

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

In the Matter of	)	
	)	
<b>Viacom Inc.</b>	)	File No.: EB-IHD-13-00011468
	)	NAL/Acct. No. 201432080027
	)	FRN: 0014247977
	)	
<b>NBCUniversal Media, LLC</b>	)	File No.: EB-IHD-13-00011381
	)	NAL/Acct. No. 201432080028
	)	FRN: 0003454881
	)	
<b>ESPN Inc.</b>	)	File No.: EB-IHD-13-00011476
	)	NAL/Acct. No. 201432080029
	)	FRN: 0001548064

**NOTICE OF APPARENT LIABILITY FOR FORFEITURE**

**Adopted: February 28, 2014**

**Released: March 3, 2014**

By the Commission:

**I. INTRODUCTION**

1. The Emergency Alert System (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. 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. The EAS uses a four-part message for an emergency activation.<sup>1</sup> 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 particular alert is embedded. The separate EAS Attention Signal that follows the EAS codes is composed of two tones that are transmitted simultaneously.<sup>2</sup>

2. In this Notice of Apparent Liability for Forfeiture (NAL), we find that three separate companies—Viacom Inc. (Viacom), NBCUniversal Media, LLC (NBCUniversal), and ESPN Inc. (ESPN) (collectively the Companies)—apparently willfully and repeatedly violated Section 325(a) of the

<sup>1</sup> The four parts are: Preamble and EAS Header Codes; audio Attention Signal; message; and, Preamble and EAS End Of Message (EOM) Codes. 47 C.F.R. § 11.31(a).

<sup>2</sup> See 47 C.F.R. § 11.31(a)(2).

Communications Act of 1934, as amended (Act),<sup>3</sup> and Section 11.45 of the Commission's rules by transmitting or causing the transmission of EAS codes or the Attention Signal, or recordings or simulations thereof (EAS Tones), in the absence of an actual emergency or authorized test of the EAS.<sup>4</sup> Misuse of EAS Tones raises serious public safety concerns. Frivolous, casual, or other uses of EAS Tones for reasons other than their defined purpose can desensitize viewers to the tones and thereby undermine the effectiveness of the system in the event of an actual emergency. Although admitting their inclusion of actual EAS Tones in commercials transmitted in their programming, the Companies have questioned their liability under the Act and the Commission's rules. As fully discussed below, we find that the Companies apparently committed multiple violations of the Act and the Commission's rules by transmitting or causing the transmission of the EAS Tones in the absence of an actual emergency or authorized test of the EAS. The prohibition on such transmissions has been in place for many years and clearly applies to the Companies' actions. Furthermore, although we reject their assertions that actual deception or intent to deceive is required to find a violation of either the Act or the Commission's rules, the record reflects the Companies' misuse of the EAS Tones in fact created a false sense of emergency for certain members of the public. As a result, and based on the record before us, we find Viacom apparently liable for a forfeiture in the amount of one million, one hundred twenty thousand dollars (\$1,120,000); we find NBCUniversal apparently liable for a forfeiture in the amount of five hundred thirty thousand dollars (\$530,000); and we find ESPN apparently liable for a forfeiture in the amount of two hundred eighty thousand dollars (\$280,000).

## II. BACKGROUND

3. In March of 2013, the Commission received complaints alleging that the Companies violated Section 325(a) of the Act and Section 11.45 of the Commission's rules (EAS Rules) related to misuse of the EAS codes or Attention Signal<sup>5</sup> when they each played EAS Tones during a commercial for the movie *Olympus Has Fallen* (the *No Surrender Trailer*).<sup>6</sup>

4. The First Complaint, dated March 4, 2013, alleges that on that date at 11:30 a.m., the complainant viewed a "preview" for *Olympus Has Fallen* on the Comedy Central Channel.<sup>7</sup> The complainant states that "[t]he EAS tones were used during an aerial fast action preview scene . . . [I] do not feel [Comedy Central] should be allowed to use this tone for commercial exploitation of this movie."<sup>8</sup>

5. A Second Complaint, dated March 5, 2013, alleges that on March 4, 2013, between 4:00 p.m. and 6:00 p.m., the complainant viewed a "TV Spot" for *Olympus Has Fallen* on ESPN, which "seemed to play artifacts of EAS digital data plus some of the two-tone [signal]."<sup>9</sup>

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<sup>3</sup> See 47 U.S.C. § 325(a).

<sup>4</sup> See 47 C.F.R. § 11.45. We elect to address the apparent violations by all three Companies in a single NAL, rather than three separate NALs, due to the similar basis for the apparent violations; that is, multiple transmissions of a trailer promoting the movie *Olympus Has Fallen*. See *infra* note 6.

<sup>5</sup> See Complaint, Form 2000D, Key No. 13-C00477601-1 (Mar. 4, 2013) (on file in EB-IHD-13-00011468 formerly EB-13-IH-0369) (First Complaint); E-mail complaint (Mar. 5, 2013) (on file in EB-IHD-13-00011476 formerly EB-13-IH-0370) (Second Complaint); and Complaint, Form 2000D, Key No. 13-C00478126-1 (Mar. 5, 2013) (on file in EB-IHD-13-00011381 formerly EB-13-IH-0239) (Third Complaint).

<sup>6</sup> The record reflects that media agency Horizon Media, Inc. (Horizon Media) released multiple versions of a movie trailer for the film *Olympus Has Fallen* around the same time but only one of these trailers contained the EAS codes and Attention Signal. That trailer is the subject of this NAL and is referred to herein as the *No Surrender Trailer*.

<sup>7</sup> See First Complaint.

<sup>8</sup> *Id.*

<sup>9</sup> See Second Complaint.

6. A Third Complaint, also dated March 5, 2013, alleges that on that date, at 8:30 p.m., the complainant viewed a “commercial” for *Olympus Has Fallen* on SyFy Channel, which “uses EAS tones.”<sup>10</sup> The complainant further states that “[t]his is misleading and had our entire family running to the TV to find out what was going on, only to find it was a commercial. Very tricky, misleading, and potentially dangerous when people get used to ‘tuning out’ the EAS tones . . . . [I]t should be illegal for anyone but the proper authorities to use the EAS tones . . . .”<sup>11</sup> The complainant further notes that the tone used in the *Olympus Has Fallen* trailer was “similar enough that one of my children started to quickly get out of the bathtub thinking there was an emergency . . . . Around here in [S]outhwest Missouri . . . we are always on high alert for EAS tones due to tornadoes, especially approaching spring time. It could be devastating if people learn to ignore the EAS tones and of course it is hardly fair to trick people into running to the television to watch your commercial.”<sup>12</sup>

7. In response to the complaints, the Enforcement Bureau’s Investigations and Hearings Division sent letters of inquiry to Viacom,<sup>13</sup> The Walt Disney Company / ESPN,<sup>14</sup> and NBCUniversal,<sup>15</sup> dated April 8, 2013, directing each of the Companies to submit, among other things, recordings of the *No Surrender Trailer* and sworn written statements as to whether it had transmitted, or caused to transmit, that trailer.<sup>16</sup> Each of the Companies responded to its respective letter of inquiry on May 22, 2013.<sup>17</sup>

#### A. Viacom’s Response

8. In its response, Viacom acknowledges that the *No Surrender Trailer* appeared a total of 57 times from March 4 – 8, 2013, on seven Viacom-owned networks, as follows:<sup>18</sup>

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<sup>10</sup> See Third Complaint.

<sup>11</sup> *Id.*

<sup>12</sup> See E-mail from Complainant to Jennifer Lewis, Attorney Advisor, Investigations and Hearings Division, FCC Enforcement Bureau (Mar. 8, 2013) (on file in EB-IHD-13-00011381 formerly EB-13-IH-0239).

<sup>13</sup> Viacom is the parent company of Comedy Central.

<sup>14</sup> The Walt Disney Company is the parent company of ESPN Inc.

<sup>15</sup> NBCUniversal is the parent company of SyFy.

