

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

In the Matter of)
ESP, Inc.) File No.: EB-IHD-21-00031798
) NAL/Acct. No. 202132080026
) FRN: 0001548064
)
)

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: August 6, 2021

Released: August 6, 2021

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. We propose a penalty of \$20,000 against ESPN, Inc. (ESPN) for apparently willfully violating the Commission’s rules that prohibit the transmission of false or deceptive emergency alert system (EAS) codes or EAS Attention Signals, or recordings or simulations thereof (together, EAS Tones). On October 27, 2020, ESPN apparently transmitted or caused the transmission of EAS Tones during the program 30 for 30: Roll Tide/War Eagle, in the absence of any actual emergency, authorized test of the EAS, or qualified public service announcement (PSA).

2. The EAS is a national public warning system that requires broadcasters, cable television operators, wireless cable operators, wireline video service providers, satellite digital audio radio service providers, and direct broadcast satellite providers to supply the communications capability to the President of the United States to address the American public during a national emergency.1 Federal, state, and local authorities may also use the EAS to deliver important emergency information, such as AMBER alerts and weather information targeted to specific areas.2

3. To preserve the unique purpose and effectiveness of the EAS Tones, the Commission enforces laws that prohibit their use, or simulations of them,3 except for specific Permitted Uses.4 The Commission has warned that the use of simulated or actual EAS Tones for non-authorized purposes—

1 See CBS Broadcasting Inc. d/b/a CBS Television Network, CBS Television Stations, Inc., CBS Stations Group of Texas LLC, CBS LITV LLC, Notice of Apparent Liability for Forfeiture, 34 FCC Rcd 8417, 8417, para. 1 (2019) (forfeiture paid) (CBS NAL); FEMA, Fact Sheet: Emergency Alert System (EAS) (2016), https://www.fema.gov/media-library-data/1465326763240-4152791226bbd49cf46aff8cd5f43bb1/Emergency_Alert_System_Fact_Sheet_2016.pdf.)

2 CBS NAL at 8417, para. 1.

3 A “simulation” of the EAS tones includes not only recordings of actual EAS Codes or Attention Signals, see 47 CFR § 11.31, but also sounds that mimic or are substantially similar to them, such that an average listener could reasonably mistake the sounds for an actual EAS code or Attention Signal. Emergency Alert System: False, Fraudulent or Unauthorized Use of the Emergency Alert System Attention Signal and Codes is Strictly Prohibited, Public Notice, 28 FCC Rcd 15438, 15440 (EB 2013) (2013 EAS Enforcement Advisory). By contrast, general alarms or other loud noises, including bells and police or fire sirens, are not considered “simulations” of the EAS tones and are not prohibited under section 11.45 of the Commission’s rules. Id.

4 Permitted uses of the EAS are limited to alerts of actual emergencies, authorized tests of the EAS, or qualified PSAs (collectively Permitted Uses). See 47 CFR § 11.45.

such as commercial or entertainment purposes—can lead to “alert fatigue,” whereby the public becomes desensitized to the alerts, questioning or simply disregarding whether a particular alert is intended to warn about a real, imminent threat or some other cause.⁵ Moreover, because the EAS Tones include operative data elements, the misuse of simulated or actual EAS Tones may result in false activations of the EAS that can spread false information or lock out legitimate activations of the EAS.⁶ Unauthorized use of the EAS Tones thus undermines the EAS and presents a substantial threat to public safety.

4. In this Notice of Apparent Liability for Forfeiture, we find that ESPN apparently willfully violated section 11.45 of the Commission’s rules⁷ when it transmitted or caused the transmission of EAS Tones in the program *30 for 30: Roll Tide/War Eagle*, which was included in ESPN’s programming stream sent to cable systems and other multichannel video programming distribution systems (collectively MVPDs) once on October 20, 2020, in the absence of any actual emergency, authorized test of the EAS, or qualified PSA.⁸ The prohibition on such transmissions has been in place for many years, and industry participants have long been on notice of the seriousness of such violations.⁹ Accordingly, based on our review of the facts and circumstances surrounding this apparent violation of section 11.45 of the Commission’s rules, we propose a forfeiture of \$20,000 against ESPN.

