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SPEAKING IN TONGUES: MANDATING MULTILINGUAL DISASTER WARNINGS IN THE PUBLIC INTEREST

Susan S. Kuo

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SPEAKING IN TONGUES: MANDATING MULTILINGUAL DISASTER WARNINGS IN THE PUBLIC INTEREST

*Susan S. Kuo**

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"The government's success in enabling reliable and effective communications can often mean the difference between life and death."¹

-Statement of Kevin J. Martin,
Chairman of the Federal Communications Commission

I. Introduction

In the aftermath of Hurricane Katrina, hundreds of thousands of individuals were evacuated from their homes and well over a thousand lost their lives.² Among the displaced and the dead were many Vietnamese, Latinos, and other language minorities.³ Approximately 35,000 Vietnamese

¹ *In re* Review of the Emergency Alert System, *Second Report and Order and Further Notice of Proposed Rulemaking*, EB Docket No. 04-296, 22 F.C.C.R. 13276 (May 31, 2007) (statement of FCC Chairman Kevin J. Martin), available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-07-109A1.pdf.

² See Sarah Childress, *Evacuees: Where Are They Now?*, NEWSWEEK, Aug. 21-28, 2006, available at <http://www.newsweek.com/id/46410> (last visited Jan. 23, 2008) (discussing a study which tracked over 200,000 evacuees one year after Katrina) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); John M. Broder & Dean E. Murphy, *Storm and Crisis: Neighbor States; Houston Struggles to Keep Up With a Surge of Evacuees Estimated at 200,000*, N.Y. TIMES, Sept. 3, 2005, § A6, at 1 (estimating that "close to 400,000 people [were] forced out of New Orleans and many others [were] driven from Mississippi and Alabama"); John Schwartz, *An Autopsy Of Katrina: Four Storms, Not Just One*, N.Y. TIMES, May 30, 2006, at F1 (reporting that Katrina's death toll exceeded 1500); Katharine Q. Seelye, *As Katrina Recedes, Newspapers Still Float*, N.Y. TIMES, Apr. 10, 2006, at C1 (reporting that in New Orleans alone, over 1100 were killed); Mary Foster, *New Orleans Medical Authorities Note Jump in Deaths and Blame Physical, Emotional Aftermath / Katrina Still Killing, Health Officials Say*, HOUSTON CHRONICLE, June 3, 2007, at A17 (reporting that, according to medical experts, Katrina continues to take lives as hurricane victims struggle to cope in its aftermath).

³ See Equitable Access to Disaster Relief and Preparedness Services Act, H.R. 5498, 109th Cong. § 2(a) (2006) ("At least 19,641 individuals within the Hurricane Katrina and Rita disaster areas spoke English less than very well . . . [Approximately] 12,649 individuals within the Hurricane Katrina and Rita disaster areas who spoke Asian and Pacific Islander languages spoke English less than very well.").

lived in areas devastated by Katrina.⁴ Many of these individuals were injured or killed during the storm and the flooding in its wake because they could not understand the English-only evacuation orders.⁵

Gulf-area residents who spoke only Spanish also suffered.⁶ An estimated 230,000 Latinos lived in the tri-state region.⁷ After the hurricane forced the sole Spanish-language radio station (KGLA (AM)) in New Orleans off the air on the evening before the hurricane struck, KGLA was off the air for more than a week.⁸ Consequently, these individuals were deprived of crucial information concerning the path of the storm, where and

⁴ See *Katrina and the Asian Community: Hearing before the Congressional Asian Pacific American Caucus, National Council of Asian Pacific Americans, and National Alliance of Vietnamese American Service Agencies*, 109th Cong. (2005) (testimony of Huy Bui, Executive Director of the National Alliance of Vietnamese American Service Agencies (NAVASA), available at <http://www.apaha.org/BODdocs/09-29-2005%20Congressional%20Hearing%20Transcript.pdf>). See generally Aimee Phan, *Vietnamese Lose All, This Time to Katrina*, USA TODAY, Sept. 15, 2005, at A11 (reporting that Vietnamese refugees began settling the Gulf coast area in the early 1980s, having fled Vietnam after the fall of Saigon. According to the 2000 Census, over 25,000 Vietnamese lived in Louisiana, and about 6,000 and 5,000 lived in Mississippi and Alabama, respectively); Christine Hauser, *Sustained by Close Ties, Vietnamese Toil to Rebuild*, N.Y. TIMES, Oct. 20, 2005, at A1 (reporting that, prior to the storm, more than 20,000 Vietnamese lived in New Orleans alone). See Muñiz, *infra* note 7, at 12 (explaining how pre-Katrina, the affected tri-state area housed an estimated 115,000 Asian Americans).

⁵ See BERKELEY INT'L HUMAN RIGHTS CLINIC, *When Disaster Strikes: A Human Rights Analysis of the 2005 Gulf Coast Hurricanes* 21 (2006) [hereinafter *When Disaster Strikes*], http://www.law.berkeley.edu/clinics/ihrlc/pdf/disaster_strikes_version2.pdf (reporting that local, state, and federal governments failed to issue hurricane warnings in any language other than English); *In re Review of the Emergency Alert System, Petition for Immediate Interim Relief*, EB Docket No. 04-296, at 1-2 & 6-7 (filed Sept. 20, 2005) (explaining that as a result of the English-only warnings, many non-English speakers were unaware of the hurricane and the need to evacuate) (on file with author); see also, e.g., Beth Musgrave, *Language Barrier: Critical Messages in English Miss Many*, LEXINGTON HERALD-LEADER A (Sept. 12, 2005) (reporting that a Vietnamese man who spent five days in a wrecked fishing boat before being rescued said that he did not understand the evacuation orders. According to rescuers, "not knowing how to get help nearly killed him and another man").

⁶ See *Petition for Immediate Interim Relief*, *supra* note 5, at 1-2.

⁷ See Brenda Muñiz, *In the Eye of the Storm: How the Government and Private Response to Hurricane Katrina Failed Latinos*, at 2 (Nat'l Council of La Raza, 2006) (explaining that in 2003, some 230,000 documented Latinos lived in the states affected by Katrina: Alabama, Mississippi, and Louisiana. "Some consular estimates place the figure of Latinos living in the affected area, particularly in New Orleans, at much higher."); Berkeley Int'l Human Rights Clinic, *Rebuilding After Katrina: A Population-Based Study of Labor and Human Rights in New Orleans*, at 10 (2006) (reporting that approximately 2.5% of the population of Louisiana was Latino); U.S. Census Bureau, 2005 American Community Survey Gulf Coast Area Data Profiles, http://www.census.gov/acs/www/Products/Profiles/gulf_coast/tables/tab1_katrinaK0100US2203v.htm (last visited Jan. 23, 2008) (estimating that the Latino population in New Orleans had increased to 6.2% by the end of 2005) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

⁸ See *Petition for Immediate Interim Relief*, *supra* note 5, at 1 (describing the effect of Katrina on KGLA).

how to seek shelter, and what precautions to take.⁹ These Asian and Latino communities were more at risk than their English-speaking neighbors to a host of health and safety problems post-Katrina and Rita—from carbon-monoxide poisoning to skin rashes to gastrointestinal problems from drinking contaminated water.¹⁰

The tragedy of Hurricane Katrina brings to the forefront the dilemma of how best to supply an effective public warning system to non-English speakers.¹¹ Language minority groups can be invisible to emergency service planners and providers because they lack representatives on local planning boards and in the mayors' and governors' offices.¹² As a result, emergency warnings are often issued only in English,¹³ leaving the limited English proficient (LEP) population in the lurch. Considering the large numbers of

⁹ See *id.* (describing the effect of the KGLA's closing on the affected population).

¹⁰ See *id.* at 7 (describing the effects of Katrina on the non-English speaking population); *When Disaster Strikes*, *supra* note 5, at 22 (reporting that language barriers prevented immigrant residents from understanding health concerns about contaminated drinking water); see also Musgrave, *supra* note 5, and accompanying text. One Latino family that had returned home and discovered that they had no electricity lit a match. The match ignited natural gas and blew up the house, killing the family. Spanish language broadcasts on taking post-hurricane precautions could have prevented this catastrophe. Petition for Immediate Interim Relief, *supra* note 5, at 2 n.2 (describing the effects of Katrina on the non-English speaking population).

¹¹ See Petition for Immediate Interim Relief, *supra* note 5, at 10–11 (filed Sept. 20, 2005) (suggesting that, although the EAS was not activated during or after Hurricane Katrina, it is likely to be activated in future emergencies) (on file with author).

¹² Several authors have written about the invisibility of racial minorities and, in particular, immigrant racial and ethnic minorities. See, e.g., Kevin R. Johnson, *Hurricane Katrina: Lessons About Immigrants in the Modern Administrative State*, 45 HOUS. L. REV. (forthcoming 2008) (describing immigrants as an "invisible group" of Katrina victims) (draft on file with author); Grace Kao, *Where Are the Asian and Hispanic Victims of Katrina?: A Metaphor for Invisible Minorities in Contemporary Racial Discourse*, 3 DU BOIS REV. 223 (2006); Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream*, 50 N.Y.L. SCH. L. REV. 417, 454 (2005–2006) (noting that immigrant workers are still largely invisible to the larger society.). For more information about this problem, see DANIEL A. FARBER & JIM CHEN, *DISASTERS AND THE LAW: KATRINA AND BEYOND* 109–60 (2006).

¹³ Some jurisdictions and broadcasters, however, have made efforts to communicate with non-English speaking residents. See, e.g., Letter from David Honig, Executive Director of Minority Media & Telecommunications Council, to Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, May 31, 2007 (noting that the Independent Spanish Broadcasters Association and Florida Association of Broadcasters have taken steps to ensure that "a 'designated hitter' English language station will provide emergency information in Spanish (or other languages) when no Spanish (or other language) station is operational") (on file with author); *Hawaii: Language Barriers Impede Disaster Readiness*, PACIFIC MAGAZINE, Oct. 4, 2005, <http://www.pacificmagazine.net/news/2005/10/04/hawaii-language-barriers-impede-disaster-readiness> (last visited Jan. 23, 2008) (discussing local radio station carrying programs in no less than eleven languages and recording emergency announcements in a variety of languages) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); Krista Mahr, *California County Tries Multilingual Warning System*, WASH. POST, Dec. 8, 2003, at A2 (describing programmable phone devices that will deliver emergency messages in languages other than English).

language minorities residing in the United States,¹⁴ steps must be taken to ensure that limited English proficient individuals receive warnings and information about imminent disasters and other emergencies.

In advocating multilingual warnings and alerts, this Article strives to find a workable solution to overcome the language barriers that prevent the dissemination of emergency information.¹⁵ Part II of this article provides an overview of our national public warning system, the Emergency Alert System (EAS). This part offers a brief history of the development of the EAS, discusses federal and state responsibility for administering the system, and explains how the system works.¹⁶ Part III describes an ongoing endeavor to rework the EAS to meet the needs of language minorities. This part focuses on a series of notices of proposed rulemaking (NPRMs) issued by the Federal Communications Commission (FCC or Commission) to address EAS failure to provide alerts and warnings to non-English speakers. Comments received in response to the NPRMs are at the heart of efforts to reform the EAS.¹⁷ Part IV discusses the FCC's obligation to safeguard the "public interest, convenience and necessity" in implementing broadcast policies and licensing requirements.¹⁸ Although the contours of this obligation have changed drastically over the past eight decades, the public

¹⁴ See *supra* notes 12–13 and accompanying text.

¹⁵ Throughout this Article, "emergency information," "emergency warnings," and "emergency alerts," are used interchangeably to refer to information provided to the public before, during, and immediately after a disaster. This Article recognizes the importance of "initial alerts preceding and during emergencies" and "provision of essential emergency-related information during the emergency and afterwards." See Letter from Derek K. Poarch, Chief, Public Safety and Homeland Security Bureau, to Marlene Dortch, Secretary, FCC (Aug. 13, 2007), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-275939A1.pdf (comments of Pat Roberts, Florida Association of Broadcasters) (stating that initial alerts and provision of emergency-related information are two separate but related effects of the emergency communications problem).

¹⁶ See P'SHIP FOR PUB. WARNING, PPW REPORT 2004–1, THE EMERGENCY ALERT SYSTEM (EAS): AN ASSESSMENT (2004) [hereinafter PPW REPORT 2004–1], **Error! Hyperlink reference not valid.** <http://www.partnershipforpublicwarning.org/ppw/docs/easassessment.pdf> (chronicling the history of The Partnership for Public Warning as a non-profit association of state, local, and private sector officials that advocated for the upgrade of American alert systems after September 11, 2001); see also Spencer S. Hsu, *Bush Orders Update of Emergency Alert System*, WASH. POST, June 27, 2006, at A4 (noting that The Partnership for Public Warning disbanded in 2004 due to lack of funding).

¹⁷ See *infra* notes 95–126, 132–38, 147–52, and 182–88 and accompanying text (outlining the FCC and NAB positions concerning non-English emergency alerts).

¹⁸ See General Rules of Practice and Procedure, 47 C.F.R. §1.62 (stating that license renewal must "serve the public interest, convenience, and necessity"); see also 47 C.F.R. §§ 1.420, 1.903, 1.939, 2.915 (using "public interest, convenience and necessity" as a guide for evaluating agency action).

interest standard continues to direct and constrain Commission decisions.¹⁹ Accordingly, this part urges FCC intervention to serve the overriding public interest in accessible public warnings for non-English speakers and in light of significant market failure to produce such warnings.²⁰

II. *This Is Only a Test:*²¹ *An Overview of the Emergency Alert System*

The Emergency Alert System serves as our current national public warning system. It allows broadcast stations, cable systems, satellite radio, Digital Broadcast Satellite (DBS) systems, participating satellite companies, and other service providers to receive and transmit presidential, state, and local alerts and emergency information directly to the public. This section provides an overview of the EAS. It describes the development, administration, and operation of the system.

A. *Evolution*

In 1951, President Harry S. Truman delegated authority to the FCC to develop the first national public warning system.²² Created during the Cold War, this system, known as Control of Electromagnetic Radiation (CONELRAD), was designed to allow the President to address the American public in the event of an enemy attack.²³ CONELRAD also provided a communications infrastructure, which enabled broadcasters to supply the public with information during national emergencies.²⁴ To accomplish this,

¹⁹ See *infra* Part IV.A. (demonstrating the evolution of the laws governing FCC regulation of emergency channels from adoption to today).

²⁰ See *infra* Part IV.B. (establishing evidence of the large proportion of limited English proficiency Americans residents who cannot make use of current emergency alert systems).

²¹ See *The Emergency Alert System (EAS): Fact Sheet*, <http://www.fcc.gov/eb/easfact.html> (last visited Jan. 23, 2008) (storing several versions of the Emergency Alert System script) (on file with the Washington and Lee Journal of Civil Rights and Social Justice). The full script reads, "This is a test of the Emergency Alert System—this is only a test." *Id.*

²² See Exec. Order No. 10,312, 16 Fed. Reg. 12452 (Dec. 10, 1951) (providing authority to FCC for emergency control over radio stations).

²³ See *Aviation Radio Servs.*, 19 Fed. Reg. 1186, 1186–87 (Mar. 3, 1954) (codified at 47 C.F.R. pt. 9 (1955)) (giving an overview of the reasoning behind the CONELRAD system's creation).

²⁴ See *id.* (stating that CONELRAD was also designed to protect national security by suspending or minimizing electromagnetic transmissions from AM radio stations during an attack); see also Exec. Order No. 10,312, 16 Fed. Reg. 12452 (Dec. 10, 1951) (delegating authority to the FCC to "prepar[e] and put[] into effect plans with respect to radio stations . . . to minimize the use of the electromagnetic radiations of such stations, in event of attack or of imminent threat thereof, as an aid to the navigation of hostile aircraft, guided missiles, and other devices capable of direct attack upon the United States").