<sup>16</sup> See Letter from Jeffrey J. Gee, Deputy Chief, Investigations and Hearings Division, FCC Enforcement Bureau, to Keith R. Murphy, Senior Vice President, Government Relations & Regulatory Counsel, Viacom Inc. (Apr. 8, 2013) (on file in EB-IHD-13-00011468 formerly EB-13-IH-0369) (Viacom LOI); Letter from Jeffrey J. Gee, Deputy Chief, Investigations and Hearings Division, FCC Enforcement Bureau, to Susan L. Fox, Vice President, Government Relations, The Walt Disney Company (Apr. 8, 2013) (on file in EB-IHD-13-00011476 formerly EB-13-IH-0370) (ESPN LOI); Letter from Jeffrey J. Gee, Deputy Chief, Investigations and Hearings Division, FCC Enforcement Bureau, to Margaret L. Tobey, Vice President, Regulatory Affairs, NBCUniversal Media, LLC (Apr. 8, 2013) (on file in EB-IHD-13-00011381 formerly EB-13-IH-0239).

<sup>17</sup> See Letter from Meredith S. Senter, Jr., Esq. and Dennis P. Corbett, Esq., Lerman Senter PLLC, Counsel to Viacom Inc., to Jennifer A. Lewis, Attorney Advisor, Investigations and Hearings Division, FCC Enforcement Bureau (May 22, 2013) (on file in EB-IHD-13-00011468 formerly EB-13-IH-0369) (Viacom LOI Response); Letter from Tom W. Davidson, Esq., Akin Gump Strauss Hauer & Feld LLP, Counsel to ESPN Inc., to Jennifer Lewis, Attorney Advisor, Investigations and Hearings Division, FCC Enforcement Bureau (May 22, 2013) (on file in EB-IHD-13-00011476 formerly EB-13-IH-0370) (ESPN LOI Response); Letter from David H. Solomon, Esq., Wilkinson Barker Knauer LLP, Counsel to NBCUniversal Media, LLC, to Jennifer A. Lewis, Attorney Advisor, Investigations and Hearings Division, FCC Enforcement Bureau (May 22, 2013) (on file in EB-IHD-13-00011381 formerly EB-13-IH-0239) (NBCUniversal LOI Response).

<sup>18</sup> Viacom LOI Response at Attachment A.

<i>Network</i>	<i>Number of Repetitions per LOI Response</i>	<i>Transmission Date(s)</i>
BET	4	3/4/2013 – 3/6/2013
Centric	6	3/4/2013 – 3/6/2013
Comedy Central	7	3/4/2013 – 3/7/2013
MTV	10	3/4/2013 – 3/7/2013
MTV2	6	3/4/2013 – 3/7/2013
Spike	12	3/4/2013 – 3/8/2013
VH1	12	3/4/2013 – 3/7/2013
<b>Total</b>	<b>57</b>	

9. Viacom confirms that the *No Surrender Trailer* contained “embedded partial EAS codes and the EAS Attention Signal.”<sup>19</sup> Viacom states that it did not produce the trailer, which was supplied by an independent film company, FilmDistrict Distribution, LLC (FilmDistrict), and its media agency, Horizon Media.<sup>20</sup> An individual in Viacom’s Standards and Practices and Advertising Standards Department reviewed the *No Surrender Trailer* and determined that it did not “conflict with Viacom’s then current (September 2012) Advertising Guidelines.”<sup>21</sup> According to those guidelines, Viacom “reviews commercials to ensure compliance with relevant government and industry regulations” and may revise or reject “any advertising that it determines . . . does not comply with the Guidelines . . . or violates applicable law.”<sup>22</sup> The guidelines, which discuss acceptable content, did not mention EAS codes.<sup>23</sup> Viacom included the *No Surrender Trailer* in network programming that it then delivered to Multichannel Video Programming Distributors (MVPDs) for distribution to their subscribers.<sup>24</sup> Viacom concedes that it did not transmit the *No Surrender Trailer* in connection with an actual National, State or Local Area emergency or authorized test of the EAS.<sup>25</sup>

10. Viacom notes that “out of an abundance of caution” it revised its advertising guidelines in May of 2013 after receiving the Viacom LOI.<sup>26</sup> Further, Viacom states that its new advertising guidelines now prohibit advertisements that “contain the Emergency Alert System codes or Attention Signals, or a recording or simulation thereof, in any circumstance other than in a National, State or Local Area emergency or authorized test of the EAS.”<sup>27</sup>

<sup>19</sup> *Id.* at 3.

<sup>20</sup> *See id.* at 4.

<sup>21</sup> *Id.* at 4–5.

<sup>22</sup> *Id.* at Attachment E.

<sup>23</sup> *See id.*

<sup>24</sup> *Id.* at 2–3.

<sup>25</sup> *See id.* at 4.

<sup>26</sup> *See id.* at 5.

<sup>27</sup> *Id.*

### B. ESPN's Response

11. In its response, ESPN acknowledges that the *No Surrender Trailer* appeared a total of 13 times from March 4 – 7, 2013, on three ESPN-owned networks, as follows:<sup>28</sup>

<i>Network</i>	<i>Number of Repetitions per LOI Response</i>	<i>Transmission Date(s)</i>
ESPN	6	3/4/2013 – 3/7/2013
ESPN2	1	3/6/2013
ESPNEWS	6	3/4/2013 – 3/6/2013
<b>Total</b>	<b>13</b>	

12. ESPN confirms that the *No Surrender Trailer*, which it received from Horizon Media, included “tones that sounded like the EAS Attention Signal,” which “may have been incomplete tones of the EAS Attention Signal.”<sup>29</sup> ESPN states that its staff reviewed and approved the *No Surrender Trailer* “in accordance with internal policies governing trailers for a motion picture.”<sup>30</sup> ESPN thereafter inserted the trailer into its programming, which ESPN then distributed to MVPDs for transmission to MVPD subscribers.<sup>31</sup> Finally, ESPN states that it had not inserted the trailer into its programming in connection with an actual National, State or Local Area emergency or authorized test of the EAS; rather, “the No Surrender Spot was an advertisement directed exclusively at promoting the release of the motion picture.”<sup>32</sup>

13. ESPN also describes how it became aware that the *No Surrender Trailer* included recorded portions of an actual EAS Tone and Attention Signal. On March 7, 2013, ESPN staff received an email message from a representative of the Society of Broadcast Engineers (SBE), stating that “a trailer for ‘Olympus Has Fallen’ ‘uses actual EAS tones’ and that broadcast stations airing the advertisement may be subject to FCC fines.”<sup>33</sup> ESPN states that this SBE email prompted ESPN Commercial Operations staff to review Section 11.45 of the Commission’s rules as well as all of the “Olympus Has Fallen” trailers that had been provided to ESPN. Out of an “abundance of caution,” ESPN rescinded its prior approval of the *No Surrender Trailer* “[a]fter determining that . . . the No Surrender Spot used audible tones similar to the EAS Attention Signal.”<sup>34</sup> ESPN states that it then removed the *No Surrender Trailer* from its commercial advertising tracking and control system, and replaced it with versions that did not contain an audible tone that sounded like the EAS Attention Signal.<sup>35</sup>

14. ESPN further states that, after it received the ESPN LOI, it “modified its procedures and requirements for reviewing advertisements that will be inserted into programming to be distributed by any

<sup>28</sup> ESPN LOI Response at 5, Exhibit C-2.

<sup>29</sup> *Id.* at 5–7.

<sup>30</sup> *Id.* at 4–5, 10, Exhibit B.

<sup>31</sup> *Id.* at 2, 5–8.

<sup>32</sup> *Id.* at 8.

<sup>33</sup> *Id.* at 5, Exhibits D-1, D-2.

<sup>34</sup> *Id.* at 6.