II. BACKGROUND

A. Legal Framework

5. Pursuant to section 503(b)(1) of the Communications Act of 1934, as amended, (Act), any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the

⁵ See, e.g., *CBS NAL* at 8418, para. 2; *Amendment of Part 11 of the Commission’s Rules Regarding the Emergency Alert System, Wireless Emergency Alerts*, PS Docket Nos. 15-94, 15-91, Report and Order and Further Notice of Proposed Rulemaking, 33 FCC Rcd 7086, 7091, para. 9 (2018); *2013 EAS Enforcement Advisory*, 28 FCC Rcd at 15438.

⁶ See 47 CFR § 11.31(a). The EAS uses a four-part message for an emergency activation. The four parts are: Preamble and EAS Header Codes; audio Attention Signal; message; and Preamble and EAS End of Message (EOM) Codes. *Id.* The component sounds of an EAS message serve the dual purposes of gaining the listener’s or viewer’s attention and conveying specially coded information for the equipment that is activated by the EAS message as part of an actual emergency or authorized test. In particular, the EAS codes consist of audible sounds in which encoded information concerning the specific alert is embedded. The separate EAS Attention Signal that follows the EAS codes is composed of two tones that are transmitted simultaneously. *Id.*

⁷ See 47 CFR § 11.45.

⁸ See Response to Letter of Inquiry, from Matthew S. DelNero and Corey Walker, Counsel to ESPN, Inc., to Jennifer Lewis Hershman, Attorney Advisor, Investigations and Hearings, Enforcement Bureau, Federal Communications Commission, pp. 2-4, Responses to Questions 3-5 (Mar. 17, 2021) (on file in EB-IHD-21-00031798) (LOI Response). ESPN also made the program available to MVPDs to offer as a free Video on Demand (VOD) and to certain VOD streaming services. *Id.* at p. 9, Response to Question 13.

⁹ See generally *False, Fraudulent, or Unauthorized Use of the Emergency Alert System or Wireless Emergency Alert Codes or Attention Signals is Strictly Prohibited*, Public Notice, 34 FCC Rcd 7041 (EB 2019) (enforcement advisory promoting understanding of the regulations governing the appropriate use of EAS Tones); *Viacom, Inc., ESPN, Inc., Forfeiture Order*, 30 FCC Rcd 797 (2015) (forfeiture paid) (affirming findings that Viacom and ESPN committed violations of the Commission’s rules by transmitting or causing transmission of EAS Tones in a promotional announcement for the movie, “Olympus Has Fallen,” on cable networks) (*Viacom/ESPN Forfeiture Order*); *2013 EAS Enforcement Advisory*, 28 FCC Rcd 1543 (promoting understanding of the laws governing appropriate use of EAS Tones to address concerns about misuse of EAS Tones aired in order to capture audience attention when there is no actual emergency or test) See also *Enforcement Bureau Reminds Emergency Alert System (EAS) Participants of Compliance Obligations*, Public Notice, 36 FCC Rcd 44, 47 (EB 2021) (reiterating that failure to comply with the EAS rules may subject a violator to sanctions, including monetary forfeitures).

United States for a forfeiture penalty.¹⁰ Section 312(f)(1) of the Act defines willful as “the conscious and deliberate commission or omission of such act, irrespective of any intent to violate” the law.¹¹ The legislative history to section 312(f)(1) of the Act clarifies that this definition of willful applies to both sections 312 and 503(b) of the Act,¹² and the Commission has so interpreted the term in the section 503(b) context.¹³ In order to impose such a penalty, the Commission must issue a notice of apparent liability, the notice must be received, and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such penalty should be imposed.¹⁴ The Commission will then issue a forfeiture if it finds, by a preponderance of the evidence, that the person has willfully or repeatedly violated the Act or a Commission rule.¹⁵