CONELRAD established a distribution network among AM radio stations.²⁵ Information and alerts would originate at designated stations.²⁶ These stations would alert other stations, which, in turn, would alert still others.²⁷

In 1963, President John F. Kennedy replaced CONELRAD with the Emergency Broadcast System (EBS).²⁸ The EBS, like CONELRAD, transmitted messages through a distribution network of broadcasters.²⁹ It operated through an analog transmission system, and television and radio stations were required to purchase and install equipment to decode EBS messages.³⁰ State and local governments also began to use the system to inform the public during state and local emergencies.³¹

In 1994, the Emergency Alert System replaced the EBS.³² The EAS is digitally structured and uses a messaging protocol identical to that employed by the National Weather Service (NWS).³³ The NWS uses the same protocol to issue weather alerts and other information to specialized radio units, which are available for purchase by the public at-large.³⁴ The

²⁵ See *In re Review of the Emergency Alert System, Notice of Proposed Rulemaking*, EB Docket No. 04-296, 19 F.C.C.R. 15775, 15776-77, ¶ 6 (2004) [hereinafter *Emergency Alert System*] (discussing CONELRAD's "simple system for alerting the public and 'downstream' stations").

²⁶ See *id.* ("[T]he alerting system consisted of a sequence of shutting the station off for five seconds, returning to the air for five seconds, again shutting down for five seconds, and then transmitting a tone for fifteen seconds.").

²⁷ See *id.* (describing alerting system process).

²⁸ See Exec. Order No. 11,092, 28 Fed. Reg. 1847 (Feb. 26, 1963) (providing authority to FCC develop national emergency plans and programs regarding "provisions by common carriers, broadcasting facilities, and the safety and special radio services"); see also PPW REPORT 2004-1, *supra* note 16, at 38 (noting that improved accuracy for missile guidance and navigational technologies rendered CONELRAD obsolete).

²⁹ See PPW REPORT 2004-1, *supra* note 16, at 38 (analyzing the early structure of the integrated EBS network); see also *In re Amendment of Part 73, Subpart G, of the Commission's Rules Regarding the Emergency Broadcast System, Report and Order and Further Notice of Proposed Rule Making*, 10 F.C.C.R. 1786, 1790-91, ¶ 10 (1994) [hereinafter *Amendment of Part 73*] (describing the alert system as a "daisy chain").

³⁰ See *Emergency Alert System, supra* note 25, at 15777, ¶ 7 (indicating the analog nature of the Emergency Alert System).

³¹ See *Amendment of Part 73, supra* note 29, at 1790, ¶ 9 (noting that state and local authorities may request use of EBS to provide information about "regional, state, county, and local emergencies").

³² See *id.* at 1788, ¶1 (establishing the EAS and replacing the EBS). The EAS was fully implemented nationwide in 1997, when broadcasters were required to install and operate EAS equipment. *Id.* at 1790-91, ¶ 167 (1994).

³³ See PPW REPORT 2004-1, *supra* note 16, at 13 (outlining the 1994 adoption of the EAS messaging protocol).

³⁴ See *Emergency Alert System, supra* note 25, at 15780 n.25 (stating that as a consequence, NWS messages are more broadly accessible today than ever before).

FCC also expanded the system's reach by requiring not only broadcasters,³⁵ but also cable companies³⁶ to install EAS equipment and transmit national EAS messages.³⁷ In 1997, the EAS was extended to wireless cable systems.³⁸ On December 31, 2006, digital television broadcasters, digital cable systems, digital audio broadcasters, and Digital Audio Radio Service were required to begin relaying national level EAS messages.³⁹ On May 31, 2007, EAS was extended to Direct Broadcast Satellite⁴⁰ and wireline video providers.⁴¹

These public warning participants continue to discuss ways to leverage technological advances in communications media. For example, cooperative groups, like the FCC's Commercial Mobile Service Alert Advisory Committee, have forged alliances between the private sector and government to enhance public alert and warning capability. This coalition's efforts recently resulted in an FCC order requiring all EAS participants to accept messages using Common Alerting Protocol (CAP), an open standard that will standardize message formats and thus provide operational compatibility among U.S. warning systems.⁴² According to the FCC, the use

³⁵ "Broadcasting" means "the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations." 47 U.S.C. § 153(6) 1997. Examples of broadcasters are radio and "free" television stations. See Andrea L. Johnson, *Redefining Diversity in Telecommunications: Uniform Regulatory Framework for Mass Communications*, 26 U.C. DAVIS L. REV. 87, 109 (1992) (detailing the FCC's method of classifying "broadcasters" and giving examples thereof).

³⁶ Cable television "involves a master antenna placed where it can receive a useable broadcast signal, a power booster and signal converter to enhance the signal, and a coaxial or fiber optics cable to carry the signal to the home viewer." See *id.* at 112 n.150 (describing how cable technology delivers programming to its subscribers).

³⁷ See Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 544(g) (2000) (requiring cable companies to afford emergency broadcasting system information). Although Congress passed this act during the EBS era, installing EBS equipment at cable heads was impracticable. Consequently, the FCC began contemplating the development of the EAS. See PPW REPORT 2004-1, *supra* note 16, at 47-48 (emphasizing the impracticability of installing EBS equipment in unmanned cable head ends).

³⁸ See Emergency Alert System, *supra* note 25, at 15777, ¶ 8 (noting the FCC's requirement that wireless cable delivery systems be added to the EAS system).

³⁹ See The Emergency Alert System (EAS): FCC Consumer Facts, <http://www.fcc.gov/cgb/consumerfacts/eas.html> (last visited Jan. 23, 2008) (giving the effectiveness date for EAS regulations) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); see also *In re Review of the Emergency Alert System, First Report and Order and Further Notice of Proposed Rulemaking*, EB Docket No. 04-296, 20 F.C.C.R. 18625 (Nov. 3, 2005) (giving the modern history of the EAS and its extension to other forms of broadcasting).

⁴⁰ *Id.*

⁴¹ Press Release, FCC, FCC Takes Action to Further Strengthen Nation's Emergency Alert System (May 31, 2007), available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-273458A1.pdf.

⁴² See P'SHIP FOR PUB. WARNING, THE COMMON ALERTING PROTOCOL: AN OPEN STANDARD FOR INTEROPERABILITY IN ALL-HAZARD WARNING, <http://www.ppw.us/ppw/cap.html> ("During 2001 an

of the CAP open standard "will help to ensure the efficient and rapid transmission of EAS alerts to the American public in a variety of formats (including text, audio and video) and via different means (broadcast, cable, satellite, and other networks) and to promote the development of Next Generation EAS."⁴³

Other federal initiatives to enhance and supplement the EAS are currently under development.⁴⁴ One example is a pilot project called the Digital Emergency Alert System (DEAS). This system allows transmission of emergency alerts over commonly available broadcast media devices, such as radios, televisions, computers, cell phones, and pagers.⁴⁵ Digital transmission is nearly instantaneous and allows for simultaneous distribution to thousands of sites.⁴⁶ In addition, "datacasting" decreases the potential for interrupted service.⁴⁷ The Federal Emergency Management Agency (FEMA) completed the DEAS pilot in December 2007. All public broadcasting stations nationwide are currently DEAS-enabled, and national DEAS deployment to all public broadcasting affiliates has begun.⁴⁸

international working group of more than 120 emergency managers and emergency information technologists developed initial requirements and a straw man design for CAP. In 2002 that effort was adopted by the Partnership for Public Warning (PPW), a national public-private partnership of agencies, vendors and academic experts.").

⁴³ Press Release, *supra* note 41. The order requires EAS participants to accept messages using CAP within 180 days after FEMA "announces its adoption of standards in each case." *Id.*

⁴⁴ See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, EMERGENCY PREPAREDNESS: CURRENT EMERGENCY ALERT SYSTEM HAS LIMITATIONS, AND DEVELOPMENT OF A NEW INTEGRATED SYSTEM WILL BE CHALLENGING 24–25 (Mar. 2007), available at <http://www.gao.gov/new.items/d07411.pdf> (noting Integrated Public Alert and Warning System, a public-private partnership, currently oversees various pilot projects).

⁴⁵ See *id.* at 24 (stating the program involves the participation of commercial television networks, cell phone providers, and Internet providers); see also Ass'n of Public Television Stations, Digital Emergency Alert System (DEAS) Fact Sheet 1, available at http://www.fema.gov/pdf/media/2006/deas_fact_sheet.pdf (describing the DEAS); CONG. RESEARCH SERV., EMERGENCY COMMUNICATIONS: THE EMERGENCY ALERT SYSTEM (EAS) AND ALL-HAZARD WARNINGS 6–7 (updated Sept. 13, 2006), available at <http://www.fas.org/sgp/crs/homesecc/RL32527.pdf> (providing DEAS fact sheet describing system).

⁴⁶ See ASS'N OF PUBLIC TELEVISION STATIONS, DIGITAL EMERGENCY ALERT SYSTEM (DEAS) 2, http://www.fema.gov/pdf/media/2006/deas_fact_sheet.pdf (last visited May 22, 2008) ("[DEAS's transmissions] can be simultaneously distributed to hundreds or even thousands of receivers in the event of an emergency in real-time.") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

⁴⁷ See *id.* ("Transmitting information via digital television decreases the potential for interrupted service.").

⁴⁸ See U.S. DEP'T OF HOMELAND SECURITY, BUDGET IN BRIEF: FISCAL YEAR 2008, available at http://www.dhs.gov/xlibrary/assets/budget_bib-fy2008.pdf. The DEAS pilot is part of the new Integrated Public Alert and Warning System (IPAWS), a public-private partnership of public warning participants in which the Department of Homeland Security holds a leadership role. See CONGRESSIONAL RESEARCH

B. Administration

The FCC, along with FEMA and the NWS, administers the EAS at the federal level.⁴⁹ The agencies' respective roles primarily stem from a 1981 Memorandum of Understanding between the FCC, FEMA, and NWS,⁵⁰ a 1984 Executive Order,⁵¹ and a 1995 Presidential Statement of Requirements.⁵² The Commission was established by the Communications Act of 1934⁵³ and is responsible for regulating interstate and international communications by radio, television, wire, satellite, and cable.⁵⁴ One of the FCC's chief functions is to provide for the national defense and protection of life and property through the nation's communication networks.⁵⁵ To meet this obligation, the agency regulates emergency broadcasting⁵⁶ and prescribes technical standards for the EAS, procedures for EAS participants to follow in the event of national activation, and EAS testing protocols.⁵⁷

SERVICE REPORT FOR CONGRESS: THE EMERGENCY ALERT SYSTEM (EAS) AND ALL-HAZARD WARNINGS, available at <http://fas.org/spp/crs/homesec/RL32527.pdf>.

⁴⁹ See *In re* Review of the Emergency Alert System, 19 F.C.C.R. 15775, 15778, ¶ 9 (2004) ("The Commission, in conjunction with FEMA and the NWS, implement EAS at the federal level.").

⁵⁰ See *id.* (citing STATE AND LOCAL EMERGENCY BROADCASTING SYSTEM (EBS) MEMORANDUM OF UNDERSTANDING AMONG THE FEDERAL EMERGENCY MANAGEMENT AGENCY (FEMA), FEDERAL COMMUNICATIONS COMMISSION (FCC), AND THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION (NOAA) (Approved by National Industry Advisory Committee (NIAC) on April 21, 1982). NIAC was chartered in 1963 to assist the FCC in its emergency preparedness responsibilities. *Id.*

⁵¹ See *In re* Review of the Emergency Alert System, *supra* note 49, at 15778, ¶ 9 (citing Assignment of National Security and Emergency Preparedness Telecommunications Functions, Exec. Order No. 12472, 49 Fed. Reg. 13471 (1984)).

⁵² See *id.* (citing Presidential Communications with the General Public During Periods of National Emergency, The White House (Sept. 15, 1995)).

⁵³ See Communications Act of 1934, 47 U.S.C. § 151 et seq. (2000) (creating the Federal Emergency Management Agency).

⁵⁴ See *id.* (noting the establishment and duties of the Commission). The FCC wields jurisdiction over all fifty states, the District of Columbia, and U.S. possessions. See *The Emergency Alert System (EAS): FCC Consumer Facts*, <http://www.fcc.gov/cgb/consumerfacts/eas.html> (last visited Jan. 23, 2008) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

⁵⁵ See 47 U.S.C. § 151 (stating that the FCC regulates the world-wide radio and wire networks to serve the national defense and promote safety of life and property).

⁵⁶ See Emergency Alert System (EAS) 47 C.F.R. § 11.1 (2000) (formalizing the FCC's creation of the Emergency Alert System). The FCC's authority to regulate derives predominantly from §§ 151, 154(i) & (o), 303(r), & 606. *In re* Review of the Emergency Alert System, 19 F.C.C.R. 15775, 15778, ¶ 10 n.14 (2004).

⁵⁷ See *In re* Review of the Emergency Alert System, *supra* note 49, at 15779, ¶ 12 (2004) ("In general, the Commission's rules prescribe: (1) technical standards for the EAS; (2) procedures for radio and television broadcast stations and cable systems to follow in the event EAS is activated; and (3) EAS

FEMA⁵⁸ serves as the President's "executive agent" for developing, operating, and maintaining the national level EAS.⁵⁹ These duties include assisting state and local emergency management officials with their respective EAS structures.⁶⁰ Although the President is responsible for activating the national level EAS,⁶¹ FEMA is responsible for implementing EAS activation at the national level.⁶² It is also responsible for executing EAS tests and drills.⁶³

Nearly all EAS alerts originate from the NWS.⁶⁴ The NWS⁶⁵ supplies local alerts and emergency weather information to the public.⁶⁶ It also broadcasts "forecasts, warnings, watches, and other non-weather related

testing protocols."). See generally Emergency Alert System (EAS), 47 C.F.R. §§ 11.1–11.61 (listing technical standards for the EAS).

⁵⁸ FEMA is a component of the Department of Homeland Security's Emergency Preparedness and Response Directorate. See Department of Homeland Security, *Emergency Preparedness and Response Could Better Integrate Information Technology with Information Response and Recovery*, 1 (Sept. 2005), available at http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_05-36_Sep05.pdf; Homeland Security Act of 2002, 6 U.S.C. § 313(l) (2000 & Supp. II 2002).

⁵⁹ See *In re Review of the Emergency Alert System*, *supra* note 49, at 15779, ¶ 13 ("Activation of the national-level EAS rests solely with the President.").

⁶⁰ See *The Emergency Alert System (EAS): FCC Consumer Facts*, <http://www.fcc.gov/cgb/consumerfacts/eas.html> ("FEMA provides direction and assistance for state and local emergency management officials to develop, implement, and maintain their EAS structure.").

⁶¹ See *In re Review of the Emergency Alert System*, *supra* note 49, at 15779, ¶ 13 (2004) ("Activation of the national-level EAS rests solely with the President."); see also National Operations Warning System Operations Manual, FEMA Manual 1550.2 at 1–2, Mar. 30, 2001, http://www.fema.gov/pdf/library/1550_2.pdf (describing FEMA's role in the EAS).

⁶² See *In re Review of the Emergency Alert System*, *supra* note 49, at 15779, ¶ 13 (delegating the responsibility of EAS implementation to FEMA); see also Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121, et. seq. (2000) (authorizing FEMA to provide emergency preparedness communications and to disseminate warnings to the public).