<sup>35</sup> *Id.*

of the ESPN cable sports programming networks. Specifically, ESPN Commercial Operations personnel will review every advertisement regarding whether it contains any audible tones that sound like the EAS Attention Signal.”<sup>36</sup>

### C. NBCUniversal’s Response

15. In its response, NBCUniversal acknowledges that the *No Surrender Trailer* appeared a total of 33 times from March 4 – 9, 2013, on seven NBCUniversal-owned networks, as follows:<sup>37</sup>

<i>Network</i>	<i>Number of Repetitions per LOI Response</i>	<i>Transmission Date(s)</i>
SyFy	4	3/5/2013 – 3/7/2013
USA	1	3/5/2013
RSN Bay Area	3	3/4/2013 – 3/9/2013
RSN California	21	3/4/2013 – 3/7/2013
RSN Houston	1	3/4/2013
RSN New England	1	3/4/2013
RSN Mid Atlantic	2	3/5/2013
<b>Total</b>	<b>33</b>	

NBCUniversal acknowledges that “[t]he FCC’s rules specify that the EAS Attention Signal is comprised of two fundamental frequencies, 853 Hz and 960 Hz, transmitted simultaneously for between eight and 25 seconds” and confirms that the *No Surrender Trailer* “contained three instances of the fundamental frequencies of the Attention Signal . . . although for much shorter durations (approximately four seconds, one second and one second) than specified in the FCC’s rules.”<sup>38</sup> NBCUniversal states that, because the trailer did not fall within certain “red flag categories” enumerated in its advertising standards, it included the *No Surrender Trailer* in programming it provided to MVPDs “for transmission to their subscribers.”<sup>39</sup> NBCUniversal concedes that it did not transmit the *No Surrender Trailer* in connection with an actual National, State or Local Area emergency or authorized test of the EAS, but rather to promote a movie that portrayed an attack on the White House.<sup>40</sup>

16. NBCUniversal explains that the ad campaign for *Olympus Has Fallen* commenced on or about March 4, 2013, and that the *No Surrender Trailer* was distributed to media outlets, including

<sup>36</sup> *Id.* at 8. ESPN notes that it has already implemented new policies and procedures, and that it has since rejected advertising spots which contain tones that sound like the EAS Attention Signal. *Id.*

<sup>37</sup> NBCUniversal LOI Response at 4.

<sup>38</sup> *Id.* at 5 (citing 47 C.F.R. § 11.31(c) (“transmission of 8 to 25 seconds of Attention Signal”).)

<sup>39</sup> *See id.* at 3, 5, 7.

<sup>40</sup> *Id.* at 6.

NBCUniversal, on behalf of FilmDistrict by Horizon Media.<sup>41</sup> NBCUniversal notes that, for advertising intended for its cable programming networks, “the Company focuses its review on certain ‘red flag’ categories, including commercials relating to issues of public controversy, gambling and casino advertising, nutritional supplements, homeopathic treatments and weight loss . . .” and determined that the *No Surrender Trailer* “did not fall within one of the red flag categories.”<sup>42</sup>

17. NBCUniversal notes that by March 6, 2013, “word was circulating within the television industry that one 30-second commercial for the film included EAS tones or tones resembling EAS tones.”<sup>43</sup> NBCUniversal further notes that “several state broadcaster associations issued advisories about the Commercial,” and, by the following day, March 7, 2013, “the matter had been brought to the attention of the Motion Picture Association of America . . . the National Cable Telecommunications Association, and the National Association of Broadcasters.”<sup>44</sup> NBCUniversal further notes that on March 7, 2013, Horizon Media sent a fax to NBCUniversal with the subject line: “URGENT RESPONSE REQUIRED REVISED FD OHF NC TRAFFIC USA,” and included the following message which “instructed the Company to immediately pull the Commercial from rotation: ‘Please be advised that due to legal reasons, your network can NO LONGER RUN NO SURRENDER FDOH3041H. It is imperative effective immediately, this spot be removed from rotation. Below you will find the new rotation until formal instructions are provided . . .’”<sup>45</sup> NBCUniversal states that, with one exception, it ceased to air the *No Surrender Trailer*, as of March 7, 2013.<sup>46</sup> NBCUniversal admits that the *No Surrender Trailer* ran an additional time on NBCUniversal’s Regional Sports Network serving the San Francisco Bay Area on March 9, 2013.<sup>47</sup>

### III. DISCUSSION

18. Pursuant to Section 503(b)(1) of the 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 United States for a forfeiture penalty.<sup>48</sup> 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.<sup>49</sup> 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,<sup>50</sup> and the

<sup>41</sup> *See id.* at 4, 6.

<sup>42</sup> *Id.* at 7. NBCUniversal notes that it is “in the process of adding the category of EAS tones or simulations thereof to its list of ‘red flag’ categories for review of advertising intended for its cable programming networks and to documents setting forth the Company’s advertising standards that are made available to advertisers and ad agencies.” *Id.*

<sup>43</sup> *Id.* at 2.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* The code FDOH3041H is a unique Industry Standard Commercial Identifier (ISCI) for the *No Surrender Trailer*. *See id.* at 2–4 & n.9. ISCI codes are a series of letters and numbers determined by a commercial’s producer, in this instance FilmDistrict. *See id.* at 6; *see also* Smart Media Group, *What is an ISCI Code and Why Do We Need It?*, <http://smartmediagroup.com/2013/05/what-is-an-isci-code-why-do-we-need-it/> (last visited Jan. 2, 2014) (noting that “A commercial’s ISCI code is actually more important than its title in terms of making sure the correct spot gets on the air. Having a unique identifier prevents misunderstandings of which commercial goes with which advertiser and which spot is supposed to air during which time slot.”).

<sup>46</sup> NBCUniversal LOI Response at 2.

<sup>47</sup> *Id.* at 2 n. 5, 4.

<sup>48</sup> 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(2).

<sup>49</sup> 47 U.S.C. § 312(f)(1).

<sup>50</sup> H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

Commission has so interpreted the term in the Section 503(b) context.<sup>51</sup> The Commission may also assess a forfeiture for violations that are merely repeated, and not willful.<sup>52</sup> “Repeated” means that the act was committed or omitted more than once, or lasts more than one day.<sup>53</sup> 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.<sup>54</sup> 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.<sup>55</sup> As described in greater detail below, we conclude under this procedure that the Companies are apparently liable for a monetary forfeiture, for apparently willfully and repeatedly violating Section 325(a) of the Act and Section 11.45 of the Commission’s rules.

19. Pursuant to Section 325(a) of the Act, “no person within the jurisdiction of the United States shall knowingly utter or transmit, or cause to be uttered or transmitted, any false or fraudulent signal of distress, or communication relating thereto.”<sup>56</sup> 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.”<sup>57</sup>

20. As discussed above, the Companies each admit that: (1) they included the *No Surrender Trailer* in the programming that they supplied to cable and satellite systems for distribution to subscribers; (2) the *No Surrender Trailer* included actual EAS codes and the Attention Signal; and (3) the EAS codes and Attention Signal were not included in their programming in connection with an actual emergency or authorized EAS test. Despite these admissions, the Companies each contest their liability for violating these provisions of the Act and our rules. We address their contentions below. First, however, we summarize our view of the case and address the number of occasions upon which the subject programming was provided by the Companies to the cable and satellite systems that further transmitted it to their customers.

**A. The Companies Each Apparently Violated Section 11.45 of the Commission’s Rules by Transmitting or Causing the Transmission of the EAS Codes and Attention Signal in the *No Surrender Trailer***

21. The record established in these investigations demonstrates that the *No Surrender Trailer* included recordings of actual EAS codes and the Attention Signal, and not simulations thereof.<sup>58</sup> In addition, the Commission’s review of the *No Surrender Trailer* provided by the Companies confirms repeated uses of the EAS codes and Attention Signal throughout the trailer, accompanied by visual text

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<sup>51</sup> See, e.g., *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388, para. 5 (1991) (*Southern California*), *recons. denied*, 7 FCC Rcd 3454 (1992).