6. Under section 11.45 of the Commission’s rules, “[n]o person may transmit or cause to transmit the EAS codes or Attention Signal, or a recording or simulation thereof, in any circumstance other than in an actual National, State or Local Area emergency or authorized test of the EAS, or as specified in [sections] 10.520(d), 11.46, and 11.61 of this chapter.”¹⁶ The Commission adopted section 11.45 in 1994, to protect the integrity and operation of the EAS,¹⁷ acknowledging that while existing laws prohibited false distress signals and broadcast hoaxes, “a specific prohibition against the misuse of the EAS attention signal and codes is necessary . . . because it is more specific and directly addresses the proper use of EAS codes and Tones.”¹⁸ Accordingly, in enforcing section 11.45 of the rules, the Commission explained:

The plain language of the rule prohibits *any* transmission of the EAS Tones in the absence of an actual emergency or authorized test Moreover, [s]ection 11.45 contains no provision limiting liability under the rule to cases where intent to deceive exists, nor does the rule make

¹⁰ 47 U.S.C. § 503(b)(1)(B); *see also* 47 CFR § 1.80(a)(2).

¹¹ 47 U.S.C. § 312(f)(1).

¹² H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982) (“This provision [inserted in section 312] defines the terms ‘willful’ and ‘repeated’ for purposes of section 312, and for any other relevant section of the act (e.g., [s]ection 503) As defined[,] . . . ‘willful’ means that the licensee knew that he was doing the act in question, regardless of whether there was an intent to violate the law. ‘Repeated’ means more than once, or where the act is continuous, for more than one day. Whether an act is considered to be ‘continuous’ would depend upon the circumstances in each case. The definitions are intended primarily to clarify the language in [s]ections 312 and 503, and are consistent with the Commission’s application of those terms”).

¹³ *See, e.g., Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388, para. 5 (1991), *recons. denied*, 7 FCC Rcd 3454 (1992).

¹⁴ 47 U.S.C. § 503(b)(4); 47 CFR § 1.80(g).

¹⁵ *See, e.g., SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591, para. 4 (2002) (forfeiture paid).

¹⁶ 47 CFR § 11.45. Section 11.46 provides that “EAS Participants may use the EAS Attention Signal and a simulation of the EAS codes as provided by FEMA in EAS Public Service Announcements (PSAs) (including commercially-sponsored announcements, infomercials, or programs) provided by federal, state, and local government entities, or non-governmental organizations, to raise public awareness about emergency alerting.” *Id.* § 11.46. Section 11.61 provides that “EAS Participants shall conduct tests [of EAS procedures] at regular intervals” *Id.* § 11.61(a). *See also Viacom/ESPN Forfeiture Order*, 30 FCC Rod at 799-800, para. 8 (explaining that section 11.45 “applies broadly to ‘persons’ and does not exclude cable programmers. Likewise, it explicitly applies to actions that ‘transmit or cause to transmit’ the restricted EAS Tones, and is not limited to direct transmissions by or to a particular person or entity.”).

¹⁷ *See Amendment of Part 73, Subpart G, of the Commission’s Rules Regarding the Emergency Broadcast System*, FO Docket Nos. 91–301 and 91–171, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 7 FCC Rcd 6903, 6907, para. 39 (1992).

¹⁸ *Amendment of Part 73, Subpart G, of the Commission’s Rules Regarding the Emergency Broadcast System*, FO Docket Nos. 91–301 and 91–171, Report and Order and Further Notice of Proposed Rulemaking, 10 FCC Rcd 1786, 1815, para. 84 (1994).

exceptions for, or protect, “dramatic” uses of the EAS Tones. Instead, the rule provides that the transmission of the EAS Tones is prohibited in “any circumstance” except when an actual emergency or authorized test warrants their use.¹⁹

