complicated and costly” for EAS Participants. *Id.* Indeed, the panel observed, “it likely would be reasonable for the FCC to flatly say that the alert originators . . . are the parties responsible for deciding whether and when to issue emergency alerts in languages in addition to English, and to leave the issue with those government entities.” *Id.* at 939.

Judge Millett dissented. Acknowledging that “the need for multilingual alerts is no doubt a complicated problem,” *id.* at 944, and that “the Commission may exercise reasonable judgment in this area,” *id.* at 945, she nevertheless found the Commission’s explanation for why it sought further information before acting (or concluding that it should not act) “unreasonable,” *id.* at 940.<sup>1</sup>

### **REHEARING EN BANC SHOULD BE DENIED**

The panel determined that the Commission reasonably sought more information from state and local authorities before deciding to restructure the nation’s emergency alert system by imposing a multilingual alerting requirement

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<sup>1</sup> Judge Millett, however, joined the other judges in rejecting MMTC’s claim that the *Order* violated Section 1 of the Communications Act, which sets forth the Act’s policy to “make available, so far as possible,” a nationwide communications service “without discrimination on the basis of race, color, religion, national origin or sex.” 47 U.S.C. § 151. MMTC does not seek further review of that unanimous ruling.

on system participants. That decision does not conflict with any decision of this Court or of the Supreme Court. The panel's decision also does not present any issue of exceptional importance; on the contrary, it applies settled principles of law in rejecting MMTC's APA challenge. And the panel's decision is correct. MMTC's petition for rehearing should therefore be denied.

**I. THE PANEL'S DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR OF THE SUPREME COURT.**

No decision of this Court, the Supreme Court—or any other court for that matter—has reviewed the Commission's efforts to examine the feasibility of multilingual EAS alerts, much less come to a conclusion different than that of the panel below. There is thus no need to review the panel's decision in order to “secure or maintain uniformity of the court's decisions.” Fed. R. App. P. 35.

MMTC claims that the order under review “failed to meet the demands of the APA” under this Court's precedent. Pet. 11. But the panel plainly applied the APA and this Court's precedent in evaluating the lawfulness of the FCC's action. *See* 873 F.3d at 937 (citing Circuit and Supreme Court APA cases); *see also id.* at 939. Thus, MMTC's asserted conflict is nothing more than a claim that the panel erred. But as we show in Part III, the panel's decision was correct.

## II. THE PANEL'S DECISION DOES NOT PRESENT ISSUES OF EXCEPTIONAL IMPORTANCE.

The question before the panel was whether the FCC's decision "to gather more information from relevant parties before deciding whether to compel broadcasters to translate emergency alerts and broadcast them in languages in addition to English" was "reasonable and reasonably explained." *Id.* at 937. This is simply an issue concerning the application of the APA's requirement that federal agency action not be "arbitrary and capricious" in a specific context; the case presents no issues extending beyond multilingual alerting via the Emergency Alert System. And a straightforward APA challenge to an agency's action on arbitrary and capricious grounds is hardly of "exceptional importance," Fed. R. App. P. 35, in this Circuit.

To be sure, determining how best to provide persons with limited English proficiency access to emergency alerts implicates significant public policy concerns. And in the *Order* under review, the agency reaffirmed its "commitment" to ensuring that EAS alerts are delivered "to as wide an audience as technically feasible, including to those who communicate in a language other than English." *Order* ¶ 1 (JA 1).

But the importance of the underlying public policy issue is not the same as the importance of the issues presented by the panel decision for which review is sought. As Judge Sentelle observed, where "the legal issues presented [] are

straightforward, requiring no more than the application of clear statutes,” en banc review is unwarranted, notwithstanding that the “underlying policy questions and the outcome of this case are undoubtedly matters of exceptional importance.”

*Coalition for Responsible Reg., Inc. v. E.P.A.*, 2012 WL 6621785 \* 3 (D.C. Cir. 2012) (Sentelle, J. concurring in denial of en banc review).

In addition, the EAS is not the only mechanism by which federal, state and local authorities disseminate emergency messages. As the panel recognized, there is a separate “wireless emergency alert system” that can transmit Spanish-language text alerts to wireless devices. 873 F.3d at 937. Given the ubiquity of cell phones, such wireless alerts are an increasingly common means of disseminating emergency information. Moreover, the panel observed, “individuals who do not understand English sometimes may rely on the same Internet, television, and radio news sources that they ordinarily rely on to obtain information in the languages that they understand.” *Id.*<sup>2</sup>

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<sup>2</sup> Apart from wireless alerts, the FCC has also adopted several measures to disseminate non-English EAS alerts. First, if the alert originator broadcasts a message in Spanish or any other language, all EAS Participants receiving that alert will automatically transmit the message in its entirety. *Order* ¶ 7 (JA 5). Second, EAS Participants may broadcast visual crawl alerts (the text at the bottom of a television screen) in other languages using translation software. *Id.* Third, alert originators can utilize the Common Alerting Protocol (CAP) format, an IP-based format, to compose alerts in multiple languages. *Id.* Finally, EAS Participants may use text-to-speech software to generate translations of multi-language enhanced text contained in CAP alert messages. *Id.*

MMTC contends that the FCC's action was "manifestly unreasonable" (Pet. 8) and that the panel's decision "flies in the face of this Court's precedent." Pet. 9. But these are, again, claims that the panel erred, which by themselves are insufficient to warrant en banc rehearing.