<sup>52</sup> See, e.g., *Callais Cablevision, Inc., Grand Isle, Louisiana*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362, para. 10 (2001) (*Callais Cablevision*) (assessing a forfeiture for a cable television operator’s repeated signal leakage).

<sup>53</sup> See, e.g., *Southern California*, 6 FCC Rcd at 4388, para. 5; *Callais Cablevision*, 16 FCC Rcd at 1362, para. 9.

<sup>54</sup> 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

<sup>55</sup> See, e.g., *SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591, para. 4 (2002) (forfeiture paid).

<sup>56</sup> 47 U.S.C. § 325(a).

<sup>57</sup> 47 C.F.R. § 11.45.

<sup>58</sup> See Viacom LOI Response at 3; ESPN LOI Response at 5–7, Exhibits D-1, D-2; and NBCUniversal LOI Response at 5.



stating “THIS IS NOT A TEST” and “THIS IS NOT A DRILL.”<sup>59</sup> Also accompanying the EAS codes and Attention Signal in the trailer were multiple visual images of “terrorists” surrounding the White House, scenes of the White House and other Washington, D.C. landmarks engulfed in flames, and military aircraft and combat vehicles in convoys patrolling the city. The record reflects that the Companies were aware of the content in the *No Surrender Trailer* and acknowledge that their staffs reviewed and approved it before they inserted it into multiple programming feeds.<sup>60</sup>

22. Section 11.45 of the Commission’s rules prohibits transmitting or causing the transmission of the actual or simulated EAS codes or Attention Signal except in an actual emergency or authorized test. The Companies acknowledge that they inserted the *No Surrender Trailer* in their networks in the absence of an emergency or authorized test.<sup>61</sup> Based on the Companies’ responses and public records, we find that each of the Companies delivers their network programming to MVPDs throughout the country with the intent (indeed, the contractual obligation) that the MVPDs transmit the networks’ programming to the MVPDs’ subscribers.<sup>62</sup> It is our further understanding that, for at least

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<sup>59</sup> The Commission reviewed each recording of the *No Surrender Trailer* submitted by the Companies, and all were identical.

<sup>60</sup> See Viacom LOI Response at 4–5, Attachment D; ESPN LOI Response at 2–5, 10, Exhibit B; and NBCUniversal LOI Response at 3, 5, 7. We note that, while the rule does not expressly require such knowledge or awareness, the Companies’ affirmative awareness further underscores their involvement in the transmissions.

<sup>61</sup> See *supra* paras. 9, 12, and 15.

<sup>62</sup> See Viacom Inc., Form 10-K (filed Nov. 14, 2013) (Viacom Annual Report). In the Viacom Annual Report, Viacom states:

We create, acquire and distribute programming and other content to our audiences across multiple platforms, which allows our audiences to engage and interact with our content in a variety of ways: through traditional cable and satellite distribution, on connected TVs, PCs, tablets and other mobile devices, and using apps, browsers and other interfaces. Viacom Annual Report at 1.

Viacom further notes with respect to affiliate revenues:

Our agreements with multichannel television service providers are generally multi-year carriage agreements with set rate increases that provide us with a reasonably stable source of revenues. The amount of the fees we receive is generally a function of the number of subscribers and the rates we receive per subscriber. Viacom Annual Report at 4.

See also NBCUniversal Media, LLC, Form 10-K (filed Feb. 21, 2013) (NBCUniversal Annual Report). In the NBCUniversal Annual Report, NBCUniversal states:

We market and distribute our cable network programming in the United States and internationally to multichannel video providers, as well as to digital distributors such as Netflix and iTunes. These distributors may exhibit our content on television, including video on demand and pay-per-view, online and through mobile apps for smartphones and tablets . . . . Our Cable Networks segment generates revenue primarily from the distribution of our cable network programming and from the sale of advertising. Distribution revenue is generated from distribution agreements with multichannel video providers. Advertising revenue is generated from the sale of advertising time on our cable networks and related digital media properties. We also generate content licensing and other revenue primarily from the licensing of our owned programming to various distribution platforms in the United States and internationally. NBCUniversal Annual Report at 2.

See also The Walt Disney Company, Form 10-K (filed Nov. 20, 2013) (WDC Annual Report). In the WDC Annual Report, The Walt Disney Company notes that its Media Networks segment includes cable network ESPN and that:

(continued....)

eight of the networks that included the *No Surrender Trailer*, the Companies deliver two feeds of their network programming in this manner—an East Coast feed and an essentially identical West Coast feed, which is the same programming time shifted by three hours.<sup>63</sup> Nothing in the record indicates that the Companies removed the *No Surrender Trailer* from the second feed where such second feeds existed. Based on the foregoing, we find that each of the Companies transmitted, or caused to be transmitted, the *No Surrender Trailer* containing the actual or simulated EAS codes and Attention Signal in the absence of an actual emergency or authorized test, as detailed in the chart below:

(Continued from previous page...)

The business in the Media Networks segment generate revenue from fees charged to cable, satellite and telecommunications service providers (Multi-channel Video Programming Distributors or MVPDs) and television stations affiliated with our domestic broadcast television network, from the sale to advertisers of time in programs for commercial announcements and from other sources such as the sale and distribution of television programming . . . . Cable networks derive a majority of their revenues from fees charged to MVPDs for the right to deliver our programming to their customers and, for certain networks (primarily ESPN and ABC Family), the sale to advertisers of time in network programs for commercial announcements. Generally, the Company's cable networks operate under multi-year agreements with MVPDs that include contractually determined fees. WDC Annual Report at 1.

<sup>63</sup> See Cable Television Advertising Bureau, *Live vs. Dual Feed Cable Networks*, <http://www.thecab.tv/main/resources/lvdFeeds/index.shtml> (last visited Jan. 3, 2014). According to information made available online by the Cable Television Advertising Bureau, the following networks are “dual feed” networks: BET, Comedy Central, MTV, MTV2, Spike TV, SyFy, USA Network, and VH1. Cable Television Advertising Bureau, *Live vs. Dual Feed Cable Networks*, <http://www.thecab.tv/php/cablefeeds/feeds.php?type=dual&Submit=Submit> (last visited Jan. 3, 2014).

<b>VIACOM-OWNED NETWORKS</b>				
<i>Network</i>	<i>Number of Repetitions per LOI Response</i>	<i>Dual Feed Network?</i>	<i>Total Transmissions</i>	<i>Duration of Transmissions (days)</i>
BET	4	Yes	8	3
Centric	6	No	6	3
Comedy Central	7	Yes	14	4
MTV	10	Yes	20	4
MTV2	6	Yes	12	4
Spike	12	Yes	24	5
VH1	12	Yes	24	4
<b>TOTAL</b>			<b>108</b>	
<b>NBCUNIVERSAL-OWNED NETWORKS</b>				
SyFy	4	Yes	8	3
USA	1	Yes	2	1
RSN Bay Area	3	No	3	3
RSN California	21	No	21	4
RSN Houston	1	No	1	1
RSN New England	1	No	1	1
RSN Mid Atlantic	2	No	2	1
<b>TOTAL</b>			<b>38</b>	
<b>ESPN-OWNED NETWORKS</b>				
ESPN	6	No	6	4
ESPN2	1	No	1	1
ESPNEWS	6	No	6	3
<b>TOTAL</b>			<b>13</b>	

**B. The Companies' Arguments Denying Liability Are Unavailing**

**1. The Companies Had Adequate Notice of Section 11.45's Applicability and Substantive Requirements**

23. Viacom and NBCUniversal each contend that they had inadequate notice of the requirements and applicability of the rules with respect to EAS violations.<sup>64</sup> We disagree. The requirements of Section 11.45 are not novel and have been well settled via rulemaking and administrative action for nearly 20 years. The rule is short and clear: it applies to "persons" and does not exclude cable programmers. It applies to actions that "transmit or cause to transmit" the restricted tones and is not limited to direct transmissions by or to a particular person or entity. Moreover, the rule explicitly applies

<sup>64</sup> See Viacom LOI Response at 7-12, NBCUniversal LOI Response at 7-9.

to the “EAS codes or Attention Signal, or a recording or simulation thereof”<sup>65</sup> and applies regardless of whether the transmission of the codes results in an inadvertent activation of the EAS. Finally, nothing in the language of Section 11.45 requires a showing of deceptive use or specific intent to deceive the public in order to find a violation. In sum, the plain and straightforward language of a long-standing rule gave clear and unambiguous notice that the Companies’ actions would be subject to sanction.