B. Factual Background

7. ESPN, based in Bristol, Connecticut, is a multimedia sports entertainment company that nationally distributes television programming. ESPN Holding Company, Inc., an indirect subsidiary of The Walt Disney Company, owns 80% of the company and Hearst Brazil, Inc., a subsidiary of The Hearst Corporation, owns the remaining 20%.²⁰ The program, *30 for 30: Roll Tide/War Eagle*, is an episode of a cable-television documentary series that ESPN included as part of its programming channel, ESPN network, which is widely carried by cable systems and other MVPDs throughout the United States.²¹

8. On October 27, 2020, the Commission received a complaint alleging that ESPN transmitted the EAS Tones, or a simulation thereof, on October 27, 2020, during *30 for 30: Roll Tide/War Eagle* absent an actual emergency, authorized EAS test, or qualified PSA.²² The Enforcement Bureau issued a Letter of Inquiry on February 1, 2021,²³ directing ESPN to submit, among other things, recordings of the October 27, 2020, episode of *30 for 30: Roll Tide/War Eagle*, and sworn written statements as to whether it had transmitted, or caused the transmission of, the EAS Tones.²⁴ ESPN responded to the letter of inquiry on March 17, 2021.²⁵

9. In its LOI Response, ESPN admits the October 27, 2020, episode of *30 for 30: Roll Tide/War Eagle*, which ESPN produced, included “a portion of the EAS Attention Signal.”²⁶ In particular, ESPN claims that it incorporated a portion of the EAS Tones in association with the depiction of a weather event “for storytelling purposes.”²⁷ ESPN further admits that it distributed the October 27, 2020, episode of *30 for 30: Roll Tide/War Eagle* for transmission on cable systems and other MVPDs throughout the country, as well as other VOD services.²⁸ ESPN also admits that its transmission of the October 27, 2020, episode of *30 for 30: Roll Tide/War Eagle* that included the EAS Tones was not in

¹⁹ *Viacom/ESPN Forfeiture Order*, 30 FCC Rcd at 801-02, para. 12 (2015).

²⁰ LOI Response at 1, Response to Question 1.

²¹ *Id.* at 2, Response to Question 3.

²² See Complaint No. 4332603 (Oct. 27, 2020) (on file in EB-IHD-21-00031798).

²³ See Letter of Inquiry from Christopher J. Sova, Deputy Chief, Investigations and Hearings Division, FCC Enforcement Bureau, to Susan L. Fox, Vice President Government Relations, The Walt Disney Company (Feb. 1, 2021) (on file in EB-IHD-21-00031798) (LOI).

²⁴ See *id.*

²⁵ See LOI Response; see also Letter from Matthew S. DelNero and Corey Walker, Counsel for ESPN, to Jennifer Lewis Hershman, Attorney Advisor, Investigations and Hearings Division, Enforcement Bureau, FCC (Mar. 17, 2021) (on file in EB-IHD-21-00031798) (requesting confidential treatment of certain information ESPN provided in response to the LOI)(Confidentiality Request). This Notice of Apparent Liability for Forfeiture does not disclose material identified as confidential by ESPN, so we defer ruling on the Confidentiality Request unless and until necessary. See 47 CFR § 0.459(d)(3) (providing that the Commission may defer acting on requests for confidential treatment of materials submitted to the Commission until a request for inspection has been made pursuant to section 0.460 or section 0.461. Such materials will be withheld from public view until the Commission acts on the request and that ruling is final). See, e.g., *Radio License Holding CBC, LLC*, Order and Consent Decree, 31 FCC Rcd 3, 8, para. 5 n.16 (EB 2016).

²⁶ LOI Response at 3, Responses to Question 4. ESPN asserts that it used a portion of the “standard federal attention tone.” LOI Response at 5, Response to Question 6.

²⁷ *Id.* at 4, Response to Question 6.