⁶³ See *In re Review of the Emergency Alert System*, *supra* note 49, at 15779, ¶ 13 ("FEMA . . . is responsible for implementation of the national level activation of EAS, tests, and exercises."); see also Written Statement of Kenneth Moran, Acting Director, Office of Homeland Security Enforcement Bureau, FCC, Before the Comm. on Commerce, Science and Transportation, Subcomm. on Disaster Prevention and Prediction, U.S. Senate, All-Hazards Alert Systems (July 27, 2005), <http://commerce.senate.gov/pdf/moran.pdf> (describing FEMA's role in the EAS).

⁶⁴ See *In re Review of the Emergency Alert System*, *supra* note 49, at 15780, ¶ 14 (noting approximately 80% of EAS alerts originate from the NWS).

⁶⁵ The NWS is part of National Oceanic and Atmospheric Administration, which, in turn, is part of the Department of Commerce. In *re Review of the Emergency Alert System*, *supra* note 49, at 15780, ¶ 14; *About NOAA's National Weather Service*, <http://www.weather.gov/admin.php>.

⁶⁶ See *The Emergency Alert System (EAS): FCC Consumer Facts*, <http://www.fcc.gov/cgb/consumerfacts/eas.html> ("The NWS provides emergency weather information to alert the public of dangerous local weather conditions and other emergencies.") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

hazard information 24 hours a day."⁶⁷ Many broadcasters and cable systems monitor NWS transmissions and, with the NWS's assistance, relay messages via the EAS.⁶⁸

At the national level, involvement in the EAS is mandatory. All EAS participants must transmit Presidential alerts.⁶⁹ At the state and local level, terrestrial EAS participants must relay EAS alerts originated by governors.⁷⁰ All other participation at the state and local level is voluntary.⁷¹ Although the EAS has never been activated at the national level,⁷² states and localities have used the system to communicate emergency information about local hazards.⁷³ Some localities have activated the EAS to issue AMBER alerts.⁷⁴ Nonetheless, because transmission of non-Presidential level and non-gubernatorial level alerts is voluntary, whether and to what extent participants actually relay these messages is unknown. One estimate suggests that only fifty percent broadcast these alerts to listeners.⁷⁵

⁶⁷ *In re* Review of the Emergency Alert System, *supra* note 49, at 15780 n.25. During an emergency, the NWS can actually activate the specialized radio units mentioned *supra* at note 34 and thus convey urgent messages. *Id.*

⁶⁸ *See In re* Review of the Emergency Alert System, *supra* note 49, at 15780, ¶ 14 & n.25 ("Many broadcast stations and cable systems also directly monitor NWS transmissions and relay the NWS messages to their audiences over EAS."). The FCC encourages monitoring of NWS transmissions. *Id.* at n.28.

⁶⁹ *See id.* at 15776, ¶ 2 (noting the EAS mandates the delivery of Presidential messages); Emergency Alert System (EAS), 47 C.F.R. § 11.44 (d) ("During a national emergency, the facilities of all EAS Participants must be reserved exclusively for distribution of Presidential Messages.").

⁷⁰ *See* Press Release, *supra* note 41 (announcing the change in an otherwise voluntary system at the state and local level). In the same announcement, the FCC also sought comment on "whether Participants should be required to deliver EAS alerts originated by local, county, tribal, or other state governmental entities." *Id.*

⁷¹ *See In re* Review of the Emergency Alert System, *supra* note 49, at 15776, ¶ 3 (2004) ("EAS use as part of such a public warning system at the state and local levels, while encouraged, is merely voluntary.") (citing Emergency Alert System (EAS), 47 C.F.R. § 11.1 (2000)).

⁷² *See* PPW REPORT 2004-1, *supra* note 16, at 9 (listing EAS history highlights). After September 11, 2001, interest in improving the efficacy of the EAS grew. *See In re* Review of the Emergency Alert System, *supra* note 49, at 15776, ¶ 2.

⁷³ *See In re* Review of the Emergency Alert System, *supra* note 49, at 15780, ¶ 14 (noting that 80% of EAS activations stem from NWS alerts). Activation statistics for some years are available at PPW REPORT 2004-1, *supra* note 16, at 9, and SUBCOMM. ON NATURAL DISASTER REDUCTION, NAT'L SCI. & TECH. COUNCIL, EFFECTIVE DISASTER WARNINGS 46, app. 3, http://www.sdr.gov/NDIS_rev_Oct27.pdf.

⁷⁴ *See* PPW REPORT 2004-1, *supra* note 16, at 51, app. E (describing EAS implementation at the local level).

⁷⁵ *See* PPW REPORT 2004-1, *supra* note 16, at 3 (noting that whether the alerts actually make it to listeners is uncertain).

C. Operation

The EAS is a "hierarchical, trickle down distribution system."⁷⁶ Messages are disbursed in descending tiers; all EAS participants have designated roles within the distribution process.⁷⁷ In the event of a Presidential level message,⁷⁸ FEMA distributes the message to thirty-six radio stations that serve as Primary Entry Points (PEPs)⁷⁹ and which encompass approximately ninety percent of the country and U.S. territories.⁸⁰ The PEP stations transmit the message to approximately 550 Local Primary One (LP-1) radio stations across the country.⁸¹ The LP-1 stations rebroadcast national alerts to local EAS participants.⁸² The local participants must monitor at least two LP-1 stations and transmit any Presidential message received.⁸³ FEMA has also added "a direct national-level EAS connection between FEMA and the public radio satellite and terrestrial backbone," which allows national alerts to reach directly about 800 public radio stations countrywide.⁸⁴

For state and local level EAS messages, the LP-1 stations serve as the primary entry points. These messages traverse the same paths as would a Presidential level message after being rebroadcast to local EAS participants. To participate at the state or local level, states and localities develop EAS

⁷⁶ Emergency Alert System, *supra* note 25, at 15780, ¶ 16.

⁷⁷ See 47 C.F.R. § 11.18 (2007) (describing the levels of the Emergency Alert System and their functions).

⁷⁸ See 47 C.F.R. § 11.44(a) (2007) (defining a Presidential Message).

⁷⁹ See Emergency Alert System, *supra* note 25, at 15780–81, ¶ 16 (delineating the location of Primary Entry Points in the Emergency Alert System hierarchy); see also 47 C.F.R. § 11.14 (2007) (defining a Primary Entry Point). FEMA provisioned two new PEP stations in 2007, increasing the number of PEP stations from 34 to 36. See U.S. DEP'T OF HOMELAND SECURITY, BUDGET IN BRIEF: FISCAL YEAR 2008, available at http://www.dhs.gov/xlibrary/assets/budget_bib-fy2008.pdf (noting two new PEP stations in Mississippi and Alabama). A third PEP station is being provisioned in Florida. Ultimately, FEMA intends to increase the number of PEP stations to sixty-three, so that every state and territory will be covered. See EMERGENCY PREPAREDNESS, *supra* note 44, at 24 (detailing the FEMA initiatives to standardize the current Emergency Alert System).

⁸⁰ See Stacy Baird, *The Government at the Standards Bazaar*, 18 STAN. L. & POL'Y REV. 35, 71 n.102 (2007) (describing the geographical coverage of Primary Entry Points).

⁸¹ See Emergency Alert System, *supra* note 25, at 15781, ¶ 17 (explaining the function of a Primary Entry Point).

⁸² See *id.* at 15781 (describing the role of Local Primary One radio stations in the Emergency Alert System).

⁸³ See 47 C.F.R. § 11.52(d) (2007) (establishing the monitoring requirements for local participants in the Emergency Alert System).

⁸⁴ EMERGENCY PREPAREDNESS, *supra* note 44, at 5 n.5 (discussing the technological improvements made to support national-level EAS messages).

Plans, which must receive FCC approval.⁸⁵ State Emergency Communication Committees and Local Emergency Communication Committees typically create these plans.⁸⁶ These committees are composed of emergency management officials and individuals from the communications industry.⁸⁷

All EAS messages are initiated by the use of dedicated EAS equipment.⁸⁸ When activated, the EAS automatically interrupts all other broadcasts and transmissions to convey the emergency alert.⁸⁹ The EAS equipment is "capable of providing warnings in the primary language that is used by the station or cable system."⁹⁰

III. *A Change Is Gonna Come:*⁹¹ *Proposed Changes to the Emergency Alert System*

Over the past few years, the FCC has sought comment on how best to provide emergency alerts to language minorities. This part tracks the ensuing discussions held between the Commission and stakeholders addressing the issue of multilingual EAS information. The FCC has yet to resolve this matter. Consequently, the EAS rules contain no provision ensuring the dissemination of disaster warnings to non-English speakers.

⁸⁵ See 47 C.F.R. § 11.21 (2007) (advising local Emergency Alert System participants of the requirements their EAS plans must meet).

⁸⁶ See Emergency Alert System, *supra* note 25, at 15780 (describing the function of State and Local Emergency Communication Committees).

⁸⁷ See *id.* (discussing the makeup of State and Local Emergency Communication Committees).

⁸⁸ See All-Hazards Alert System: Hearing before the Subcomm. On Disaster Prevention, and Prediction of the S. Comm. on Commerce, Science, and Transportation, 109th Cong. 5 (2005) (Statement of Kenneth Moran, Acting Director of the Federal Communication Commission's Bureau of Homeland Security), <http://commerce.senate.gov/pdf/moran.pdf>. (explaining the activation of the Emergency Alert System).

⁸⁹ See *id.* at 5 (describing the Emergency Alert System's effect on regular programming).

⁹⁰ *Id.* at 5; see also 47 C.F.R. §§ 11.54(b)(8), 11.55(c)(4) (2007) (stating the duties of an Emergency Alert System participant during a National Level emergency).

⁹¹ SAM COOKE, *A Change is Gonna Come*, on AIN'T THAT GOOD NEWS (RCA Victor Records 1964).

*A. Notice of Proposed Rulemaking in the Matter of Review of the
Emergency Alert System and Petition for Immediate Interim Relief*

On August 12, 2004, the FCC released a Notice of Proposed Rulemaking (NPRM), seeking comment, *inter alia*, "on whether current methodologies for providing alert and warning to non-English speaking persons are adequate."⁹² In the NPRM, the Commission acknowledged that it should "consider the needs of people with primary languages other than English when considering the best method of contacting the public during an emergency."⁹³ The NPRM specifically inquired about additional provisions necessary for providing multilingual alerts as well as projected costs associated with implementing any changes.⁹⁴

Out of the several hundreds of responses to the NPRM,⁹⁵ one comment, a Petition for Immediate Interim Relief,⁹⁶ has emerged as a potential bellwether of change. The Petition, filed in the aftermath of Hurricane Katrina by an organization of independent Spanish language broadcasters and two civil rights organizations,⁹⁷ called for the FCC to modify its EAS rules and adopt emergency provisional EAS policies "to provide non-English speaking persons in the United States with access to emergency information during times of local, state and national emergencies."⁹⁸ To facilitate these changes, the petitioners proposed that:

1. EAS PEP stations . . . air Presidential level messages in both English and Spanish[;]

⁹² Emergency Alert System, *supra* note 25, at 15790, ¶ 40.

⁹³ *Id.* at 16.

⁹⁴ *See id.* (requesting feedback for this proposed rulemaking).

⁹⁵ An electronic search on the FCC's website revealed well over 500 filings submitted in response to the NPRM initiated in 2004.

⁹⁶ *See* Petition, *supra* note 5 (offering suggestions for the FCC to enhance their delivery of emergency messages to non-English speaking individuals).

⁹⁷ The Independent Spanish Broadcasters Association (ISBA), the Office of Communication of the United Church of Christ, Inc. (OC), and the Minority Media and Telecommunications Council (MMTC) filed the petition. The ISBA is an organization of independent Spanish language and Latino radio and television broadcasters. *Id.* at 2 n.3. The OC advocates on behalf of individuals historically excluded from the media, including people of color, women, and disabled individuals. *Id.* at 2 n.4. The MMTC is a national nonprofit "dedicated to promoting and preserving equal opportunity and civil rights in the mass media and telecommunications industries." *Id.* at 2 n.5.

⁹⁸ *Id.* at 3-4.

2. [S]tate and local EAS plans . . . designate a "Local Primary Spanish" ("LP-S") station to transmit emergency information in Spanish in local areas where a substantial proportion of the population has its primary fluency in Spanish[;]

3. [S]tate and local EAS plans . . . designate a "Local Primary Multilingual" ("LP-M") station in local areas where a substantial proportion of the population has its primary fluency in a language other than English or Spanish[;]

4. [A]t least one broadcast station in every market . . . monitor and rebroadcast emergency information carried by local LP-S and LP-M stations[;]

5. [S]tations remaining on the air during an emergency . . . broadcast emergency information in Spanish and in languages used on local LP-S and LP-M stations if these stations lose transmission capability[;] and

6. [A]ll broadcasters . . . be encouraged to assist local LP-S and LP-M stations to return to the air under such circumstances.⁹⁹

The petitioners also recommended that the Commission look to the Voting Rights Act of 1965 to ascertain whether a language minority group has achieved numbers sufficient to constitute a "substantial proportion of the population."¹⁰⁰ Under the Voting Rights Act, certain qualifying jurisdictions must make available language assistance at polling locations for language minorities with limited English proficiency.¹⁰¹ Required language assistance may include the provision of registration and voting materials in a minority language in addition to oral instructions.¹⁰² Whether a jurisdiction is responsible for providing language assistance to a language minority group depends on the number of LEP citizens of voting age in that language

⁹⁹ *Id.* at 4 (footnotes omitted). Additional details about this proposal are set forth in the Petition at pages 13–16.

¹⁰⁰ *Id.* at 4 n.9 & n.10.

¹⁰¹ Voting Rights Act of 1965, 42 U.S.C. § 1973aa-1a(b)(1). The rationale for this requirement, as stated by Congress, is that LEP citizens have been effectively denied the right to vote due to "high illiteracy" resulting from "unequal educational opportunities." *Id.* § 1973aa-1a(a). Required language assistance may include the provision of registration and voting materials in a minority language.

¹⁰² *See id.* § 1973aa-1a(c).

minority.¹⁰³ Borrowing from this line of reasoning, the petitioners suggested that an LP-S or LP-M station be designated when the population of LEP individuals within a language minority group is over 50,000 or more than five percent of the total market population.¹⁰⁴

In addition, the Petition addressed the issue of costs associated with implementing the proposal. Specifically, the petitioners asserted that members of the Independent Spanish Broadcasters Association, one of the parties seeking the interim relief, would be likely voluntarily to provide translation services for other broadcasters in their respective communities.¹⁰⁵ They also surmised that broadcasters who provide services in languages other than English would likewise volunteer to help translate emergency information.¹⁰⁶

Weighing in on the issues raised by the petitioners, the National Association of Broadcasters (NAB) submitted comments questioning the Commission's authority to implement the petitioners' proposal.¹⁰⁷ The NAB response identified FEMA as the appropriate entity to address the petitioners' request for multilingual EAS messages because FEMA is responsible for the EAS at the national level¹⁰⁸ and possesses "direct authority over state and local emergency funding."¹⁰⁹ The association thus urged the petitioners "to work with FEMA and broadcasters to explore these

¹⁰³ See *id.* § 1973aa-1a(b)(2)(A)(i)(I)-(II) & (ii).