24. Although Section 325(a) of the Act or Section 73.1217 of the Commission’s rules (the Hoax Rule)<sup>66</sup> may also subject violators to liability for false or misleading emergency signals, the Commission decided in 1994 to create Section 11.45 as a vehicle to directly and specifically deter and prohibit misuse of the EAS codes and Attention Signal.<sup>67</sup> The regulatory history of Section 11.45 emphasizes the seriousness and danger to public safety resulting from the improper use of EAS codes and Attention Signal. Moreover, the Commission’s concern over the abuse of emergency signals predates the order establishing the EAS.<sup>68</sup> For example, the *1994 EBS Order* references earlier proceedings that noted that the misuse of the actual EAS (referred to as the EBS at that time) signal, or “a recording thereof, or any simulation thereof, severely undermines the integrity of the [EAS] alert system and will not be tolerated by the Commission.”<sup>69</sup> In the *1994 EBS Order*, the Commission acknowledges commenters’ concerns that “any use of the EBS attention signal, other than for tests and activations, could be an enormous detriment to the system,”<sup>70</sup> notes its determination to prevent the misuse of the EAS Tones, and declares that—although such violations could be pursued under 47 U.S.C. § 325(a) and the Hoax Rule—the improper use of an EAS attention signal was important enough to warrant the establishment of Section 11.45.<sup>71</sup> In the context of the Commission’s desire to strengthen the integrity of the nation’s EAS, it is clear that any use of the EAS Tones absent an actual emergency or testing of the system would constitute false use.<sup>72</sup>

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<sup>65</sup> See 47 C.F.R. §11.45.

<sup>66</sup> See 47 C.F.R. § 73.1217. The Hoax Rule provides that “[n]o licensee or permittee of any broadcast station shall broadcast false information concerning a crime or a catastrophe if: (a) The licensee knows this information is false; (b) It is foreseeable that the broadcast of the information will cause substantial public harm; and (c) Broadcast of the information does in fact directly cause substantial public harm.” *Id.*

<sup>67</sup> See *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 FCC Rcd 1786, 1815, para. 84 (1994) (*1994 EBS Order*). The Emergency Broadcast System (EBS) was the predecessor to the EAS, which was created by the Commission’s actions in the *1994 EBS Order*. See *Turner Broadcasting System, Inc.*, Notice of Apparent Liability for Forfeiture, 28 FCC Rcd 15455, 15458–59, para. 9 (Enf. Bur. 2013) (forfeiture paid) (*Turner*) (citing *Emmis Broadcasting Corp. of St. Louis*, Notice of Apparent Liability for Forfeiture, 6 FCC Rcd 2289, 2289–90 (1991) (*Emmis*)).

<sup>68</sup> See *1994 EBS Order*, 10 FCC Rcd at 1792 n.14.

<sup>69</sup> See *id.* (citing *Amendment of Part 73, Subpart G, of The Commission’s Rules Regarding The Emergency Broadcast System*, Notice of Inquiry and Notice of Proposed Rule Making, 6 FCC Rcd 6739, 6741, para. 12 (1991)).

<sup>70</sup> *Id.* at 1815, para. 83.

<sup>71</sup> *Id.* at 1815, para. 84 (“There are two prohibitions potentially relevant to misconduct in operation of the EAS: Section 325(a) of the Communications Act, which prohibits false distress signals, and Section 73.1217 of the Commission’s Rules and Regulations prohibiting broadcast hoaxes. We believe a specific prohibition against the misuse of the EAS attention signal and codes is necessary, however, because it is more specific and directly addresses the proper use of EAS codes and tones. Therefore, we adopt new Section 11.45 to prohibit *anyone* from transmitting the EAS two-tone attention signal or any of the new special codes for false or deceptive use.”) (emphasis added).

<sup>72</sup> *Id.* at 1815, para. 83

25. Viacom appears to suggest that the parties' lack of notice argument is buttressed by the long absence of Commission enforcement actions under Section 11.45 for misuse of EAS Tones.<sup>73</sup> We find this suggestion unpersuasive. The paucity of EAS complaints that might have prompted Commission action under Section 11.45 in the past does not compel us to forbear from enforcement action now, in the face of viable complaints concerning current misconduct. Indeed, any claim that the industry lacked notice of what was prohibited by the rule is belied by the fact that many members of the media industry instantly recognized problems with the *No Surrender Trailer*. Within days of the trailer's release, ESPN received an email from the SBE advising that the trailer could subject stations airing the ad to FCC fines,<sup>74</sup> and several state broadcaster associations issued advisories about the ad.<sup>75</sup> According to NBCUniversal, by March 7, 2013, the matter had been brought to the attention of the National Cable Telecommunications Association and the National Association of Broadcasters.<sup>76</sup> NBCUniversal further acknowledges that, on that same day, Horizon Media issued a warning to stop running the trailer.<sup>77</sup> This immediate outcry by disparate members of the media industry demonstrated a widespread recognition that the No Surrender Trailer ran afoul of the EAS Rules. This long-standing, common understanding of the rule's applicability was also reflected in the Commission's recent enforcement actions against a cable network programmer and a broadcast station for EAS violations and in an Enforcement Advisory issued in conjunction with those actions.<sup>78</sup> The *Advisory*, which was issued following widespread complaints regarding misuse of the EAS Tones, recites the rationale for the 20-year old rule and reminds the public of its general applicability.<sup>79</sup>

## 2. The Applicability of Section 11.45 Is Not Limited to EAS Participants

26. The Companies argue that Section 11.45 does not apply because they are not EAS participants and therefore not subject to the EAS rules.<sup>80</sup> NBCUniversal further argues that it is unclear whether the EAS rules apply to program providers or cable programming networks such as itself but, if they do, the Commission never provided notice of such applicability.<sup>81</sup> We disagree. First, the language of Section 11.45 plainly indicates that the Commission did not limit the rule's applicability to EAS participants.<sup>82</sup> In this connection, Section 11.45 provides that "[n]o person may transmit or cause to transmit the EAS codes or Attention Signal."<sup>83</sup> In addition, the Commission specifically found in its *1994*

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<sup>73</sup> See Viacom LOI Response at 9.

<sup>74</sup> See *supra* para. 13; see also ESPN LOI Response at 5.

<sup>75</sup> See *supra* para. 17; see also NBCUniversal LOI Response at 2.

<sup>76</sup> See *id.*

<sup>77</sup> See *id.*

<sup>78</sup> See *Turner*, 28 FCC Rcd at 15456–58, paras. 5–8; *MMK License LLC*, Order, 28 FCC Rcd 15443 (Enf. Bur. 2013); *Emergency Alert System False, Fraudulent or Unauthorized Use of the Emergency Alert System Attention Signal and Codes is Strictly Prohibited*, FCC Enforcement Advisory, Public Notice, 28 FCC Rcd 15438 (Enf. Bur. 2013) (*Advisory*).

<sup>79</sup> See *Advisory*. Although issued after the Companies' misuse of the EAS Tones described here, the *Advisory* was a reminder of the prohibitions, not a required or necessary predicate to our enforcement of those prohibitions.

<sup>80</sup> See Viacom LOI Response at 6; NBCUniversal LOI Response at 9; and ESPN LOI Response at 2, 11.

<sup>81</sup> See NBCUniversal LOI Response at 9.