²⁸ *Id.* at 2, 9, Response to Questions 3, 13.

connection with an actual emergency, authorized test of the EAS, or qualified PSA.²⁹ Rather, ESPN indicates that the EAS Tones were included in the episode for “the limited purpose of presenting a dramatic recreation of an actual severe weather event.”³⁰ ESPN claims, however, that the portion of the EAS Tones it transmitted “could not have triggered any automated relay equipment” because the portion transmitted “did not include audio frequency-shift keying (AFSK) tones,”³¹ and that the portion of the EAS Tones “appeared very briefly in the [program], with the audio including the tones lasting a total of one second and fifty frames, or 1.83 seconds.”³²

III. DISCUSSION

10. We find that ESPN apparently willfully violated section 11.45 of the Commission’s rules. ESPN confirms that the October 27, 2020, episode of *30 for 30: Roll Tide/War Eagle* includes the EAS Tones. In its LOI Response, ESPN admits to using the EAS Tones during the episode, and transmitting the program one time via multiple cable systems, MVPDs, and VOD services.³³ ESPN also confirms that none of the material in question was transmitted in connection with an actual national, state, or local emergency, authorized test, or qualified PSA.³⁴ ESPN acknowledges that its use of the EAS Tones was in association with the depiction of a weather event for storytelling purposes, and that “[a] key segment of the documentary concerns the April 27, 2011 tornados that damaged areas throughout Alabama As part of the narrative framing of this weather event, the filmmakers included news coverage and footage of the tornados from a variety of sources.”³⁵ ESPN notes that “a portion of the EAS Attention Signals was used to introduce tornado footage.”³⁶

11. ESPN asserts that *30 for 30: Roll Tide/War Eagle* was subject to internal review and approval by multiple producers and “various other ESPN production staff” before it was ultimately delivered to MVPDs for transmission.³⁷ ESPN also contends that the programming “did not use any of the AFSK tones used to trigger automated relay equipment”³⁸ and that the portion of the EAS Tones “appeared very briefly in the [p]rogramming . . . lasting a total of . . . 1.83 seconds.”³⁹ We find that although the audio material may have constituted only a “portion” of the EAS Tones, and did not contain AFSK tones, the question of whether ESPN violated the rule in this instance, does not turn on the length of the EAS Tones or whether EAS data was embedded therein.⁴⁰

²⁹ *Id.* at 3-4, Response to Question 5.

³⁰ *Id.* at 5, Response to Question 6.

³¹ *Id.* at 3, Response to Question 4.

³² *Id.* at 5, Response to Question 7.

³³ LOI Response at 2, 9, Response to Questions 3, 13.

³⁴ *See* LOI Response at 3-4, Response to Question 5.

³⁵ *Id.* at 4-5, Response to Question 6.

³⁶ *Id.*

³⁷ LOI Response at 6, Response to Question 8.

³⁸ *Id.* at 5, Response to Question 7.

³⁹ *Id.*

⁴⁰ *See* 47 CFR § 11.45. *See also* *CBS NAL*, 34 FCC Rcd at 8424, paras. 15, 17 (2019) (explaining that [w]hile the audio material may not have included embedded EAS data, a “simulation” need not be an exact copy or recording of the EAS codes. Nor does [violation of] the rule require the inclusion of embedded EAS data.” The Commission also explained that softening or shortening the EAS Tones is not controlling in the Commission’s determination of liability under section 11.45 of the Commission’s rules: “Rather, CBS’s error lay in utilizing a tone that, despite being softer in volume and shorter in duration, nonetheless possessed the same dual-tone frequency, pitch, and timbre as the actual EAS Tones, and was recognizable by viewers or listeners as substantially similar to the EAS Tones.”).

12. Based on the evidence before us, we find that ESPN apparently willfully violated section 11.45 of the Commission's rules.