¹⁰⁴ See *In re* Review of the Emergency Alert System, Petition for Immediate Interim Relief, EB Docket No. 04-296 (filed Sept. 22, 2005) (recommending, identical to the threshold in the Voting Rights Act, that five percent be the minimum). See Voting Rights Act of 1965, 42 U.S.C. § 1973aa-1a(b)(2)(A)(i)(I) (setting forth 10,000 as the minimum). The 50,000 then, would diverge from the 10,000 minimum in the act. See *id.* § 1973aa-1a(b)(2)(A)(i)(II). According to Mr. David Honig, Executive Director for the MMTC and one of the attorneys who submitted the Petition, the 50,000 is the "back-of-the-envelope number that represents, in a medium sized market, the number of cume listeners sufficient to justify having a news service." E-mail exchange between author and David Honig on Sept. 5, 2007 (on file with author). A radio station's cume, or cumulative audience, is analogous to a newspaper's circulation. For a more in-depth explanation of cume, see TRAC Media Services, Terms and Definitions, at <http://www.tracmedia.com/Cume.aspx>.

¹⁰⁵ See Petition for Immediate Interim Relief, *supra* note 104 (arguing that non-English speaking parties seeking interim relief can likely be assumed to volunteer their translation services).

¹⁰⁶ See *id.* (stating the same).

¹⁰⁷ See *In re* Review of the Emergency Alert System, Comments in Response to Petition for Immediate Interim Relief, EB Docket No. 04-296, at 2-4 (filed Oct. 14, 2005).

¹⁰⁸ See *id.* at 2. Specifically, the NAB noted that the FCC cannot require PEPs to broadcast Presidential level EAS messages in English and Spanish because it bears no authority over the content of Presidential level messages. *Id.*

¹⁰⁹ *Id.* at 3. In support of this point, the NAB argued that the FCC lacks authority to require localities or states to develop emergency plans to implement newly created LP-S or LP-M stations.

issues further."¹¹⁰ The NAB also suggested that a study be conducted on how non-English speaking individuals receive information, including emergency information, before taking definitive steps to alter the current EAS rules.¹¹¹ Finally, the NAB expressed concerns about the feasibility of the proposed changes and listed an assortment of potential practical problems, such as, "How . . . would non-English speaking listeners in a given radio market be alerted if they are not tuned into the one 'designated' monitoring station?";¹¹² if an LP-S or LP-M station lost its transmission capacity, how would "the 'remaining' stations . . . be able to determine whether the LP-S or LP-M station had lost transmission and when transmission had been restored?";¹¹³ and, if an LP-S or LP-M station lost its transmission capacity, how would the remaining stations then "transmit non-English state and local emergency information?"¹¹⁴

The petitioners submitted comments in reply, addressing the points raised by the NAB and amending the original proposal.¹¹⁵ The petitioners affirmed that the Commission has the jurisdiction to execute the petitioners' suggested changes to the EAS and is thus a proper entity to address the Petition for Immediate Interim Relief.¹¹⁶ The petitioners also responded to

¹¹⁰ *Id.* at 4.

¹¹¹ See *id.* at 5 (suggesting a study be conducted).

¹¹² *Id.* at 4–5.

¹¹³ Comments in Response to Petition for Immediate Interim Relief, *supra* note 107, at 5.

¹¹⁴ *Id.* Responses from other stakeholders raised similar concerns. See, e.g., *In re* Review of the Emergency Alert System, Joint Comments of the Named State Broadcasters Associations, EB Docket No. 04-296 (filed Oct. 29, 2004) (questioning FCC authority to mandate relief sought by petitioners, raising practical concerns related to execution of petitioners' proposal, and cautioning against "hasty conclusions and ambiguous rules"); *In re* Review of the Emergency Alert System, Comments of the California Broadcasters Association, EB Docket No. 04-296 (filed Oct. 29, 2004) (emphasizing voluntary nature of EAS participation and need for broadcaster discretion regarding factors such as language and culture of target audience); *In re* Review of the Emergency Alert System, Joint Comments of the National Association of Broadcasters and the Association for Maximum Service Television, Inc., EB Docket No. 04-296 (filed Oct. 29, 2004) (emphasizing need for broadcaster flexibility and discretion regarding dissemination of multilingual warnings); *In re* Review of the Emergency Alert System, Comments to Proposed Rulemaking Regarding Emergency Alert System by Orange County Local Emergency Communication Committee, EB Docket No. 04-296 (filed Nov. 1, 2004) (asserting that local EAS communities are better positioned to determine language of broadcast).

¹¹⁵ See *In re* Review of the Emergency Alert System, Reply Comments, EB Docket No. 04-296, at 5 (filed Oct. 18, 2005).

¹¹⁶ See *id.* at 2–3. On this point, the petitioners argued that the Commission has the authority to withhold approval of an EAS that fails to adequately provide for multilingual information and thus can compel localities and states to develop plans to implement newly created LP-S or LP-M stations. *Id.* With respect to the NAB's concerns about the FCC's inability to mandate the content of Presidential level messages, the petitioners clarified that they requested only that FEMA deliver these messages to PEP stations in Spanish or, alternatively, that PEP stations be provided with appropriate funding and resources to translate these messages into Spanish. *Id.* at n.9.

the NAB's laundry list of practical concerns, positing, for example, that an LEP listener who was not tuned into an LP-S or LP-M could simply search for the fitting LP-S or LP-M station during an emergency.¹¹⁷ In the event that an LP-S or LP-M station lost its transmission capacity, the petitioners assured that "English language stations would receive multilingual content from another station in the relevant queue as provided by a state or local EAS plan or from the state and local authorities with appropriate funding."¹¹⁸

Regarding the NAB's request for further study on how non-English speakers receive information, the petitioners cited to a 2005 analysis of ethnic media as providing "ample data [illustrating] how ethnic minorities use radio."¹¹⁹ The study, conducted by the New California Media and Leadership Conference on Civil Rights, found that ethnic minorities, particularly Latinos and Asian Americans, are "extraordinarily reliant on ethnic media for information about politics, government, and issues important to their communities."¹²⁰ Of particular relevance is the finding that eighty-two percent of Latinos and fifty-four percent of Asian Americans "rely more on ethnic media than general market media" for information about their respective native countries or issues important to their respective ethnic communities.¹²¹ More generally, "45% of all African American, Hispanic, Asian American, Native American and Arab American adults prefer ethnic television, radio or newspapers to their mainstream counterparts,"¹²² and these ethnic media consumers "access ethnic media frequently."¹²³

¹¹⁷ See *id.* at 4 (arguing the same).

¹¹⁸ *Id.* at 5. The petitioners further elaborated that this sort of detail is best addressed by state and local officials familiar with local conditions.

¹¹⁹ See *id.* at 4 (citing New California Media and Leadership Conference on Civil Rights, *Ethnic Media in America: The Giant Hidden in Plain Sight* (June 2005), available at <http://www.ncmonline.com/polls/NCMEthnicMediaSurvey.pdf>). This study is the first comprehensive study of ethnic media. *Id.*

¹²⁰ *Id.*

¹²¹ New California Media and Leadership Conference on Civil Rights, *The Ethnic Media in America: The Giant Hidden in Plain Sight* 18 (June 2005), available at <http://www.ncmonline.com/polls/NCMEthnicMediaSurvey.pdf> (*The Ethnic Media*). This study was presented at the 2005 Leadership Conference on Civil Rights.

¹²² New California Media and Leadership Conference on Civil Rights, *The Ethnic Media in America: The Giant Hidden in Plain Sight, Major Findings* (June 2005), available at http://www.civilrights.org/press_room/press-releases/the-ethnic-media-in-america-the-giant-hidden-in-plain-sight.html?templateName=template-29304670&print=t. These 29 million adults constitute approximately thirteen percent of the adult population in the United States.

¹²³ *Id.*

The petitioners amended the original proposal in response to the NAB's query about how a station would know when an LP-S or LP-M had lost transmission.¹²⁴ Recognizing that broadcasters might not be able "to survey the dial" during an emergency, the petitioners recommended that the FCC be responsible for posting "on its home page in real time a link to a list of PEP, LP-1, LP-S and LP-M stations remaining on air."¹²⁵ Given that the FCC regularly monitors all stations, the petitioners concluded that the Commission could provide this information on its website during emergencies.¹²⁶

B. Further Notice of Proposed Rulemaking in the Matter of Review of the Emergency Alert System and Subsequent Commentary

In response to the Petition for Immediate Interim Relief and the comments submitted in reply thereto, the Commission released a Further Notice of Proposed Rulemaking (FNPRM) on November 10, 2005.¹²⁷ In the FNPRM, the FCC, again, sought comment on "how to amend the EAS rules to ensure that EAS messages more effectively reach . . . speakers of languages other than English."¹²⁸ This time, however, the Commission specifically requested feedback from interested parties on the issues raised in the Petition.¹²⁹ In particular, the Commission asked how the petitioners' proposal ought to be implemented and called for additional proposals for alerting language minorities.¹³⁰ While the Commission continued to deliberate, it encouraged EAS participants voluntarily to provide multilingual emergency information.¹³¹

¹²⁴ See Reply Comments, *supra* note 115, at 5.

¹²⁵ *Id.*

¹²⁶ See *id.* The Regional and Field Offices of the FCC's Enforcement Bureau routinely monitors all stations.

¹²⁷ *In re* Review of the Emergency Alert System, EB Docket No. 04-296, *First Report and Order and Further Notice of Proposed Rulemaking*, 20 F.C.C.R. 18625 (Nov. 3, 2005). The FCC also released a First Report and Order to the NPRM adopting rules to extend EAS obligations to digital television broadcasters, digital cable systems, digital audio broadcasters, Digital Audio Radio Service, and Direct Broadcast Satellite. *Id.*

¹²⁸ *Id.*

¹²⁹ See *id.* (incorporating the Petition and comments filed in response thereto into the FNPR).

¹³⁰ See *id.* (relaying the Commission's concerns regarding the petitioner's proposal).

¹³¹ See *id.* (urging that action be taken regarding multilingual alerts).

Both the petitioners and the NAB filed comments.¹³² The petitioners urged adoption of their proposal as a "blueprint for a simple, straightforward plan to provide non-English speaking persons in the United States with access to emergency information during times of local, state and national emergencies."¹³³ They quoted statements made by FCC commissioners emphasizing the importance of providing multilingual disaster warnings¹³⁴ and requested that the Commission incorporate multilingual EAS messaging into EAS rules for new technologies, including digital services.¹³⁵ The NAB advocated continued adherence to the FCC's original position allowing stations voluntarily to provide multilingual EAS messages.¹³⁶ It reiterated points made in its earlier comments, identifying FEMA as the proper agency to address the need for these alerts at the Presidential level and to provide funding and guidance to state and local governments to develop emergency plans that meet the needs of both English and non-English speakers.¹³⁷ The NAB also stressed that practical concerns, raised in its previous comments, required further consideration by the FCC before adopting the petitioners' plan.¹³⁸

¹³² Additional stakeholders submitted comments, many of which were similar to those presented by the NAB. *See, e.g., In re Review of the Emergency Alert System, Joint Comments of the Named State Broadcasters Associations*, EB Docket No. 04-296 (filed Jan. 24, 2006) (encouraging the FCC to bring together all stakeholders at the federal, state, and local levels to address need for multilingual warnings); *In re Review of the Emergency Alert System, Comments of the Association for Maximum Service Television, Inc.*, EB Docket No. 04-296 (filed Jan. 24, 2006) (arguing that making multilingual warnings mandatory could negatively impact broadcaster ability to provide comprehensive emergency coverage); *In re Review of the Emergency Alert System, Comments of the Community Broadcasters Association*, EB Docket 04-296 (filed Jan. 24, 2006) (arguing that local stations know how best to reach their audiences and that making multilingual warnings mandatory would lead to staffing problems).

¹³³ *In re Review of the Emergency Alert System, Comments of Indep. Spanish Broadcasters Ass'n, Office of Comm., United Church of Christ, Inc., and Minority Media and Telecomm. Council*, EB Docket No. 04-296, at 3 (filed Jan. 24, 2006).

¹³⁴ *See id.* at 4 (quoting Commissioners Copps and Adelstein).

¹³⁵ *See id.* at 5-7 (asking that multilingual alert systems be implemented).

¹³⁶ *In re Review of the Emergency Alert System, Comments of the Nat'l Ass'n of Broadcasters*, EB Docket No. 04-296, at 13-16 (filed Jan. 24, 2006).

¹³⁷ *See id.* at 14-15 (arguing that FEMA needed to take action regarding multilingual alerts).

¹³⁸ *See id.* at 15-16 (arguing for further consideration by the FCC).

C. Notice of Proposed Rulemaking in the Matter of Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communication Networks and Subsequent Commentary

On June 19, 2006, the FCC released a Notice of Proposed Rulemaking to "address and implement" the recommendations of the FCC's Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks.¹³⁹ The Panel, established by FCC Chairman Kevin J. Martin in January 2006, was "charged with studying the impact of Hurricane Katrina on the telecommunications and media infrastructure in the areas affected by the hurricane and making recommendations for improving disaster preparedness, network reliability and communications among first responders."¹⁴⁰ With respect to the issue of multilingual emergency alerts, the Panel found that, during and after the hurricane, the dissemination of multilingual emergency weather information "appeared limited" and that, to the extent that such information was provided, its distribution depended on the "willingness and ability of local weather forecasting offices and the availability of ethnic media outlets."¹⁴¹ To remedy this oversight, the Panel recommended that the FCC: (1) "[p]romptly find a mechanism to resolve any technical and financial hurdles in the current EAS to ensure that non-English speaking people . . . have access to public warnings"¹⁴²; (2) "[w]ork with the various industry trade associations . . . to create and publicize best practices for serving" people who do not speak English¹⁴³; and (3) "[e]ncourage state and local government agencies who provide emergency information . . . to take steps to make critical emergency information accessible to persons" who do not speak English.¹⁴⁴

In this NPRM, the Commission restated the Panel's findings and recommendations regarding multilingual emergency information, seeking

¹³⁹ *In re Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks, Notice of Proposed Rulemaking*, EB Docket No. 06-119, 21 F.C.C.R. 7320 (June 16, 2006).

¹⁴⁰ INDEPENDENT PANEL REVIEWING THE IMPACT OF HURRICANE KATRINA ON COMMUNICATIONS NETWORKS, REPORT AND RECOMMENDATIONS TO THE FEDERAL COMMUNICATIONS COMMISSION, i (June 12, 2006) (PANEL REPORT). The Panel was composed of twenty-seven individuals representing the public safety and communications industry. *Id.* at 1. Many of its members participated in recovery efforts following Hurricane Katrina. *Id.* at 2. The Panel's charter, which sets forth its objectives and scope of activity, is available at <http://www.fcc.gov/eb/hkip/HKIPCharter.pdf>.

¹⁴¹ *Id.* at 29-30.

¹⁴² *Id.* at 41.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

comment on how to address the recommendations "consistent with [its] statutory authority and jurisdiction."¹⁴⁵ In particular, with respect to the Panel's recommendation to find a mechanism to ensure access to multilingual public warnings, the FCC noted that the same issue was the focus of its earlier NPRM and FNPRM in the Matter of Review of the Emergency Alert System.¹⁴⁶

Again, the petitioners and the NAB submitted comments.¹⁴⁷ The petitioners praised the Independent Panel for its report and exhorted the Commission "to act expeditiously on the recommendation to ensure that non-English speaking persons have access to public warnings as part of [the] Emergency Alert System."¹⁴⁸ They advocated for the adoption of their proposal submitted in response to the initial NPRM, including the amendment calling for the FCC to provide a list of stations remaining on the air.¹⁴⁹ They renewed their request that multilingual alerts be provided on new technologies incorporated into the EAS.¹⁵⁰ The NAB recognized the "key leadership role" assumed by broadcasters during crises and agreed with

¹⁴⁵ *In re Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks, Notice of Proposed Rulemaking*, EB Docket No. 06-119, 21 F.C.C.R. 7320 (June 16, 2006). In a later filing, the FCC expanded the scope of its inquiry, requesting that comments address the applicability of the Panel recommendations to all types of disasters, natural and manmade. Public Notice, *In re Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks, Notice of Proposed Rulemaking, Request for Comment on Applicability of Recommendations to All Types of Disasters*, EB Docket No. 06-119 (June 25, 2006), available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-06-1524A1.pdf. The Commission also asked for comments discussing any impact the nation's diverse topography could have on the Panel's recommendations. *Id.*

¹⁴⁶ *See id.* at 8 (citing the FR&O and FNPRM and the original NPRM).