<sup>82</sup> The Commission's intent in establishing universal deployment of the EAS (and as a corollary, the rules governing it) is reflected in the Commission's decision to rename the EBS as the EAS. See *1994 EBS Order*, 10 FCC Rcd at 1800–01, para. 39 (“[T]he word ‘broadcast’ in the Emergency Broadcast System should be changed to inform the public that the new system, EAS, is not necessarily a broadcast-based service but ultimately an aggregation of many services working together.”).

*EBS Order* that, “[w]e believe 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. Therefore, we adopt new Section 11.45 to prohibit *anyone* from transmitting the EAS two-tone attention signal or any of the new special codes for false or deceptive use.”<sup>84</sup> As the plain language of both Section 11.45 and the *1994 EBS Order* adopting Section 11.45 use terms of broad applicability in defining the scope of entities subject to the rule and eschew any limitation to EAS participants or otherwise, the Companies’ claims that they lacked notice of the rule’s applicability to them are ill-founded.

27. Our recent actions involving Section 11.45 have been consistent with this conclusion. In our most recent action, we found Turner Broadcasting System, Inc. (Turner)—a cable programming provider similar to the Companies—apparently liable for a forfeiture in the amount of two hundred thousand dollars (\$200,000) in connection with a violation of Section 11.45 of the Commission’s rules and Section 325(a) of the Act after Turner transmitted or caused the transmission of a simulation of the EAS codes in connection with a Best Buy commercial promoting the release of a new recording by music artist A\$AP Rocky.<sup>85</sup> Likewise, the Enforcement Bureau previously found that Turner violated Section 11.45 and Section 325(a) when it transmitted or caused the transmission of a promotion for the *Conan* show, which included audio material that constituted a simulation of the EAS codes and Attention Signal.<sup>86</sup> In that case, the Bureau found Turner apparently liable for a forfeiture in the amount of twenty-five thousand dollars (\$25,000).<sup>87</sup> Furthermore, the Bureau noted in its 2013 *Advisory*, that Section 11.45:

[A]ppplies to programmers that distribute programming containing a prohibited sound regardless of whether or not they deliver the unlawful signal directly to consumers; it also applies to a person who transmits an unlawful signal even if that person did not create or produce the prohibited programming in the first instance. Therefore, the prohibition also applies to a broadcaster, cable operator, or satellite carrier that transmits programming containing a prohibited sound even if the programmer that embedded the sound is not under common ownership or control with the respective broadcaster, operator, or carrier.<sup>88</sup>

(Continued from previous page...)

<sup>83</sup> 47 C.F.R. § 11.45 (emphasis added). Further, the rule specifically provides that “[b]roadcast station licensees should also refer to § 73.1217 of this chapter.” *Id.* This reference to the broadcast rule demonstrates that, while the Hoax Rule is limited to broadcasters, Section 11.45, which is contained, not in the Part 73 broadcast rules, but in Part 11, shall apply more broadly to any person. Moreover, the Act broadly defines “person” to include “an individual, partnership, association, joint-stock company, trust, or corporation.” 47 U.S.C. § 153(39).

<sup>84</sup> *1994 EBS Order*, 10 FCC Rcd at 1858, para. 84 (emphasis added). We note that, in contrast to this more expansive language in Section 11.45, other Part 11 EAS rules specifically provide that they apply only to EAS participants. *See, e.g.*, 47 C.F.R. §§ 11.41, 11.46. Moreover, the argument that Section 11.45 applies only to enumerated entities, such as EAS participants, is not only contrary to the plain language of the rule, but would yield the perverse result of incentivizing non-enumerated entities to use the EAS Tones indiscriminately for strategic or commercial advantage over enumerated entities. Accepting the Companies’ argument would defeat the rule’s stated purpose of preserving use of EAS Tones for emergency use and testing purposes only and therefore is not a reasonable reading of the rule.

<sup>85</sup> *Turner Broadcasting System, Inc.*, Notice of Apparent Liability for Forfeiture, FCC 14-1, 2014 WL 172669 (Jan. 14, 2014) (forfeiture paid) (*Turner II*).

<sup>86</sup> *See Turner*, 28 FCC Rcd at 15458, para. 8.

<sup>87</sup> *See id.* at 15461, para. 15.

<sup>88</sup> *See Advisory*.

### 3. The Companies' Actions Transmitted or Caused the Transmission of the EAS Tones

28. The Companies also argue that they did not violate Section 11.45 because they did not “transmit” the *No Surrender Trailer*.<sup>89</sup> Viacom further claims that it did not even cause the trailer to be transmitted, instead blaming the advertising agency that provided the ad to it.<sup>90</sup> These arguments lack merit. As noted above, Section 11.45, on its face, is not limited to direct transmissions by or to a particular person or entity. The plain language of Section 11.45 specifies that no person may transmit or “cause to transmit” the EAS Tones.<sup>91</sup> The rule’s use of the disjunctive “or” means that a company may violate the rule if it either transmits or causes the transmission of EAS Tones. Even assuming, *arguendo*, that each of the Companies did not “transmit” the *No Surrender Trailer*, each of the Companies unquestionably *caused* the transmission of the trailer. The Companies make no claim that they were unaware of their acceptance of the *No Surrender Trailer* or that it was included in their programming and distributed without their knowledge. Indeed, each of the Companies admits reviewing the *No Surrender Trailer* for inclusion in its respective programming.<sup>92</sup> Each of the Companies further admits affirmatively deciding to include the trailer in the programming it distributed to MVPDs with the knowledge that the MVPDs would, in turn, transmit the programming to their subscribers.<sup>93</sup> In short, each of the Companies caused the transmission of the trailer. Any attempt to evade liability by reading out the “cause to transmit” clause from Section 11.45 is unreasonable and contrary to the plain language of the rule.

29. Viacom claims that it did not cause the transmission of the tones because the ad agency that produced the trailer embedded the EAS Tones in the trailer. Thus, according to Viacom, the ad agency, not Viacom, established “the necessary conditions for, or ‘caused,’ the transmission of the EAS Tones to the public.”<sup>94</sup> This attempt to shift blame must fail. Viacom admits that it accepted the ad and distributed it through its networks. Moreover, it acknowledges that it reviewed the trailer prior to including it in its networks’ programming.<sup>95</sup> Indeed, according to Viacom’s own advertising guidelines, Viacom retains the express right to review commercials “to ensure compliance with relevant government and industry regulations” and “reject any advertising that it determines . . . violates applicable law.”<sup>96</sup> Viacom, like the other Companies, reviewed the content of the *No Surrender Trailer* and included it in its programming, which it then distributed to MVPDs for transmission to the public. In this manner Viacom and the other Companies transmitted or caused the transmission of the EAS codes and Attention Signal in circumstances prohibited by the rule.

### 4. Section 11.45 Does Not Require Deceptive Use or Intent To Deceive

30. Viacom and NBCUniversal also argue that it is unclear that the rule prohibits network program providers from using EAS Tones in dramatic programming or other “non-deceptive” circumstances.<sup>97</sup> Contending that Section 11.45 derives from Section 325 of the Act, which proscribes the transmission of false or fraudulent distress signals, Viacom questions whether Section 11.45 proscribes

<sup>89</sup> See ESPN LOI Response at 2, 7; Viacom LOI Response at 6; and NBCUniversal LOI Response at 3.

<sup>90</sup> See Viacom LOI Response at 6–7.

<sup>91</sup> 47 C.F.R. § 11.45 (emphasis added).

<sup>92</sup> ESPN LOI Response at 10; Viacom LOI Response at 4–5; and NBCUniversal LOI Response at 7.

<sup>93</sup> See *supra* note 62; ESPN LOI Response at 7; Viacom LOI Response at 2; and NBCUniversal LOI Response at 3.

<sup>94</sup> See *supra* para. 9; Viacom LOI Response at 6–7.

<sup>95</sup> See Viacom LOI Response at 4–5.

<sup>96</sup> See Viacom LOI Response at Attachment E.

<sup>97</sup> See Viacom LOI Response at 7–12; NBCUniversal LOI Response at 7–9.