IV. PROPOSED FORFEITURE

13. Section 503(b) of the Act authorizes the Commission to impose a forfeiture against any entity that "willfully or repeatedly fail[s] to comply with . . . any rule, regulation, or order issued by the Commission . . ." ⁴¹ In exercising our forfeiture authority, we must consider the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require. ⁴² The Commission has established forfeiture guidelines, base penalties for certain violations and has identified criteria that it considers when determining the appropriate penalty in any given case. ⁴³ Under these guidelines, we may adjust a forfeiture downward for violations that are voluntarily disclosed or where there is a history of compliance. ⁴⁴ We may adjust a forfeiture upward for violations that are egregious, intentional, repeated, or that cause substantial harm or generate substantial economic gain for the violator. ⁴⁵

14. The Commission has previously applied an \$8,000 base forfeiture for violations of section 11.45 of the Commission's rules. ⁴⁶ We have discretion, however, to depart from these base forfeiture guidelines, taking into account the particular facts of each individual case. ⁴⁷

15. The nature of EAS violations requires particularly serious consideration because, among other issues, such violations undermine the integrity of the EAS by desensitizing viewers to the potential importance of warning tones and therefore implicate substantial public safety concerns. As explained in *CBS NAL*, our forfeiture determination in such cases is based on multiple factors associated with the nature of the violation and the violator. ⁴⁸ In this case, ESPN included the EAS Tones in a program transmitted over cable systems and MVPDs reaching virtually every television market in the country, thereby increasing the potential harm by increasing the potential reach of the transmissions. Nonetheless, no single factor (e.g., the number of transmissions) is controlling. When applying the statutory factors concerning the circumstances, extent, and gravity of an EAS violation, we take into account a number of specific factors, including: (1) the number of repetitions (i.e., the number of individual transmissions); (2) the duration of the violation (i.e., the number of days or months over which the violation occurred); (3) the audience reach of the transmissions (e.g., nationwide, regional, or local); and (4) the extent of the public safety impact (e.g., whether an EAS activation is triggered). ⁴⁹

16. As detailed above, ESPN, transmitted the programming once, on October 27, 2020. With respect to audience reach, ESPN's parent company The Walt Disney Company stated in its most recent annual report that ESPN has 84 million subscribers, as estimated by Nielsen Media Research as of

⁴¹ 47 U.S.C. § 503(b)(1)(B).

⁴² 47 U.S.C. § 503(b)(2)(E); 47 CFR § 1.80(b)(10).

⁴³ 47 CFR § 1.80(b)(10).

⁴⁴ *Id.* at Table 3.

⁴⁵ *Id.*

⁴⁶ *See, e.g., CBS NAL* at 8431, para. 36.

⁴⁷ *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17098–99, para. 22 (1997) (noting that "[a]lthough we have adopted the base forfeiture amounts as guidelines to provide a measure of predictability to the forfeiture process, we retain our discretion to depart from the guidelines and issue forfeitures on a case-by-case basis, under our general forfeiture authority contained in Section 503 of the Act") (*Forfeiture Policy Statement*), *recons. denied*, Memorandum Opinion and Order, 15 FCC Rcd 303 (1999).

⁴⁸ *See CBS NAL* at 8431, para. 37.

⁴⁹ *Id.*

September 2020.⁵⁰ In its LOI Response, ESPN admitted the October 27, 2020, episode of *30 for 30: Roll Tide/War Eagle* containing EAS Tones was aired on the ESPN network, “a nationally distributed cable network that delivers programming to most [c]able [s]ystems and other [MVPDs] in the United States.”⁵¹ The fact that the Company’s programming reached such potentially vast audiences greatly increases the extent and gravity of the instant violation.

17. In calculating the appropriate forfeiture, we also consider ESPN’s past compliance record. ESPN has a history of noncompliance with respect to section 11.45(a) of the Commission’s rules. In 2015, ESPN paid a \$280,000 forfeiture for violations of section 325(a) of the Act, and section 11.45 of the Commission’s rules when it transmitted EAS Tones in the absence of a Permitted Use.⁵² We find ESPN’s prior history of violations to be a significant factor to consider in determining the proposed forfeiture in this case.⁵³

18. In applying the forfeiture guidelines established by the Commission, we also consider whether there is any basis for a downward adjustment of the proposed forfeiture.⁵⁴ Here, we find none.