¹⁴⁷ Other stakeholders submitted comments as well. The Named State Broadcasters Associations echoed the sentiments put forth by the NAB. *See In re Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks, Joint Comments of the Named State Broadcasters Associations*, EB Docket No. 06-119 (filed Aug. 21, 2006) (opposing regulatory mandates for multilingual warnings and championing voluntary measures). Other stakeholders urged the FCC to develop and maintain technology capable of displaying or broadcasting multilingual warnings. *See, e.g.*, Comments of the American Association of State Highway and Transportation Officials, EB Docket No. 06-119 (filed Aug. 7, 2006) (calling for multilingual alerts on highway information signs and in advisory radio station broadcasts); *In re Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks, Comment on Report and Recommendations by American Association of Paging Carriers*, EB Docket No. 06-119 (filed Aug. 7, 2006) (describing paging technology as "inherently well-suited" for disseminating multilingual alerts).

¹⁴⁸ *In re Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks, Comments of Independent Spanish Broadcasters Association, Office of Communication, United Church of Christ, Inc., and the Minority Media and Telecommunications Council*, EB Docket No. 06-119, (filed Aug. 7, 2006).

¹⁴⁹ *See id.* at 4 (arguing that their proposal be adopted).

¹⁵⁰ *See id.* at 5 (arguing for expanded multilingual alert coverage).

the Panel "that there are voluntary proactive steps that all communications providers should take to ensure readiness for the next emergency."¹⁵¹ It suggested that the FCC continue to contemplate the issues raised by the petitioners and asserted its willingness to "work with the Commission to explore how local, state and federal agencies, through the voluntary cooperation of broadcasters, can better serve . . . persons who do not speak English, while simultaneously assuring the timely dissemination of emergency information."¹⁵²

D. Second Further Notice of Proposed Rulemaking in the Matters of Review of the Emergency Alert System and the Petition for Immediate Relief

On July 12, 2007, the FCC released a second Further Notice of Proposed Rulemaking (SFNPRM) seeking additional comments on the issue of multilingual emergency alerts.¹⁵³ The Commission affirmed its commitment to providing EAS alerts for non-English speakers and asserted its belief "that the first step toward more effectively serving non-English speakers" is to require EAS participants to adopt the Common Alerting Protocol.¹⁵⁴ It recognized, however, that CAP is "not a comprehensive solution for making general emergency and public safety information available to non-English speakers."¹⁵⁵ Accordingly, the Commission initiated the SFNPRM to address this problem from a broader perspective.¹⁵⁶

In the SFNPRM, the Commission solicited comments on the "technical, economic, practical, and legal issues, including the Commission's authority, involved in making emergency information accessible" to non-English speakers.¹⁵⁷ It presented several questions for consideration,

¹⁵¹ *In re* Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks, *Comments of the National Association of Broadcasters*, EB Docket No. 06-119, FCC 06-83 (filed Aug. 7, 2006).

¹⁵² *Id.* at 14.

¹⁵³ *Second Report and Order and Further Notice of Proposed Rulemaking*, *supra* note 1. The FCC also announced its Second Order and Report in this proceeding. The SO&R required EAS participants to (1) receive emergency alerts using CAP, a common messaging protocol; (2) adopt Next Generation EAS delivery systems; and (3) transmit gubernatorial state and local EAS alerts. It also required EAS participants to adopt Next Generation EAS delivery systems and extended the EAS to include wireline video providers. *Id.* at 5-19.

¹⁵⁴ *Id.* at 25.

¹⁵⁵ *Id.*

¹⁵⁶ *See id.* ("Indeed, we believe that Petitioners' request is broader than the formal EAS structure and raises important questions about the availability of emergency information to the non-English speaking audience.").

¹⁵⁷ *Id.* at 38.

including, how should localities with non-English speakers be identified and "[i]n which markets should special emergency alert rules apply?"¹⁵⁸ It asked, "What criteria should the originator of an EAS message use in determining which languages to require EAS Participants to transmit?" and "Should more than two languages be transmitted in certain areas?"¹⁵⁹ Referring to the Petition for Immediate Interim Relief, the FCC asked whether a broadcast station in every market should be required to monitor and rebroadcast emergency information carried by an LP-M station and whether, during an emergency, stations remaining on the air should be required to broadcast LP-M emergency information in the event that the LP-M station loses transmission capability.¹⁶⁰ With respect to the petitioners' proposition that an LP-M station be designated in areas where a substantial proportion of the population has a primary fluency in a language other than English, the FCC asked how it should quantify a "substantial proportion."¹⁶¹

The FCC invited comments about other efforts developed to address these issues, taking note of initiatives in Florida, California, and Texas to provide multilingual emergency alerts.¹⁶² The "Florida Prepares" program includes an annual public education media campaign developed in English and Spanish as well as the distribution of EAS messages in both English and Spanish.¹⁶³ California and Texas have addressed the issue of providing multilingual alerts in their state EAS plans filed with the FCC.¹⁶⁴

The Commission also expressed its hope that the stakeholders would come to an agreement with respect to how to address the problem of reaching non-English speakers.¹⁶⁵ To this end, the commissioners instructed the FCC's Public Safety and Homeland Security Bureau to convene a meeting of the stakeholders to discuss the "EAS as it relates to the needs of non-English

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* (asking questions about updating the multilingual alert system).

¹⁶¹ *Id.*

¹⁶² *See id.* (inviting comments relating to the multilingual alert system).

¹⁶³ / The Lifesaving Role of Accurate Hurricane Prediction: Oversight Hearing Before the Subcomm. on Disaster Prevention and Prediction of the S. Comm. on Commerce, Science and Transportation, 109th Cong. 3-5, 11 (2005) (statement of C. Patrick Roberts, President, Fla. Ass'n of Broadcasters).

¹⁶⁴ *See Second Report and Order and Further Notice of Proposed Rulemaking, supra* note 1, at 38 (showing that California and Texas have provided multilingual alerts).

¹⁶⁵ *See id.* at 25 (encouraging stakeholders to come to an agreement).

speakers."¹⁶⁶ Providing an extra push toward settlement, a few of the commissioners issued individual statements emphasizing the importance of providing multilingual messages and the need for stakeholders to find common ground.¹⁶⁷ One commissioner went so far as to suggest that the need to provide alerts in languages other than English might extend beyond changes to the EAS and reach "other Commission rules and licensee obligations."¹⁶⁸ Another commissioner conveyed his disappointment that the issue remained unresolved and stressed that the FCC should "pay serious attention to this important concern."¹⁶⁹ Perhaps, for this reason, the FCC announced that, in the absence of an agreement, it would issue an order on these matters within six months.¹⁷⁰

Pursuant to the SFNPRM, the Public Safety and Homeland Security Bureau arranged a stakeholder meeting to discuss the issue of multilingual disaster warnings.¹⁷¹ Representatives for the petitioners, the NAB, Univision, and the Florida Association of Broadcasters (FAB) attended the June 14, 2007 meeting.¹⁷² Topics discussed included the current delivery of multilingual emergency information via the EAS, the anticipated scope of participation needed for effective delivery of multilingual emergency information via the EAS and the costs of this participation, and the type and scope of FCC action needed to ensure delivery of multilingual emergency information.¹⁷³

¹⁶⁶ *Id.* The FNPRM also required the Bureau to submit into the record a progress report on this meeting or series of meetings within thirty days. *Id.*

¹⁶⁷ *See, e.g., id.* at 69 (statement of Chairman Kevin J. Martin) ("I also hope that the industry will continue to work hard to find a way to provide multilingual alerts on its own.").

¹⁶⁸ *See id.* at 69 (statement of Commissioner Michael J. Copps) ("I am particularly committed to take whatever steps we can to ensure that emergency and public safety information is fully accessible by . . . residents whose primary language is not English. This includes EAS, but may involve other Commission rules and licensee obligations.").

¹⁶⁹ *See id.* at 72 (statement of Commissioner Jonathan S. Adelstein) ("I am . . . disappointed that this *Report* does not resolve EAS and general emergency information access concerns of non-English speaking and multi-lingual communities . . . Access to multi-lingual emergency information should have been a priority issue fully addressed and resolved in today's item. I am hopeful that, once and for all, the Commission will pay serious attention to this important concern.").

¹⁷⁰ *See id.* at 25 (announcing its intent to issue an order within six months).

¹⁷¹ *See* DEREK K. POARCH, PUBLIC SAFETY AND HOMELAND SECURITY BUREAU, PROGRESS REPORT TO THE COMMISSION CONCERNING THE DELIVERY OF EMERGENCY ALERT SYSTEM MESSAGES TO NON-ENGLISH SPEAKERS, EB Docket No. 04-296 (Aug. 13, 2007) (reporting on the June 14, 2007 meeting of stakeholder representatives and Bureau leadership and staff).

¹⁷² *See id.* at 1 (discussing the roster of attendees at the June 14, 2007 meeting). Also in attendance were Commissioner Jonathan Adelstein and staff from the Public Safety and Homeland Security Bureau. *See id.* at 1 (discussing the roster of attendees at the June 14, 2007 meeting).

¹⁷³ *See id.* at 2-4 (discussing the main meeting topics: "Multilingual Delivery in the Current EAS," "Scope of Multilingual EAS Alert Notifications and Costs," and "Need for FCC Action and its

All of the participants at the meeting acknowledged the importance of providing multilingual emergency information to non-English speakers.¹⁷⁴ Discussion about the current delivery of multilingual EAS messages centered on Florida's efforts to provide alerts in English and Spanish¹⁷⁵ and whether the provision of multilingual messages should be voluntary or mandatory. The stakeholders unanimously praised the Florida plan, but disagreed about whether voluntary plans would satisfy the need for multilingual emergency information.¹⁷⁶ The petitioners reasserted portions of their proposal relevant to the scope of participation needed by broadcasters and other communications providers.¹⁷⁷ Funding for additional EAS costs was a key concern for the participants, but the meeting did not address what those costs would be or who would bear them.¹⁷⁸ The stakeholders also differed on the scope of FCC involvement, with some parties urging for aggressive participation and others calling for more involvement by other groups, including FEMA and state governors.¹⁷⁹ On this issue, the Bureau asked "what the FCC could do to promote cooperation among broadcasters and other alert providers short of issuing mandates"¹⁸⁰ and "whether mandatory FCC action wouldn't threaten to undo what had been accomplished in Florida pursuant to its voluntary, cooperative plan."¹⁸¹

Extent"). The participants also discussed Florida's "designated hitter" approach to disseminating emergency information, the delivery of multilingual emergency information via Next Generation EAS technology, and the roles played by FEMA and the National Oceanographic and Atmospheric Administration/NWS in the EAS. *See id.* at 1-4 (discussing the main meeting topics, including "Next Generation EAS" and "Role of FEMA and NOAA/NWS").

¹⁷⁴ *See generally id.* (discussing the participants' disagreements on how to provide emergency information to non-English speakers and the role the government should take).

¹⁷⁵ *See id.* at 2 (applauding Florida's current voluntary-basis efforts to ensure that alerts are broadcast in Spanish, but also discussing concerns that voluntary-basis programs are not sufficient to ensure the dissemination of these broadcasts in areas not served by major Spanish language media like Univision and Telemundo).

¹⁷⁶ *See id.* at 5 (summarizing the NAB's and FAB's support of voluntary efforts and the petitioners demand for program mandates).

¹⁷⁷ *See id., supra* note 171, at 3-4 (discussing petitioners' responses to Bureau's inquiry into what it can do, short of issuing mandates).

¹⁷⁸ *See id.* at 3 ("NAB participants agreed that who paid for significant additional EAS costs was an important questions [sic], as well as who would be required to furnish the multilingual messages to EAS participants and who had liability if messages were not adequately translated.").

¹⁷⁹ *See id.* at 3-4 (reporting how petitioners advocated for quick and decisive action by the FCC, whereas the NAB sought additional involvement from FEMA and the states). The FAB encouraged the FCC to "include consultations with other emergency organizations and interests, including state governors, EOCs, state National Guard commanders, NAB and the NASB." *Id.* at 4.

¹⁸⁰ *Id.* at 3.

¹⁸¹ *Id.* at 4.

Since the June meeting, stakeholders have continued to submit comments in response to the SFNPRM. Several argued that voluntary programs created by broadcasters, state and local authorities, and other interested individuals and groups would be more effective than uniform measures mandated by the federal government.¹⁸² In addition, some reasoned that, because cable systems retransmit EAS alerts on an automated basis, the originator of the emergency message should shoulder responsibility for providing the message in a language other than English.¹⁸³ One stakeholder, clearly in favor of governmental mandates in the area of multilingual emergency information, suggested that the Commission "supplement a population/percentage approach [to determining whether warnings are needed in a language other than English] with additional considerations focusing on the emergency/disaster-prone nature of particular regions."¹⁸⁴ This comment acknowledged the utility of a population/percentage-based approach, but urged the FCC to also consider the degree to which specific areas . . . are emergency/disaster-prone¹⁸⁵ and "the corresponding benefit of including non-English language speakers in those regions in EAS."¹⁸⁶ Perhaps most importantly, the petitioners, the NAB, numerous state broadcasters associations, and other interested parties requested that the Commission postpone its plans to issue an order addressing the matter of multilingual disaster warnings and, instead, allow negotiations among the stakeholders to continue unhindered.¹⁸⁷ As evidence

¹⁸² See, e.g., *In re* Review of the Emergency Alert System, Comments of the National Association of Broadcasters and the Association for Maximum Service Television, Inc. in Response to Second Further Notice of Proposed Rulemaking Regarding Emergency Alert System, EB Docket No. 04-296, at 7 (filed Dec. 3, 2007) (opposing mandates); *In re* Review of the Emergency Alert System, Comments of the Alaska Broadcasters Association and Alaskan's State Emergency Communications Committee, EB Docket No. 04-296, at 3 (filed Dec. 3, 2007) (emphasizing that imposition of national standard would be difficult in Alaska and requesting flexibility at state and local level in crafting messaging strategies).

¹⁸³ See, e.g., *In re* Review of the Emergency Alert System, Comments of the National Cable & Telecommunications Association, EB Docket No. 04-296, at 7 (filed Dec. 3, 2007) (arguing that multilingual EAS is best accomplished if originator of EAS message issues message in English and Spanish); *In re* Review of the Emergency Alert System, Joint Comments of the Ohio, Virginia, and North Carolina Associations of Broadcasters, EB Docket No. 04-296, at 3 (filed Dec. 3, 2007) (noting "turnkey" qualities of EAS system and urging that FCC require originating authority to provide multilingual messages). The Ohio, Virginia, and North Carolina Associations of Broadcasters also remarked on the expense and burden of providing or evaluating translations of EAS messages. *Id.*

¹⁸⁴ Comments of Sunbelt Multimedia Co., *In re* Review of the Emergency Alert System, EB Docket No. 04-296, at 4 (filed Dec. 3, 2007).

¹⁸⁵ *Id.* at 3.

¹⁸⁶ *Id.* at 4.