“non-deceptive” EAS Tones, such as those embedded in the trailer.<sup>98</sup> Citing two cases in which the Commission proposed forfeitures for inadvertent, “non-deceptive” activation of the EAS Tones in violation of Sections 11.32(a)(9)(v) and 11.61, Viacom also posits that the Commission “will not impose sanctions under Rule 11.45 on unauthorized uses of EAS Tones outside of actual emergencies where no intent to deceive exists.”<sup>99</sup> Viacom states that there “is nothing about the Advertisement’s contents or its context which suggests that” the use of the EAS Tones was intended to deceive or mislead any viewer that an actual emergency existed.<sup>100</sup> Viacom asserts that the FCC’s prior actions relating to Section 11.45 “do not provide fair notice that such a non-deceptive use of EAS Tones could result in a monetary fine.”<sup>101</sup>

31. These arguments disregard the plain language of the rule prohibiting *any* transmission of EAS codes or Attention Signal or simulations thereof in the absence of an actual emergency or authorized test.<sup>102</sup> The text of the rule does not provide or suggest that having intent to deceive is required, nor does it excuse “dramatic” uses; rather the rule provides that transmission of these emergency sounds or simulations thereof is simply prohibited in “any circumstance” except when an actual emergency or authorized test warrants their use. Moreover, Viacom’s apparent suggestion that “deceptive” use is a necessary component of a violation of Section 325(a) and, because Section 11.45 is derived from Section 325(a), also a necessary component of a violation of Section 11.45, errs on both accounts. First, as discussed below, Section 325(a) itself does not require a deceptive use before its terms may be violated. Second, in the *1994 EBS Order*, the Commission acknowledged that Section 325(a) was “potentially relevant” to EAS-related misconduct but nevertheless found that “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.”<sup>103</sup> Therefore, it is not necessary to demonstrate that the Companies’ use of the EAS Tones was deceptive or that they intended to deceive their audiences; it is sufficient that they transmitted or caused the transmission of the EAS Tones, when, as the Companies admit, there was no actual emergency or authorized test.<sup>104</sup>

32. The LOI responses also suggest audiences could not have been deceived because the sounds in this case appeared in an advertisement for a movie.<sup>105</sup> Just as a “deceptive use” is not required as a component of a Section 11.45 violation, neither is a showing that viewers were in fact deceived by the misuse of the EAS Tones. Nevertheless, we know from the complaints that viewers *were* confused. They thought the sounds, which they associate with emergencies, were heralding the presence of an emergency when they were not.<sup>106</sup> This result illustrates why it is so important that EAS Tones simply not be used outside the context of an actual alert or an authorized test of the system. The LOI responses disregard the very concern that the complaints raise; that hearing the EAS sounds is comparable to “crying wolf” or yelling “fire” when there is none. The Companies also disregard the substantial risk of harm if audience members, inured to the sounds of the EAS Tones after misuse for promotional purposes, no longer react to the alarm when real danger is present.<sup>107</sup>

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<sup>98</sup> See Viacom LOI Response at 7.

<sup>99</sup> See *id.* at 7–14.

<sup>100</sup> See *id.* at 10–14.

<sup>101</sup> See *id.*

<sup>102</sup> See 47 C.F.R. § 11.45.

<sup>103</sup> *1994 EBS Order*, 10 FCC Rcd at 1815, para. 84.

<sup>104</sup> See ESPN LOI Response at 8; Viacom LOI Response at 4; and NBCUniversal LOI Response at 6.

<sup>105</sup> See ESPN LOI Response at 11; Viacom LOI Response at 10–11; and NBCUniversal LOI Response at 7.

<sup>106</sup> See, e.g., Third Complaint.

<sup>107</sup> *Id.*



**C. Viacom, NBCUniversal, and ESPN Each Apparently Violated Section 325(a) of the Act**

33. Misuse of the EAS codes or Attention Signal or simulations thereof also apparently violates Section 325(a) of the Act, which prohibits transmission of false distress signals.<sup>108</sup> For example, in *Emmis*, the Commission found a radio station in Missouri apparently liable for a violation of Section 325(a) after the station broadcast a “bleep” that listeners mistook as the tone for an authentic emergency signal. The decision held that using the tone to “cry wolf” undermined the integrity of the EBS and endangered the effectiveness of the EBS warning tone as a method of alerting the public to danger in the first instance.<sup>109</sup> The Commission pointed to the effect of the broadcast on the EBS as a factor that exacerbated the violation, even though the station did not use the actual EBS attention signal.<sup>110</sup> At that time, the Commission lacked a rule that explicitly prohibited misuse of emergency broadcast signals, and relied on Section 325(a), finding that such misuse of the emergency broadcast signals constituted a false distress signal.<sup>111</sup> Even as we subsequently proposed and adopted the prohibition in Section 11.45, however, the Commission continued to affirm that false use of the EAS codes and Attention Signal “will be considered a false distress communication.”<sup>112</sup> Thus, any claim that the industry lacked notice that a misuse of the EAS Tones may violate Section 325(a) is without merit. Similarly, in *Turner*, the Enforcement Bureau found that Turner’s inclusion of the simulated EAS codes and Attention Signal caused the transmission of false distress signals in violation of Section 325(a) of the Act.<sup>113</sup> The Enforcement Bureau noted that “[b]y including in its network programming the EAS codes and Attention Signal or simulations thereof, in non-emergency situations that are promotional or commercial in nature, Turner created a ‘cry wolf’ scenario similar to that encountered in *Emmis*.”<sup>114</sup>

34. In these cases, we find that the Companies’ repeated inclusion in their respective network feeds of the actual EAS codes and Attention Signal caused the transmission of false distress signals in violation of Section 325(a) of the Act.<sup>115</sup> Since the origin of the EBS, and its evolution into the current EAS, preserving the integrity of the system has been of paramount importance.<sup>116</sup> It is imperative that the public not be desensitized to the serious implications of the transmission of the EAS codes and Attention Signal by misuse of the codes and Signal or simulations thereof.<sup>117</sup> By including in their network

<sup>108</sup> See 47 U.S.C. § 325(a) (“No person within the jurisdiction of the United States shall knowingly utter or transmit, or cause to be uttered or transmitted, any false or fraudulent signals of distress, or communication relating thereto . . .”).

<sup>109</sup> See *Emmis*, 6 FCC Rcd 2289 (also noting that *Emmis* announced, with the sound of civil defense sirens in the background, that the tone was not a test and the United States was under nuclear attack).

<sup>110</sup> See *id.* at 2289–90 (noting that *Emmis* used a common “bleep” tone rather than the two-tone EBS warning and thus no EBS equipment was activated, but listeners mistook the tone for the authentic EBS signal).

<sup>111</sup> *Id.*

<sup>112</sup> See *Amendment of Part 73, Subpart G, of the Commission’s Rules Regarding the Emergency Broadcast System*, Notice of Proposed Rule Making/Further Notice of Proposed Rule Making, 7 FCC Rcd 6903, 6907, para. 41 (1992) (*1992 EBS Notice*); *1994 EBS Order*, 10 FCC Rcd at 1815, para. 84 (subsequent history omitted) (stating “[s]uch false use and misconduct will be considered a false distress communication and will be subject to Commission penalties, such as monetary forfeiture or other appropriate sanctions.”).

<sup>113</sup> See *Turner*, 28 FCC Rcd at 15459, para. 10.

<sup>114</sup> *Id.*

<sup>115</sup> See 47 U.S.C. § 325(a).

<sup>116</sup> See *1992 EBS Notice*, 7 FCC Rcd at 6907, para. 39; *Emmis*, 6 FCC Rcd at 2290.