19. In determining the proposed forfeiture amount, we considered the factors outlined in the Commission’s *Forfeiture Policy Statement*, section 1.80 of the Commission’s rules, and section 503 of the Act. With respect to the nature, circumstances, extent, and gravity of the apparent violation, we considered the number of transmissions at issue, the amount of time over which the transmissions took place, the nationwide scope of ESPN’s audience reach, and the serious public safety implications of the apparent violation. With respect to the apparent violator in this matter, we also considered ESPN’s culpability and its prior history of violations of section 11.45 of the Commission’s rules. Although only a single transmission was involved, given the totality of the circumstances, and consistent with the *Forfeiture Policy Statement*, we conclude that an \$8,000 base forfeiture plus an upward adjustment in the amount of \$12,000 is warranted.⁵⁵ We therefore propose a total forfeiture of \$20,000, for which ESPN is apparently liable.⁵⁶

V. CONCLUSION

20. In view of the foregoing, we determine that ESPN apparently willfully violated section 11.45 of the Commission’s rules and propose a total forfeiture of \$20,000.

⁵⁰ The Walt Disney Company, Annual Report at 4 (Form 10-K) (Nov. 25, 2020), <https://www.sec.gov/ix?doc=/Archives/edgar/data/1744489/000174448920000197/dis-20201003.htm> (last visited Apr. 22, 2021) (Walt Disney 2020 Annual Report).

⁵¹ LOI Response at 2, Response to Question 3.

⁵² See *Viacom/ESPN Forfeiture Order*, 30 FCC Rcd 797 (affirming \$280,000 forfeiture against ESPN for violations of the laws that prohibit misuse of tones reserved for the EAS).

⁵³ See, e.g., *Turner Broadcasting System, Inc.*, Notice of Apparent Liability for Forfeiture, 29 FCC Rcd 752, 758, para. 16 (2014) (finding a higher degree of culpability due to a previous experience with misusing the EAS Tones).

⁵⁴ 47 CFR § 1.80(b)(10), Table 3 (downward adjustment factors include minor violations, good faith or voluntary disclosure, history of overall compliance, and inability to pay).

⁵⁵ See *Forfeiture Policy Statement* at 17099, para. 22 (noting that “[a]lthough we have adopted the base forfeiture amounts as guidelines to provide a measure of predictability to the forfeiture process, we retain our discretion to depart from the guidelines and issue forfeitures on a case-by-case basis, under our general forfeiture authority contained in Section 503 of the Act.”).

⁵⁶ Any entity that is a “Small Business Concern” as defined in the Small Business Act (Pub. L. 85-536, as amended) may avail itself of rights set forth in that Act, including rights set forth in 15 U.S.C. § 657, “Oversight of Regulatory Enforcement,” in addition to other rights set forth herein.

VI. ORDERING CLAUSES

21. Accordingly, **IT IS ORDERED** that, pursuant to section 503(b) of the Act⁵⁷ and section 1.80 of the Commission's rules,⁵⁸ ESPN, Inc. is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR FORFEITURE** in the amount of twenty thousand dollars \$20,000 for willful violation of section 11.45 of the Commission's rules.⁵⁹

22. **IT IS FURTHER ORDERED** that, pursuant to section 1.80 of the Commission's rules,⁶⁰ within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture, ESPN, Inc. **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture consistent with paragraph 25 below.

23. ESPN, Inc. shall send electronic notification of payment to Jeffrey Gee at Jeffrey.Gee@fcc.gov, Christopher Sova at Christopher.Sova@fcc.gov, Frederick Giroux at Frederick.Giroux@fcc.gov, and Jennifer Lewis at Jennifer.Lewis@fcc.gov on the date said payment is made. Payment of the forfeiture must be made by credit card, ACH (Automated Clearing House) debit from a bank account using the Commission's Fee Filer (the Commission's online payment system),⁶¹ or by wire transfer. The Commission no longer accepts forfeiture payments by check or money order. Below are instructions that payors should follow based on the form of payment selected:⁶²

- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. A completed Form 159 must be faxed to the Federal Communications Commission at 202-418-2843 or e-mailed to RROGWireFaxes@fcc.gov on the same business day the wire transfer is initiated. Failure to provide all required information in Form 159 may result in payment not being recognized as having been received. When completing FCC Form 159, enter the Account Number in block number 23A (call sign/other ID), enter the letters "FORF" in block number 24A (payment type code), and enter in block number 11 the FRN(s) captioned above (Payor FRN).⁶³ For additional detail and wire transfer instructions, go to <https://www.fcc.gov/licensing-databases/fees/wire-transfer>.
- Payment by credit card must be made by using the Commission's Fee Filer website at <https://apps.fcc.gov/FeeFiler/login.cfm>. To pay by credit card, log-in using the FRN captioned above. If payment must be split across FRNs, complete this process for each FRN. Next, select "Pay bills" on the Fee Filer Menu, and select the bill number associated with the NAL Account – the bill number is the NAL Account number with the first two digits excluded – and then choose the "Pay by Credit Card" option. Please note that there is a \$24,999.99 limit on credit card transactions.
- Payment by ACH must be made by using the Commission's Fee Filer website at <https://apps.fcc.gov/FeeFiler/login.cfm>. To pay by ACH, log in using the FRN captioned above. If payment must be split across FRNs, complete this process for each FRN. Next, select "Pay bills" on the Fee Filer Menu and then select the bill number associated to the

⁵⁷ 47 U.S.C. § 503(b).

⁵⁸ 47 CFR § 1.80.

⁵⁹ 47 CFR § 11.45.

⁶⁰ 47 CFR § 1.80.

⁶¹ Payments made using the Commission's Fee Filer system do not require the submission of an FCC Form 159.

⁶² For questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone at 1-877-480-3201 (option #6), or by e-mail at ARINQUIRIES@fcc.gov.

⁶³ Instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

NAL Account – the bill number is the NAL Account number with the first two digits excluded – and choose the “Pay from Bank Account” option. Please contact the appropriate financial institution to confirm the correct Routing Number and the correct account number from which payment will be made and verify with that financial institution that the designated account has authorization to accept ACH transactions.

24. Any request for making full payment over time under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 45 L Street, NE, Washington, D.C. 20554.⁶⁴ Questions regarding payment procedures should be directed to the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

25. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to sections 1.16 and 1.80(f)(3) of the Commission’s rules.⁶⁵ The written statement must be mailed to the Office of the Secretary, Federal Communications Commission, 45 L Street, NE, Washington, D.C. 20554, ATTN: Enforcement Bureau – Investigations & Hearings Division, and must include the NAL/Account Number referenced in the caption. The statement must also be e-mailed to Jeffrey Gee at Jeffrey.Gee@fcc.gov, Christopher Sova at Christopher.Sova@fcc.gov, Frederick Giroux at Frederick.Giroux@fcc.gov, and Jennifer Lewis at Jennifer.Lewis@fcc.gov.

26. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits the following documentation: (1) federal tax returns for the past three years; (2) financial statements for the past three years prepared according to generally accepted accounting practices; or (3) some other reliable and objective documentation that accurately reflects the petitioner’s current financial status.⁶⁶ Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation.

27. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture shall be sent by first class mail and certified mail, return receipt requested, to Susan L. Fox, Vice President, Government Relations, The Walt Disney Company, 425 Third Street, SW, Suite 1100, Washington D.C. 20024 and to ESPN’s attorneys, Matthew S. DelNero, Esq. and Corey Walker, Esq., Covington & Burling LLP, One CityCenter, 850 Tenth Street, NW, Washington, D.C. 20001-4956.

FEDERAL COMMUNICATIONS COMMISSION

Rosemary C. Harold
Chief
Enforcement Bureau

⁶⁴ See 47 CFR § 1.1914.

⁶⁵ *Id.* §§ 1.16, 1.80(f)(3).

⁶⁶ 47 U.S.C. § 503(b)(2)(E).