¹⁸⁷ See, e.g., *In re* Review of the Emergency Alert System, Letter from MMTTC and the NAB to FCC, EB Docket No. 04-296 (filed Feb. 5, 2008) (confirming ongoing stakeholder attempts to reach consensus); *In re* Review of the Emergency Alert System, Joint Reply Comments of the Named State

of their good faith efforts to reach a consensus, petitioners and the NAB created a Task Force of state broadcast associations, local and state public safety officials, and other stakeholders on February 25, 2008, "to actively pursue a process by which an efficient and ubiquitous multi-lingual warning and information system possibly will result."¹⁸⁸

IV. *Warning Babel.*¹⁸⁹ *Mandating Multilingual Disaster Warnings in the Public Interest*

As evidenced by the foregoing discussion, the Commission is cognizant of the need for multilingual alerts in the United States. Whether it is aware of its legal responsibility to address this urgent need, however, is unclear. Part IV considers the FCC's duty to provide multilingual alerts pursuant to its statutory directive to act in the public interest.¹⁹⁰ This part first examines the

Broadcasters Associations, EB Docket No. 04-296, at 6–7 (filed Dec. 17, 2008) (noting that "stakeholders are currently engaged in active discussions seeking to develop a consensus plan"); *In re* Review of the Emergency Alert System, Comments of the National Association of Broadcasters and the Association for Maximum Service Television, Inc. in Response to Second Further Notice of Proposed Rulemaking Regarding Emergency Alert System, EB Docket No. 04-296, at 7 (filed Dec. 3, 2007) (requesting that FCC allow negotiation process to continue).

¹⁸⁸ See *NAB Seeks Input on Multilingual EAS*, (Feb. 22, 2008), available at <http://www.tvtechnology.com/pages/s.0015/t.11390.html>; *In re* Review of the Emergency Alert System, Letter from MMTTC and the NAB to FCC, EB Docket No. 04-296 (filed Feb. 5, 2008) (alerting FCC of plan to create Task Force).

Addendum

As this Article was going to press, the petitioners filed a Request to Defer Action on Multilingual Issues with the FCC. *In re* Review of the Emergency Alert System, Request to Defer Action on Multilingual Issues, EB Docket No. 04-296 (filed June 5, 2008). In this filing, the petitioners reported that the stakeholders had developed a "Trial Plan for Universal Emergency Broadcasting." *Id.* at 1. Pursuant to this trial test plan, the NAB, FAB, and other broadcast organizations will provide multilingual warnings in approximately twenty radio markets during the 2008 hurricane season. *Id.* at 1–2. In the interests of fostering this initial step toward a stakeholder consensus, the petitioners requested that the Commission defer action on the multilingual broadcasting issues raised in its SFNPRM until December 31, 2008. *Id.* at 2.

¹⁸⁹ The biblical story of the Tower of Babel describes mankind's efforts to build a tower to reach the heavens. According to this tale, God, to punish man for his arrogance, confused the language of humanity, rendering impossible any future efforts to build the tower. This story provides a religious basis for the existence of different languages. *Genesis* 11:1–11:9 (New Revised Standard Version) ("Therefore it was called Babel, because there the Lord confused the language of all the earth.")

¹⁹⁰ Congress has directed the FCC to act in the public interest throughout the Communications Act. See, e.g., Communications Act of 1934, 47 U.S.C. §§ 201(b), 215(a), 319(c), & 315(a) ("public interest"); *Id.* § 214(a) & (c) ("public convenience and necessity"); *Id.* § 214(d) ("interest of public

origins and development of the public interest standard in the 1934 Communications Act.¹⁹¹ It then discusses the Commission's public interest obligations with respect to the provision of emergency warnings and alerts to non-English speakers.

A. *The Public Interest Standard*

The public interest standard for radio communications made its statutory debut in the Radio Act of 1927, which created the Federal Radio Commission (FRC) to regulate non-governmental radio use in the United States.¹⁹² In the Act, Congress bestowed the FRC with broad regulatory powers, but guided its discretion with the requirement that the agency's actions serve the public interest.¹⁹³ In particular, due to concerns about the limited number of channels available to broadcasters,¹⁹⁴ the Act directed the

convenience and necessity"); *Id.* §§ 307(c), 309(a), & 319(d) ("public interest, convenience, and necessity"); § 307(a) ("public convenience, interest, or necessity"); and *Id.* §§ 311(b) & 311(c)(3) ("public interest, convenience, or necessity").

¹⁹¹ This article does not quibble with the current interpretation and implementation of the public interest standard by the Commission or courts. Accordingly, this part devotes only minor attention to the development of the standard. For a more in-depth treatment of the standard itself, see Anthony E. Varona, *Changing Channels and Bridging Divides: The Failure and Redemption of American Broadcast Television Regulation*, 6 MINN. L.J. SCI. & TECH. 1 (2004), and Erwin G. Krasnow & Jack N. Goodman, *The "Public Interest" Standard: The Search for the Holy Grail*, 50 FED. COMM. L.J. 605 (1998).

¹⁹² Radio Act of 1927, Pub. L. No. 69-632, ch. 169, 44 Stat. 1162, repealed by Communications Act of 1934, ch. 652, § 602(a), 48 Stat. 1064, 1102, codified as amended in sections of 47 U.S.C., available at <http://showcase.netins.net/web/akline/pdf/1927act.pdf>. The idea of a public interest in radio communications, however, was initially expressed by then-Commerce Secretary Herbert Hoover while addressing the Fourth Annual Radio Conference in 1925:

The ether is a public medium, and its use must be for public benefit. The use of a radio channel is justified only if there is public benefit. The dominant element for consideration in the radio field is, and always will be, the great body of the listening public, millions in number, countrywide in distribution. There is no proper line of conflict between the broadcaster and the listener, nor would I attempt to array on against the other. Their interests are mutual, for without the one the other could not exist.

Proceedings of the Fourth National Radio Conference and Recommendations for Regulation of Radio 7 (Nov. 9–11, 1925) (Government Printing Office 1926).

¹⁹³ See Radio Act of 1927, Pub. L. No. 69-632, ch. 169 § 11 (directing applications for licenses and license renewals and modifications be granted if the "public interest, convenience, or necessity" would be served). The FRC regulated radio use in the United States from 1927 until 1934, when Congress abolished the agency and replaced it with the FCC. 47 U.S.C. § 151.

¹⁹⁴ By the end of 1925, nearly 600 commercial radio stations were on the air, most in major metropolitan areas. Due to insufficient regulations governing frequency use, transmission power, and hours of operation, radio broadcast interference was significant. ERWIN G. KRASNOW ET AL., *THE POLITICS OF BROADCAST REGULATION* 11 (3d ed. 1982); see also *NBC v. United States*, 319 U.S. 190, 212 (1943) ("With everybody on the air, nobody could be heard.").

FRC to "determine that the public interest, convenience, or necessity would be served by the granting [of a broadcast license]."¹⁹⁵ Uncertainty about the scope of FRC authority under the Act, however, limited the effectiveness of the agency.¹⁹⁶

Congress subsequently enacted the Communications Act of 1934, which incorporated most of the provisions of the 1927 Radio Act, including the public interest standard.¹⁹⁷ The 1934 Act created the FCC to replace the FRC and directed the Commission to make licensing decisions in accordance with the public interest.¹⁹⁸ Under the Act, broadcasters, too, are required to serve the public interest. Specifically, under sections 307 and 309 of the Communications Act, the Commission may grant an application for the use of a frequency if the applicant demonstrates that its broadcasting activities will serve "the public interest, convenience, and necessity."¹⁹⁹ Applications for license renewal must meet the same standard.²⁰⁰

Nowhere in the 1927 or 1934 Acts, however, did Congress provide a definition for its public interest standard.²⁰¹ Accordingly, interpretation and implementation of the standard has been subject to much agency tinkering. For many years, the standard was central to the public trusteeship model of broadcasting. The deregulatory policies of the 1980s, however, have led to a relaxation of the standard. The following discussion traces the development of the public interest standard from its original conception as integral to the trusteeship model of broadcasting to its current interpretation as being a component of the marketplace model of broadcasting.

¹⁹⁵ Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162 at § 11.

¹⁹⁶ See KRASNOW ET AL., *supra* note 194, at 13–14 (describing the effectiveness of FRC's authority).

¹⁹⁷ See Communications Act of 1934, 47 U.S.C. §§ 151, 152 et seq. (indicating that in addition to broadcasters, the 1934 Act also reached the telephone and telegraph industries and has since been expanded to cover other telecommunications technologies).

¹⁹⁸ See generally 47 U.S.C. §§ 151, 303, 307, & 309.

¹⁹⁹ Communications Act of 1934, 47 U.S.C. §§ 307, 309.

²⁰⁰ *Id.* § 307(c) (stating that applications for license renewal must serve "the public interest, convenience, and necessity.").

²⁰¹ See Randolph J. May, *The Public Interest Standard: Is It Too Indeterminate to Be Constitutional?*, 53 Fed. Comm. L.J. 427, 443–52 (2001) (arguing that public interest standard is too indeterminate and may violate the non-delegation doctrine). *But see* NBC v. United States, 319 U.S. 190, 225–26 (1943) (holding, *inter alia*, that public interest standard is not unconstitutionally vague).

1. The Public Trusteeship Model

Originally premised on a public trusteeship model, the Radio Act and the Communications Act perceived the radio frequency spectrum to be a limited resource belonging to the public.²⁰² As public trustees, broadcasters were expected to make use of such a scarce public resource in a manner benefiting the community. Thus, the FRC and FCC were to grant licenses only to applicants capable of operating in the public interest.²⁰³

Seeking to give meaning to the standard, the FRC issued an interpretative policy statement in 1928, observing that the standard is "comparative" and not "absolute."²⁰⁴ Because the number of applicants requesting licenses far surpasses the limited number of channels, the Commission stated that it "must determine from among the applicants . . . which of them will, if licensed, best serve the public," and that "[t]hose who give the least . . . must be sacrificed for those who give the most."²⁰⁵ The FRC also generated a set of guidelines for evaluating a licensee's performance under the standard.²⁰⁶ These guidelines required licensees to air programs meeting "the tastes, needs, and desires of all substantial groups among the listening public,"²⁰⁷ and made clear that programming would be a factor considered at license renewal time.²⁰⁸ Implementation of these

²⁰² See 47 U.S.C. § 301 (providing for "the use of such channels, but not the ownership thereof"); Radio Act of 1927 (providing for "the use of such channels, but not the ownership thereof") (preamble); see also *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390–92 (1969) (upholding Fairness Doctrine as justified by scarcity rationale); *NBC v. United States*, 319 U.S. 190, 226–27 (1943) (upholding Chain Broadcasting Regulations as justified by scarcity rationale).

²⁰³ See 47 U.S.C. §§ 307 & 309; Radio Act of 1927, §§ 9 & 11 (allowing licenses to be granted only if in the public interest).

²⁰⁴ 2 F.R.C. Ann. Rep. 169–70 (1928).

²⁰⁵ *Id.* at 170.

²⁰⁶ See 3 FRC Ann. Rep. 32–35 (1929) (analyzing the matter of *Great Lakes Broad. Co. v. Federal Radio Comm'n*, 37 F.2d 993 (D.C. Cir. 1930), *appeal dismissed per curiam*, 281 U.S. 706 (1930)).

²⁰⁷ *Id.* at 34. This principle calls for a licensee to meet:

the tastes, needs, and desires of all substantial groups among the listening public . . . in some fair proportion, by a well-rounded program, in which entertainment, consisting of music of both classical and lighter grades, religion, education and instruction, important public events, discussions of public questions, weather, market reports, and news, and matters of interest to all members of the family find a place.

²⁰⁸ See *id.* at 32 (setting forth that "where two stations apply for the same frequencies, the station with the longest record of continuous service has the advantage; where there is a substantial difference between the programming service of the two, the station with superior programming will have the advantage"). "[T]here is no room for operation of 'propaganda stations,' as opposed to 'general public-service stations.'" *Id.* at 35.

guidelines "established programming content as a criterion of the public interest."²⁰⁹

The trusteeship model still held sway in 1946, when the FCC made public a staff report entitled, "Public Service Responsibility of Broadcast Licensees," containing a host of programming guidelines for broadcasters.²¹⁰ Popularly known as the "Blue Book" because of its blue cover, the report described the public interest as encompassing noncommercial programming, local live programming, programming addressing local public issues, and the elimination of excessive advertising.²¹¹

In 1960, the FCC sought again to provide clarification of the public interest standard in a Programming Policy Statement that listed "major elements usually necessary to meet the public interest, needs and desires of the community in which the station is located."²¹² These elements included programming preferences such as news programs, educational programs, weather and market reports, and programs devoted to serving minority interests.²¹³ The policy statement also instructed broadcasters to ascertain the needs, tastes, and desires of their communities through the use of

²⁰⁹ Krasnow & Goodman, *supra* note 191, at 612. See *KFKB Broad. Ass'n v. Federal Radio Comm'n*, 47 F.2d 670 (D.C. Cir. 1931); *Trinity Methodist Church, South v. Federal Radio Comm'n*, 62 F.2d 850 (D.C. Cir.), *cert. denied*, 284 U.S. 685 (1932) (evidencing that the Commission subsequently made good on its promise to review programming practices in revoking the licenses of two stations).

²¹⁰ FED. COMM. COMM'N, PUBLIC SERVICE RESPONSIBILITY OF LICENSEES (1946).

²¹¹ *Id.* at 12–39. Assailed by commercial broadcasters as censorship, the Blue Book guidelines were never officially enforced. See Bill F. Chamberlin, *Lessons in Regulating Information Flow: The FCC's Weak Track Record in Interpreting the Public Interest Standard*, 60 N.C. L. REV. 1057, 1063 n.25 & 1064 (1982) (citing Richard J. Meyer, *Reaction to the "Blue Book"*, 6 J. BROADCASTING 295 (1962)). See *id.* at 1063 n.25 (explaining that after the FCC released the report, the NAB lobbied against the Blue Book, attacking its programming preferences as invalid under the 1934 Communications Act and the First Amendment).

²¹² *En Banc Programming Inquiry*, 44 F.C.C. 2303, 2314 (1960). Despite the care taken in fashioning the 1960 programming policy, however, enforcement of the policy was uncommon. See Chamberlin, *supra* note 211, at 1068–69 (commenting that the renewal process appeared to be markedly superficial absent a third-party license challenge). The FCC's Broadcast Bureau, the FCC division given authority to review and recommend a grant or denial of license renewal applications, rarely recommended denial on public interest grounds. *Id.* What is more, the review provided by the Broadcast Bureau was superficial at best. See Varona, *supra* note 191, at 25 (noting that the FCC's Broadcast Bureau rarely recommended denial of license renewal applications on the grounds that the licensee had failed to satisfy its public interest programming requirements).

²¹³ See *id.* (describing programming preferences). The list also included opportunity for local self-expression, the development and use of local talent, programs for children, religious programs, public affairs programs, editorialization by licensees, political broadcasts, agricultural programs, sports programs, and entertainment programs. *Id.*

interviews and surveys so as to enable broadcasters to meet local programming needs.²¹⁴

2. *The Private Marketplace Model*

By the late 1970s, the move toward FCC adoption of the private marketplace model had begun. The advent of cable television and its unlimited channel capacity had eclipsed the spectrum scarcity rationale, producing a shift in FCC interpretation of the public interest standard.²¹⁵ No longer preoccupied with concerns about broadcasters or advertisers diverting the public airways for their own personal gains, the Commission embraced the private marketplace approach.²¹⁶

Today, the private marketplace model of broadcasting is the reigning paradigm.²¹⁷ Under the marketplace model, the competitive marketplace defines the public interest,²¹⁸ which is best served by relying on market forces to remedy any deficiencies in a broadcaster's commitment to act in the

²¹⁴ See *id.* at 2313–14 (instructing broadcasters to gather information on communities); see also *Primer on Ascertainment of Community Problems by Broadcast Applicants, Part I, Sections IV-A and IV-B of FCC Forms, Report and Order*, 27 F.C.C.2d 650, 656–58 (1971) (addressing several questions and answers, including the purpose of section IV and how the ascertainment of problems is to be made). To enforce the 1960 policy statement, the FCC adopted a revised license renewal form that required licensees to document their efforts to ascertain community programming needs. See Chamberlin, *supra* note 211, at 1066–67 for a detailed description of the commission's efforts to ensure a station is operated in the public interest.