### **III. THE PANEL'S DECISION WAS CORRECT.**

Finally, the FCC's *Order* "was reasonable and reasonably explained." 873 F.3d at 937. Rather than seeking to have EAS alert originators—federal and state agencies over whom the FCC has no control—disseminate alerts in multiple languages, MMTC asked the FCC to restructure the entire EAS to compel broadcaster EAS participants to translate and broadcast emergency alerts in multiple languages. *Id.* But broadcasters have traditionally served as "passive conduits" of emergency alerts composed by alert originators, and have historically not "created or altered" the content of those messages, *id.*, in line with the "largely automated" architecture of the EAS. *Id.* at 938; *see also Order* ¶¶ 5, 6, 20 (JA 4-5, 12). Moreover, there would be "real practical and technological concerns about forcing broadcasters into a new role in the emergency alert system." 873 F.3d at 937. For one thing, many broadcasters "lack the personnel to translate" EAS alerts into other languages. *Id.*; *Order* ¶ 5 (JA 4). Broadcasters would also be hard-pressed to translate EAS alerts within "the stringent time constraints" required by regulation—or, more importantly, to allow alert recipients time to respond to an

imminent weather-related or national emergency. 873 F.3d at 937; *Order* ¶ 6 (JA 4-5); *see* 47 C.F.R. § 11.51(m)(2) (Presidential alerts must be transmitted immediately); *id.* § 11.51(n) (state and local emergency alerts must be broadcast within 15 minutes). Furthermore, the panel explained, MMTC’s proposals “would change an automated system into a system with a substantial possibility of human error in translation,” 873 F.3d at 938; *see Order* ¶¶ 5, 6 (JA 4-5), a particular concern in emergency alerts, where inaccuracies can have serious consequences.<sup>3</sup>

Under the circumstances, the panel stated, “it likely would be reasonable for the FCC to flatly say that the alert originators,” which are not subject to the constraints imposed on broadcasters, “are the parties responsible for deciding whether and when to issue emergency alerts in languages in addition to English.” 873 F.3d at 939; *see Order* ¶ 20. “In any event,” the panel concluded, it was “surely reasonable . . . for the FCC to move cautiously and gather more comprehensive information before deciding whether to force private broadcasters to play a major new role in the emergency alert system.” 873 F.3d at 939.

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<sup>3</sup> As the panel noted, MMTC did not limit its proposal to alerts just in “English and Spanish,” but also asked for “alerts in whatever languages might be commonly spoken in particular local communities,” including, for example, “Portuguese, Chinese, Vietnamese, Japanese, or Arabic.” 873 F.3d at 938. The wide range of languages to which MMTC’s proposal applied would also pose “a difficult, complicated, and costly task for many broadcasters.” *Id.*



MMTC, joined by Judge Millett, insist that the Commission's decision to "request the same information it had previously sought" is arbitrary. Pet. 11; *Id.* at 940. But the agency's prior requests sought the *voluntary* submission of information, and the responses turned out to be incomplete. *Order* ¶ 21, n.74 (JA 12). Under the Commission's new rule, EAS Participants are required to submit reports describing their current and future plans to implement multilingual alerting. *Id.* ¶ 22 (JA 13). These reports will provide the agency for the first time a comprehensive record of what broadcasters are doing to communicate emergency alerts to non-English speakers, and will help inform "future Commission or federal action, if appropriate." *Id.* ¶ 23 (JA 13).

Particularly given the "extremely limited and highly deferential review" applicable to agency refusals to grant petitions for rulemaking, the panel correctly denied MMTC's challenge to the Commission's *Order*. 873 F.3d at 937 (quoting *Massachusetts v. EPA*, 549 U.S. 497, 527-28 (2007)). The panel determined that the agency was reasonable in seeking to obtain a complete record before concluding its examination of what is a complex and difficult issue. *Id.* at 935.

MMTC contends that the Commission was unreasonable in relying on "voluntary arrangements" to address the issue of multilingual emergency alerts. Pet. 13. That is not the case. Voluntary arrangements may best "reflect the resources, localized needs and environmental characteristics" of individual

communities, which are not easily addressed by an across-the-board federal solution. *Order* ¶ 32 (JA 16); *see also id.* ¶ 28 (JA 15). In any event, the Commission here imposed a mandatory reporting requirement regarding state and local efforts at multilingual alerting; all prior reporting had been voluntary. And the Commission did not rule out taking further action in the future, if legally authorized and appropriate. *Id.* ¶¶ 23, 27 (JA 13, 14).

MMTC also insists that the Commission “fail[ed] to address a host of solutions” that it had proposed. Pet. 14. But as the panel recognized, MMTC’s proposals had a common theme—to have the FCC require broadcasters to translate EAS alerts if the alert originator did not do so—and were accordingly subject to the same “practical and technological concerns.” 873 F.3d at 938. The Commission also noted that the overwhelming majority of commenters opposed MMTC’s proposals. *See Order* ¶¶ 12-13, 15 (JA 7-10).

In addition, MMTC acknowledged the infeasibility of its proposal to air Presidential level alerts in both English and Spanish, Pet. 15, when it conceded before 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 66)*. Its proposal to withhold approval of a state EAS plan “that does not provide adequately for multilingual EAS communications,” Pet. 15, provided no standards for doing so. And MMTC did not explain how its designated hitter proposal (Pet.

16), by which other local broadcasters would be required to carry non-English programming in the event of the failure a foreign-language station, could be implemented “within the EAS architecture.” *Order* ¶ 33 & n.85 (JA 16).

In sum, as the panel found, the FCC “reasonably explained that shifting some of the responsibility for message content from alert originators to broadcasters . . . would generate practical problems and could undermine the workability of the emergency alert system.” 873 F.3d at 939; *see Order* ¶ 33 (JA 16).

### CONCLUSION

The petition for rehearing en banc should be denied.

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I, Thaila K. Sundaresan, hereby certify that on January 19, 2018, I filed the foregoing Respondents' Opposition to Petition for Rehearing En Banc with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the electronic 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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