²¹⁵ Mark Fowler, the FCC Chairman appointed by President Reagan in 1981, championed the marketplace approach in a law review article co-written by Daniel Brenner, his legal assistant. See Mark Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982) (arguing for the superiority of the deregulated marketplace approach). Refuting the trusteeship model, they described the defects underlying the scarcity rationale. *Id.* at 221–26. The United States Supreme Court has found marketplace regulation to be "a constitutionally permissible means of implementing the public-interest standard of the Act." *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 604 (1981).

²¹⁶ See Fowler & Brenner, *supra* note 215, at 217–18 (arguing that the use of public interest standard to regulate programming content violated broadcasters' First Amendment rights and Communications Act's prohibition on censorship).

²¹⁷ At least one of the current FCC Commissioners, Robert McDowell, openly subscribes to the marketplace method of interpretation of the public interest standard: "My approach to each issue that comes before the Commission is to focus on my belief that the core mission of the FCC is to promote freedom . . . I trust free people acting within free markets to make better decisions for themselves than those of us in government." Doug Mohny, *Robert McDowell FCC Commissioner Pioneer Interview*, <http://vonmag.com/editorial/pioneer/the-pioneers-of-von-robert-mcdowell#Start> (last visited Jan 23, 2008) (releasing the content of the interview with Robert McDowell) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

²¹⁸ See *id.* at 210 (arguing that communications policy should be directed toward maximizing the services the public desires).

public interest.²¹⁹ For this reason, the FCC now regards broadcasters not as "fiduciaries of the public," but as "marketplace competitors,"²²⁰ and substantial deference is afforded to "a broadcaster's judgment about how best to compete for viewers and listeners because this serves the public interest."²²¹ Absent a showing of market failure, the FCC relies on market forces to ensure that the interests of the public have been met. As a consequence, agency scrutiny or regulation is "necessary only when the marketplace clearly fails to protect the public interest."²²²

This sea change in agency approach has led to a wholesale reduction in broadcast regulation.²²³ In its Deregulation of Radio decision in 1981, the FCC shelved earlier rules requiring broadcasters to ascertain local programming needs and provide minimum amounts of public affairs programming.²²⁴ Rules pertaining to program logs and advertising limitations also fell by the wayside.²²⁵ Eschewing the "illusory comfort of a specific, quantitative guideline," the FCC announced:

The Commission was not created solely to provide certainty. Rather, Congress established a mandate for the Commission to act in the public interest. We conceive of that interest to require us to regulate where necessary, to deregulate where warranted, and above all, to assure the maximum service to the public at the lowest cost and with the least amount of regulation and paperwork.²²⁶

²¹⁹ See *id.* (arguing that the first step in a marketplace approach to broadcast regulation is to focus on broadcasters as marketplace competitors).

²²⁰ *Id.*

²²¹ Mark S. Fowler, *The Public's Interest*, 4 COMM. & L. 51, 52 (Winter 1982) (arguing that a marketplace approach to broadcast regulation should be applied).

²²² Krasnow & Goodman, *supra* note 191, at 616 (discussing the marketplace approach to interpreting the public interest standard).

²²³ See *Deregulation of Radio*, 84 F.C.C.2d 968, 977-90 (1981) (stating the actions being taken under the non-entertainment programming guideline).

²²⁴ See *id.* (abolishing earlier rules).

²²⁵ See *id.* (abolishing rules related to program logs and advertising limitations).

²²⁶ See *id.* at 971 (outlining the history of the deregulation proceeding). To facilitate this goal, the Commission instituted a "postcard renewal" process, whereby applications for license renewal were effectively granted without any meaningful review of the station's performance. See *Revision of Applications for Renewal of License of Commercial and Noncommercial AM, FM, and Television Licensees, Report and Order*, 49 Rad. Reg. 2d (P & F) 740, 741 (1981) (discussing the adoption of new renewal forms and procedures).

This deregulatory zeal spread to commercial television and non-commercial broadcasting.²²⁷ In accordance with this non-regulatory approach, the Commission continued to dismantle the public trusteeship doctrine well into the 1990s.²²⁸

B. *The Public Interest in Multilingual Alerts*

Under the private marketplace approach, issuing emergency alerts and warnings in multiple languages is necessary to serve the public interest. As set forth in Part II, one of the Commission's primary responsibilities is to regulate emergency broadcasting for the purpose of protecting life and property.²²⁹ Receipt of emergency information concerning dangerous weather conditions or other urgent situations is essential to safeguarding public health and welfare. For this reason, the Commission developed the EAS to serve the public interest in receiving emergency information²³⁰ and requires EAS participants to relay national and gubernatorial-level alerts.²³¹

Due to the changing demographics in this country, disseminating emergency information in multiple languages is also necessary to serve the public interest.²³² "The number of non-English speaking residents in the United States continues to increase."²³³ Although neither approach to

²²⁷ See *The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, Report and Order*, 98 F.C.C.2d 1075 (1984) (arguing that the existing regulatory scheme imposes unnecessary burdens on both licensees and the public, and the marketplace approach should be adopted); *Revision of Program Policies and Reporting Requirements Related to Public Broadcasting Licensees, Report and Order*, 98 F.C.C.2d 746 (1984) (discussing the deregulatory steps to remove unnecessary or outdated public broadcasting programming and reporting requirements); cf. *Action for Children's Television v. FCC*, 821 F.2d 741 (D.C. Cir. 1987) (upholding elimination of program lists under FCC's deregulation of television decision, but ruling that FCC failed to explain adequately decision to eliminate commercial guidelines for children's programming). Another noteworthy casualty of the marketplace model is the Fairness Doctrine, which tasked broadcasters with a duty to provide coverage of "controversial issues of public importance" as well as to provide airtime for divergent views. See *In re Complaint of Syracuse Peace Council against Television Station WTVH Syracuse, New York, Memorandum Opinion and Order*, 2 F.C.C.R. 5043 (1987) (indicating that the fairness doctrine contravenes the First Amendment and thereby disserves the public interest).

²²⁸ See Varona, *supra* note 191, at 27–32 (discussing FCC's continued deregulation of media industry).

²²⁹ See *supra* note 55 and accompanying text.

²³⁰ See *supra* notes 22–31 and accompanying text.

²³¹ See *supra* notes 69–70 and accompanying text.

²³² See HYON B. SHIN & ROSALIND BRUNO, LANGUAGE USE AND ENGLISH-SPEAKING ABILITY 1 (2003), available at <http://www.census.gov/prod/2003pubs/c2kbr-29.pdf> (noting that the ability to communicate with government agencies and private parties depends on the ability to speak English).

²³³ Equitable Access to Disaster Relief and Preparedness Services Act, H.R. 5498, 109th Cong. (2006). Between 1990 and 2000, the number of foreign-born people living in the United States increased

broadcasting quantifies the public and its corresponding interest, when a sizeable portion of the public is unable to comprehend these messages, then the public interest purpose of providing emergency information is thwarted. According to the 2000 Census, eighteen percent (47 million individuals) of the United States population speaks a language other than English at home.²³⁴ Approximately eight percent of the United States population (21 million individuals) have limited English proficiency (LEP),²³⁵ making difficult the communication of emergency information. In particular, nearly thirty percent of Spanish-speaking people in the United States²³⁶ and over twenty percent of Asian Americans are limited English proficient.²³⁷ In 2000, 4.4 million households qualified as "linguistically isolated"—meaning that no one aged fourteen or over in the household speaks English "very well."²³⁸ These households encompass 11.9 million people.²³⁹ Multilingual emergency alerts are necessary to warn these individuals and households of approaching weather hazards and other dangerous conditions.

by more than half. NOLAN MALONE ET AL., THE FOREIGN BORN POPULATION: 2000 2 (2003), available at <http://www.census.gov/prod/2003pubs/c2kbr-34.pdf> (noting that the foreign-born population increased and over half of these individuals were from Latin America). Of these foreign-born individuals, over 52% are from Latin America and at least 25% are from Asia. *Id.*

²³⁴ See SHIN & BRUNO, *supra* note 232 (providing important data in the report and discussing its coverage).

²³⁵ See Guidance to Federal Financial Assistance Recipients, 67 Fed. Reg. 19237, 19239 (Apr. 18, 2002) (defining individuals with a limited ability to read, speak, or understand English as limited English proficient or "LEP").

²³⁶ POPULATION 5 YEARS AND OVER BY LANGUAGE SPOKE AT HOME AND ABILITY TO SPEAK ENGLISH (2000), http://factfinder.census.gov/servlet/QTTable?_bm=y&-geo_id=01000US&-qr_name=DEC_2000_SF3_U_QTP17&-ds_name=DEC_2000_SF3_U&-lang=en&-redoLog=false&-sse=on (last visited Jan. 23, 2008) (indicating that approximately 28.3% of Spanish speakers in the United States speak English "not well" or not at all") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

²³⁷ See *id.* (indicating that approximately 22.5% of Asian Americans speak English "not well" or "not at all").

²³⁸ See SHIN & BRUNO, *supra* note 232, at 10 (indicating the number of people who were linguistically isolated). For example, nationally, 45% of Vietnamese households, 31.8% of Cambodian households, and 31.8% of Laotian households are linguistically isolated. See HUNG QUOC NGUYEN, VIRGINIA ASIAN ADVISORY BOARD PUBLIC FORUM (May 15, 2004), http://64.233.169.104/search?q=cache:IqCJMABCoQJ:www.vaab.virginia.gov/docs/testimonies/Hung_Nguyen.doc+45%25+vietnamese+households+linguistically+isolated&hl=en&ct=clnk&cd=8&gl=us [hereinafter *Public Forum*] (recommending ways to provide language minorities with access to public service information) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

²³⁹ See SHIN & BRUNO, *supra* note 232, at 10 (noting that 11.9 million people inhabit these households).

What is more, although the vivid horrors of Hurricane Katrina have drawn attention to deficiencies in our public warning system,²⁴⁰ the need for multilingual emergency warnings is not a new phenomenon. For example, in 1999, residents of Richmond, California received telephone emergency notifications when an explosion at the local plant sent massive amounts of smoke throughout the city.²⁴¹ The telephone warnings, advising residents to seek shelter and to shut windows and doors, provided the thousands of non-English speakers living in the affected area little benefit.²⁴² In particular, members of Richmond's Laotian community did not understand the emergency messages and thus did not know to take safety measures.²⁴³ Many of these non-English speakers were injured when, concerned about the commotion, they stepped outside upon hearing warning sirens.²⁴⁴

Another example occurred in 1987, when a tornado destroyed half the city of Saragosa, Texas.²⁴⁵ Of the estimated 428 residents,²⁴⁶ 29 individuals were killed and 121 were injured.²⁴⁷ All but two families living in Saragosa were of Mexican descent,²⁴⁸ and most preferred to use Spanish to communicate within the home.²⁴⁹ Although the English language television stations broadcast tornado warnings, emergency weather announcements were not relayed to the Spanish language television channel.²⁵⁰ Apparently, many of the televisions in Saragosa that were turned on were tuned to the Spanish language channel on the night of the tornado.²⁵¹ Thus, many lives

²⁴⁰ Although the catastrophic events of September 11, 2001 served as the original catalyst for the 2004 Notice of Proposed Rulemaking, Hurricane Katrina triggered the Petitioners' Petition for Immediate Interim Relief. *See In re Review of the Emergency Alert System, Notice of Proposed Rulemaking*, 69 Fed. Reg. 52843, 52844, ¶ 1 (Aug. 30, 2004) (codified at 47 C.F.R. pt. 11) (stating that the tragic events of September 11, 2001 have raised issues about the efficacy of EAS as a public warning mechanism); *see generally In re Review of the Emergency Alert System, Petition for Immediate Interim Relief*, EB Docket No. 04-296 (filed Sept. 20, 2005), available at <http://www.fcc.gov/pshs/hkip/docs/mmtc1.pdf>.

²⁴¹ Krista Mahr, *California County Tries Multilingual Warning System*, WASH. POST, Dec. 8, 2003 at A2.

²⁴² *See id.* (describing the effectiveness of telephone warnings).

²⁴³ *See id.* (stating the same).

²⁴⁴ *See id.* (stating the same).

²⁴⁵ *See* Benigno E. Aguirre, *The Lack of Warnings Before the Saragosa Tornado*, 6 INT'L J. MASS EMERGENCIES & DISASTERS 65, 65 (Mar. 1988).

²⁴⁶ *See id.*

²⁴⁷ *See id.* at 66.

²⁴⁸ *See id.*

²⁴⁹ *See id.* at 71.

²⁵⁰ *See id.* The Spanish language channel was Univision, the major Spanish language television channel in the United States. *Id.* Univision was provided to Saragosa residents through their cable service. *Id.*

²⁵¹ *See id.*

might have been saved had the weather warnings been transmitted by the Spanish language channel to the citizens of Saragosa.²⁵²

Sensitive to this need, official acknowledgment of the ongoing public interest in multilingual alerts has been steadfast. For example, the FCC has affirmed that "a wide-reaching public alert system is critical to the public safety."²⁵³ In its most recent EAS NPRM, the Commission announced, "We recognize the need for *all* Americans—including those whose primary language is not English—to be alerted in the event of an emergency."²⁵⁴ FEMA officials have also stated that our national alert system "should provide various means to reach the greatest number of people."²⁵⁵ President George W. Bush formally recognized the need for multilingual alerts when he commanded the Secretary of Homeland Security to "include in the public alert and warning system the capability to alert and warn all Americans, including . . . those without an understanding of the English language."²⁵⁶ This presidential mandate confirms the importance of delivering multilingual alerts and imparts optimism that, in the future, the United States will possess a comprehensive system by which emergency communications will reach

²⁵² See *id.*

²⁵³ See U.S. GOV'T ACCOUNTABILITY OFF., EMERGENCY PREPAREDNESS: CURRENT EMERGENCY ALERT SYSTEM HAS LIMITATIONS, AND DEVELOPMENT OF A NEW INTEGRATED SYSTEM WILL BE CHALLENGING preamble (2007), available at <http://www.gao.gov/new.items/d07411.pdf> (reporting on discussions with FEMA officials).

²⁵⁴ *Second Report and Order and Further Notice of Proposed Rulemaking*, supra note 1. All stakeholders in the EAS NPRMs also agree on the importance of providing multilingual EAS alerts. See generally *In re* Review of the Emergency Alert System, Petition for Immediate Relief, *Progress Report to the Commission Concerning the Delivery of Emergency Alert System Messages to Non-English Speakers*, EB Docket No. 04-296 (Aug. 13, 2007) (relaying information about multilingual emergency alert systems).

²⁵⁵ See U.S. GOV'T ACCOUNTABILITY OFF., EMERGENCY PREPAREDNESS: CURRENT EMERGENCY ALERT SYSTEM HAS LIMITATIONS, AND DEVELOPMENT OF A NEW INTEGRATED SYSTEM WILL BE CHALLENGING preamble (2007), available at <http://www.gao.gov/new.items/d07411.pdf> (reporting on discussions with FEMA officials).

²⁵⁶ Exec. Order No. 13407, 71 Fed. Reg. 36975 (June 26, 2006), available at <http://www.whitehouse.gov/news/releases/2006/06/20060626.html>. In this 2006 executive order, President George W. Bush proclaimed:

It is the policy of the United States to have an effective, reliable, integrated, flexible, and comprehensive system to alert and warn the American people in situation of war, terrorist attack, natural disaster, or other hazards to public safety and well-being . . . and to ensure that under all conditions the President can communicate with the American people.

Id.

everyone. In the interim, the FCC must provide means to accomplish this task.

To serve the public interest in multilingual warnings, the FCC has, for several years, endeavored to prompt industry reform on this matter through the notice and comment process.²⁵⁷ By pledging to take action on the issue of multilingual alerts, the Commission has tried to encourage broadcasters to address the problem without federal intervention. Unfortunately, agency attempts to spur self-regulation by means of its rulemaking procedures have been unavailing.²⁵⁸ Consequently, continued adherence to a wait-and-see approach will not suffice.

Considering the obvious need for multilingual disaster warnings, broadcasters should provide these alerts in fulfillment of their duties to serve the public interest, convenience, and necessity.²⁵⁹ Broadcaster responsibility to provide multilingual alerts is readily apparent under the public trusteeship model, which required broadcasters to discern local needs and to provide programming in accordance with these needs.²⁶⁰ Were broadcasters to venture into their respective communities, they would be able to ascertain whether and to what extent emergency alerts in languages other than English are needed. In contrast, broadcaster responsibility under the private marketplace model is not as plain because this model relieves broadcasters of the burden of surveying community needs and, instead, allows broadcasters to respond to needs identified by market forces. Presumably, if multilingual emergency programming is needed, the market should, in theory, provide programming to fill that need.²⁶¹

Market forces have failed, however, to yield this vital public safety service; few broadcasters offer emergency information in languages other than English.²⁶² Nonetheless, market failure with respect to this matter is unsurprising. The competitive market regularly fails to produce public goods, and public safety services are a noteworthy example of a public good

²⁵⁷ See *supra* Part III.

²⁵⁸ The FCC has succeeded in using this tactic at least once before when the broadcasting industry, fearful of agency action, undertook self-regulation efforts. See *Action for Children's Television v. Fed. Comm'n's Comm'n*, 564 F.2d 458, 463–64 (D.C. Cir. 1977) (discussing industry self-regulation efforts).

²⁵⁹ See *supra* notes 197–199 and accompanying text.

²⁶⁰ See *supra* notes 202–214 and accompanying text.

²⁶¹ See *supra* notes 218–21 and accompanying text.

²⁶² Some states, however, have adopted protocols for providing alerts in languages other than English. See *supra* notes 162–64 and accompanying text.

that is typically under-produced in the marketplace.²⁶³ As explained by FCC officials in an article discussing the marketplace model:

[U]nder some circumstances market forces will fail to produce outputs that maximize social welfare. For example, . . . [t]he market . . . may fail to yield socially efficient output of public goods. Public goods are products or services that individuals can consume without purchasing (nonexcludability) and without detracting from other consumers' opportunities to benefit from the same unit of the good (nonrivalry in consumption). The marketplace typically underproduces public goods because, lacking the power to exclude, producers are unable to collect a charge from every consumer of the good.²⁶⁴

In light of the market failure to produce these warnings in the public interest, the Commission is duty-bound to promulgate rules requiring broadcasters to air multilingual emergency information.²⁶⁵ These rules could follow the framework of the petitioners' proposal—requiring EAS PEP stations to air Presidential level messages in English and Spanish, requiring states and localities to designate LP-S and LP-M stations in areas with substantial non-English speaking populations, requiring stations to monitor and rebroadcast this information, and requiring stations to take over for LP-S or LP-M stations that lose transmission capability.²⁶⁶ These regulations could be enforced via the agency's licensing decisions.²⁶⁷ In addition, the Commission might also consider adopting structural policies that would impact station ownership patterns—encouraging ownership interests aligned with the interests of substantial language minority groups.²⁶⁸ These stations would likely voluntarily serve as LP-S or LP-M stations within the EAS

²⁶³ See Gregory L. Rosston & Jeffrey S. Steinberg, *Using Market-Based Spectrum Policy to Promote the Public Interest*, 50 Fed. Comm. L.J. 87, 104 (1997) (arguing that public safety is an under-produced public good). Other examples include national defense and basic scientific research. *Id.*

²⁶⁴ *Id.* at 103–04. Rosston completed this article while serving as Deputy Chief Economist at the FCC. At this time, Steinberg was serving as Special Counsel for the Commercial Wireless Division in the Wireless Telecommunications Bureau at the FCC. *Id.* at 87 (authors' footnotes).

²⁶⁵ When the market clearly fails to provide for the public interest, the FCC is obliged to regulate "in the public interest, convenience, and necessity." See generally *supra* notes 199, 222, and 226 and accompanying text.

²⁶⁶ See *supra* notes 99–106 and 124–126 and accompanying text.

²⁶⁷ See *supra* notes 198–200 and accompanying text.

²⁶⁸ See Krasnow & Goodman, *supra* note 191, at 628 (citing FCC policies regulating station ownership patterns as examples of "content-neutral" or "structural" policies).

structure. Furthermore, should the Commission determine that funding is needed to develop these programs, it should appeal to Congress for financial support.²⁶⁹

Alternatives lie at the other end of the spectrum, too. For instance, the Commission could opt not to develop a particular protocol, but rather mandate that EAS participants deliver multilingual alerts and provide guidelines and deadlines for executing and deploying this order. The Commission took this course of action in an earlier case when it decided to provide consumers using wireless phones with enhanced 911 (E911) emergency services. To accomplish this goal, the agency required certain commercial mobile radio service providers to offer E911 services meeting particular criteria by specific dates, but left providers free to make their own technological choices.²⁷⁰ In another decision, the Commission directed broadcasters to provide children's programming, but retained broadcasters' options in fulfilling their obligations under the Children's Television Act of 1990, while imparting guidance with respect to how to satisfy this public interest requirement.²⁷¹ Adopting this approach for multilingual emergency broadcasting would allow broadcasters flexibility in selecting the method of implementation appropriate to the particular facts and circumstances of the communities they serve.²⁷² Plans such as the petitioners' proposal and Florida's designated hitter-based program would provide inspiration and

²⁶⁹ See Rosston & Steinberg, *supra* note 263, at 104 ("Some have argued that the best way to [ensure that efficient quantities of public goods are produced] is for the public to allocate direct financial subsidies to producers of public goods."). Rosston and Steinberg were referring to discussions among stakeholders about how best to allocate the electromagnetic spectrum for public safety uses, such as first-responder use. *Id.* (citing Transcript, En Banc Hearing on Spectrum Policy Before the FCC 34, 165-66 (Mar. 5, 1996) (statements of Tom Hazlett and Peter Pitsch), available at http://www.fcc.gov/Reports/enbanc_spectrum.rpt.txt).

²⁷⁰ See Revision of the Commission's Rules to Ensure Compatibility With Enhanced 911 Emergency Calling Systems: Report and Order and Further Notice of Proposed Rulemaking, 11 F.C.C.R. 18676, 18682-84 (1996) (noting certain requirements on wireless services providers to offer enhanced 911 services).

²⁷¹ See Policies and Rules Concerning Children's TV Prog., Report and Order, 11 F.C.C.R. 10660, 3 Comm. Reg. (P & F) 1385 (1996) (discussing how broadcaster's can fulfill their obligations to satisfy the public interest requirement).

²⁷² Rosston and Steinberg favor this route of "focusing on outcomes rather than means," so as to be "minimally restrictive of users' flexibility." Rosston & Steinberg, *supra* note 263, at 106. Commissioner Robert McDowell also prefers this course of action. Doug Mohney, *Robert McDowell FCC Commissioner Pioneer Interview*, Von Magazine, <http://vonmag.com/editorial/pioneer/the-pioneers-of-von-robert-mcdowell#Start> (last visited Jan. 23, 2008)("[A]ny remedies applied to market failure should be narrowly tailored and sunsetted to maximize freedom for all market players.") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

guidance to other states and localities for developing protocols tailored to fit local needs.²⁷³

Agency guidelines for any course of action should include standards for determining which markets require multilingual emergency broadcasting plans. The petitioners, for example, trace the contours of the Voting Rights Act to designate the conditions necessary for activating their proposal.²⁷⁴ Following this well-trod path would supply a quantifiable measure of the public interest in multilingual alerts. Under the Voting Rights Act, a jurisdiction is responsible for providing language assistance to a particular language minority group when the number of LEP citizens of voting age in that minority language group is greater than 10,000 or greater than five percent of all voting age citizens in that jurisdiction, and when the illiteracy rate of the citizens in the minority language group is higher than the national illiteracy rate.²⁷⁵ By analogy, the Commission could require stations in a market where language minorities have reached a critical mass of either 10,000 individuals or five percent of the total market population to develop plans to broadcast multilingual emergency information. Moreover, considering that public health and safety concerns are often more pressing than protecting even the political franchise right, it is worth contemplating a variation on this theme: Lowering the numeric trigger below 10,000 would expand multilingual emergency broadcasting to additional language minority groups in more markets. For example, if the demographics of broadcast markets roughly resemble voting jurisdictions, then "a 7,500 trigger would add Chinese coverage in Sacramento County, California; Cambodian in Los Angeles County; Korean in Cook County, Illinois; and Asian Indian languages in Queens County, New York."²⁷⁶ A 5000 trigger would include eight Asian language groups—the five already included under the 10,000 trigger (Chinese, Korean, Filipino, Vietnamese, and Japanese)—and Cambodian, Asian Indian, and Thai in twenty-one jurisdictions.²⁷⁷

²⁷³ See Petition for Immediate Interim Relief, *supra* note 5, at 13–16; *Progress Report to the Commission Concerning the Delivery of Emergency Alert System Messages to Non-English Speakers*, *supra* note 254, at 1–2.

²⁷⁴ Petition for Immediate Interim Relief, *supra* note 5, at 14.

²⁷⁵ Voting Rights Act of 1965, 42 U.S.C. § 1973aa-1a(b)(2)(i)(I)–(II) & (ii). The Act defines LEP as "unable to speak or understand English adequately enough to participate in the electoral process." *Id.* § 1973aa-1a(B). "'Illiteracy' means the failure to complete the 5th primary grade." *Id.* § 1973aa-1a(E).

²⁷⁶ Asian American Legal Defense and Education Fund, *Asian Americans and the Voting Rights Act: A Case for Reauthorization* 35 (May 2006) at 47, available at <http://www.aaldef.org/docs/AALDEF-VRAReauthorization-2006.pdf>.

²⁷⁷ *Id.*

In view of the clear public interest in the provision of multilingual disaster warnings, obvious marketplace failure to supply these warnings, and the deadly consequences that can result in the absence of these warnings,²⁷⁸ agency inertia is unacceptable. The Commission possesses latitude in deciding how to regulate in this matter, but, considering the nature of the public interest at stake, it must regulate.²⁷⁹ Moreover, because emergencies and disasters, natural or otherwise, regularly, if unpredictably, occur,²⁸⁰ the urgency of the need for agency action is staggering. FCC plans to ensure multilingual alert delivery must be moved to the vanguard of EAS modifications.

V. Conclusion

The FCC must take measures to ensure the dissemination of multilingual emergency alerts.²⁸¹ The marketplace has failed to produce a

²⁷⁸ See *In re Review of the Emergency Alert System*, EB Docket No. 04-296, *Second Report and Order and Further Notice of Proposed Rulemaking*, 22 F.C.C.R. 13276, 13335 (May 31, 2007) (statement of FCC Chairman Kevin J. Martin) ("The government's success in enabling reliable and effective communications can often mean the difference between life and death.").

²⁷⁹ When "a critical public interest objective is at stake and a standard is essential to meet the objective, the government should take all necessary measures to address the objective." Stacy Baird, *The Government at the Standards Bazaar*, 18 Stan. L. & Pol'y Rev. 35, 36 (2007). Granted, the FCC should not be alone in this endeavor. A comprehensive solution to the problems resulting from language barriers ideally should include participation from FEMA and state and local governments. Nonetheless, the national public alert and warning system is a sensible place to begin reform. In the event of a power failure, the optimal method for transmitting emergency information is by terrestrial radio broadcast because most individuals have access to a battery-operated radio receiver. See *FCC Multilingual Emergency Alert Meetings May Draw Agreement*, COMM. DAILY, Aug. 16, 2007 (statement of Pat Roberts, President, Florida Association of Broadcasters) ("Radio stations are best suited to alert those who don't speak English, because during power failures battery operated receivers are the best way to get information."), available at <http://www.ucc.org/media-justice/pdfs/comm-daily-quote-8-16-07.pdf>.

Although an agency decision not to regulate is given substantial deference by the courts, the Commission must articulate a rational justification for such a choice. See *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 168 (1962) (requiring agency to articulate "rational connection between the facts found and the choice made"). If challenged in court, an agency action is reviewed de novo for an abuse of discretion under an "arbitrary and capricious" standard. See *Administrative Procedure Act*, 5 U.S.C. § 706(2) (1970) (stating that reviewing courts shall "hold unlawful and set aside agency action, findings, and conclusions . . . found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . and unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court").

²⁸⁰ See W.B. Yeats, *The Second Coming*, in *THE COLLEGE ANTHOLOGY OF BRITISH AND AMERICAN VERSE 486-87* (A. Kent Heath & William Park, eds., 1964) ("Things fall apart; the centre cannot hold.").

²⁸¹ Though the FCC already has taken a "first step toward more effectively serving non-English speakers" by requiring the use of open source content standards in the context of developing Next Generation EAS, the CAP protocol has yet to be implemented nationwide. *Second Report and Order and Further Notice of Proposed Rulemaking*, *supra* note 1, at 13295. "[W]aiting for Next Generation EAS to solve the multilingual alert issue [will] only further delay the availability of multilingual alerts."

solution; the public interest demands agency intervention. In the words of FCC Commissioner Jonathan Adelstein: "We cannot overemphasize the importance of disseminating emergency information in multiple languages As set forth in Section 1 of the Communications Act, we have an obligation to address this problem."²⁸²

Over the past three years, the FCC, through the notice and comment process, has facilitated valuable discussion on this critical issue.²⁸³ But discussion will not stop time from passing or the seasons from turning. The Atlantic Hurricane season began on June 1, 2008.²⁸⁴ The public interest requires a little less conversation and a little more action.²⁸⁵

Progress Report to the Commission Concerning the Delivery of Emergency Alert System Messages to Non-English Speakers, *supra* note 254, at 3.

²⁸² *In re* Review of the Emergency Alert System, EB Docket No. 04-296, *First Report and Order and Further Notice of Proposed Rulemaking*, 20 F.C.C.R. 18625, 18721 (Nov. 3, 2005).

²⁸³ See generally *In re* Review of the Emergency Alert System, *Notice of Proposed Rulemaking*, 69 Fed. Reg. 52843, 52844, ¶ 1 (Aug. 30, 2004) (codified at 47 C.F.R. pt. 11) (stating that earlier events served as the original catalyst for the initial Notice of Proposed Rulemaking in 2004).

²⁸⁴ The 2008 Atlantic hurricane season officially started on June 1, 2008 and will last until November 30, 2008. *Public Information Statement Issued by NWS Boston, MA available at* <http://www.crh.noaa.gov/product.php?site=NWS&issuedby=BOX&product=PNS&format=TXT&version=1&glossary=0>.

²⁸⁵ ELVIS PRESLEY, *A Little Less Conversation*, on *A LITTLE LESS CONVERSATION* (RCA Victor Records 1968).