<sup>117</sup> See *1992 EBS Notice*, 7 FCC Rcd at 6907, paras. 39–40; *1994 EBS Order*, 10 FCC Rcd at 1815, paras. 83–84 (noting that several commenters stressed that any use of the EBS attention signal, other than for tests and activations, could be “an enormous detriment to the system” and further stating that “[s]uch false use and

(continued....)

programming the actual EAS codes and Attention Signal, in non-emergency situations, the Companies created a “cry wolf” scenario similar to that encountered in both *Emmis* and *Turner*.<sup>118</sup>

35. The Companies argue that it was clear from the context that the *No Surrender Trailer* was an advertisement for a movie, and that no viewer could reasonably interpret the tones heard therein as related to an actual emergency.<sup>119</sup> Just as with Section 11.45 of the Commission’s rules, however, enforcement of Section 325(a) of the Act is not conditioned on proof of deception or harm.<sup>120</sup> The provision expressly provides that no person may “transmit, or cause to be uttered or transmitted, any false or fraudulent signals of distress . . . .”<sup>121</sup> The disjunctive description of “false or fraudulent” establishes that false use, even where it is arguably not fraudulent or deceptive in nature, is sufficient to trigger a violation and the Commission has so interpreted Section 325(a).<sup>122</sup> The use of EAS Tones, whose sole and clearly defined purposes are to alert the public to emergency situations, in a non-emergency context, is by its nature false and constitutes a violation of Section 325(a).<sup>123</sup> We note, moreover, that in each of the complaints about the *No Surrender Trailer*, the viewer specifically expresses concern that the EAS Tones did, in fact, create a false sense of emergency and had the potential to desensitize the public to the signal that could be life-saving in a real national, state or local area emergency.<sup>124</sup> One complainant even noted that, upon hearing the EAS Tones embedded in the *No Surrender Trailer*, a family member rushed to exit his bathtub, thinking there was an emergency.<sup>125</sup>

**D. Calculation of Appropriate Forfeitures for Violations of Section 11.45 of the Commission’s Rules and Section 325(a) of the Act**

36. Based upon the evidence before us, we find that each of the Companies apparently willfully and repeatedly violated Section 11.45 of the Commission’s rules and Section 325(a) of the Act. The Commission’s *Forfeiture Policy Statement* sets a base forfeiture amount of eight thousand dollars (\$8,000) for false distress communications.<sup>126</sup> In assessing the monetary forfeiture amount, we must take into account the statutory factors set forth in Section 503(b)(2)(E) of the Act and Section 1.80 of the Commission’s rules, which include the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and

(Continued from previous page. . .)

misconduct will be considered a false distress communication, and will be subject to Commission penalties, such as monetary forfeiture or other appropriate sanctions.”).

<sup>118</sup> See *supra* note 67.

<sup>119</sup> See Viacom LOI Response at 10; ESPN LOI Response at 5; and NBCUniversal LOI Response at 7.

<sup>120</sup> By contrast, the Hoax Rule is more narrow in scope and applies specifically to situations where licensees can be held liable “only when they know the report to be false and can foresee that the report will, and does in fact, result in substantial public harm.” See *Amendment of Part 73 Regarding Broadcast Hoaxes*, Report and Order, 7 FCC Rcd. 4106, para. 9 (1992).

<sup>121</sup> 47 U.S.C. § 325(a).

<sup>122</sup> See *1994 EBS Order*, 10 FCC Rcd at 1815, para. 84; *Turner*, 28 FCC Rcd at 15459, para. 10.

<sup>123</sup> We also believe that such false use of the EAS Tones to draw attention to a commercial advertisement for a movie or any other product is inherently deceptive.

<sup>124</sup> See First Complaint; Second Complaint; Third Complaint. In addition, audiences that rely primarily on audio cues (such as those with visual impairments or those listening from another room) would reasonably focus on such sounds.

<sup>125</sup> See *supra* note 12.

<sup>126</sup> See *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, 17113 (1997), *recons. denied*, 15 FCC Rcd 303 (1999) (*Forfeiture Policy Statement*).

other such matters as justice may require.<sup>127</sup> We note that the forfeiture amount proposed for the apparent violation(s) here does not exceed the maximum monetary forfeiture permissible under the Act and the rules.<sup>128</sup>

37. As noted above, 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 *Turner II*, our forfeiture determination in such cases is based on multiple factors associated with the nature of the violation and the violator.<sup>129</sup> For instance, in that case the offending advertisement was transmitted over only a single Turner-controlled network, while the *No Surrender Trailer* was transmitted on no fewer than three different networks by each of the Companies, greatly 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 networks over which the transmissions occurred; (2) the number of repetitions (i.e., the number of individual transmissions); (3) the duration of the violation (i.e., the number of days over which the violation occurred); (4) the audience reach of the transmissions (e.g., nationwide, regional, or local); and (5) the extent of the public safety impact (e.g., whether an EAS activation is triggered).<sup>130</sup>

38. As detailed above, each of the Companies apparently committed multiple violations over multiple days on multiple networks, with the number of transmissions doubled on some networks due to the separate East Coast and West Coast programming feeds. With respect to audience reach, Viacom states in its 2013 Annual Report that Comedy Central, “reached approximately 99 million domestic television households in September 2013.”<sup>131</sup> NBCUniversal states in its 2013 Annual Report that its SyFy cable network reached approximately 98 million U.S. subscribers as of December 31, 2012.<sup>132</sup> ESPN states in its 2013 Annual Report that ESPN Network reached approximately 99 million subscribers as of September 28, 2013.<sup>133</sup> In addition, each of the Companies admits that the *No Surrender Trailer* ran on additional networks under their control, thereby further increasing the scope of their audience reach. The fact that each of the Companies’ programming reached such potentially vast audiences greatly increases the extent and gravity of the violations. These are circumstances to be considered in establishing the appropriate forfeiture.

39. With respect to the Companies’ ability to pay, we note that Viacom reported annual revenues in excess of \$13.7 billion as of September 30, 2013.<sup>134</sup> NBCUniversal reported annual revenues

<sup>127</sup> See 47 U.S.C. § 503(b)(2)(E); 47 C.F.R. § 1.80(b)(8).

<sup>128</sup> See 47 U.S.C. § 503(b)(2); 47 C.F.R. § 1.80(b). See also Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890, amended by Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, Sec. 31001, 110 Stat. 1321 (codified as amended at 28 U.S.C. § 2461 note (4)); *Inflation Adjustment of Maximum Forfeiture Penalties*, Rules and Regulations, 73 Fed. Reg. 44663, 44664 (July 31, 2008) (applicable for violations that occurred after Sept. 2, 2008, but before Sept. 13, 2013); *Amendment of Section 1.80(b) of the Commission’s Rules, Adjustment of Civil Monetary Penalties to Reflect Inflation*, Order, 28 FCC Rcd 10785 (Enf. Bur. 2013); *Inflation Adjustment of Maximum Forfeiture Penalties*, Rules and Regulations, 78 Fed. Reg. 49370 (Aug. 14, 2013) (applicable for violations that occurred after Sept. 13, 2013).

<sup>129</sup> See *Turner II*, 2014 WL 172669, at \*4, para.13.

<sup>130</sup> *Id.*

<sup>131</sup> See Viacom Annual Report *supra* note 62 at 9.

<sup>132</sup> See NBCUniversal Annual Report *supra* note 62 at 2.

<sup>133</sup> See WDC Annual Report *supra* note 62 at 2.

<sup>134</sup> See Viacom Annual Report *supra* note 62 at 35–36.

in excess of \$23.8 billion, with its cable networks segment accounting for over \$8.7 billion of total corporate revenues.<sup>135</sup> The Walt Disney Company reported 2013 total revenues in excess of \$45 billion, with its Media Networks segment, including ESPN, accounting for over \$20.3 billion of total revenues.<sup>136</sup> As the Commission made clear in the *Forfeiture Policy Statement*, companies with substantial revenues, such as the Companies, may expect the imposition of forfeitures well above the base amounts in order to deter violative behavior.<sup>137</sup>

40. In calculating the appropriate forfeiture, we also consider the entity's past compliance record. We found nothing in the record or in the Companies' prior history of violations or compliance sufficient to reduce the proposed forfeiture amounts based on such factors.

41. The Commission also may consider whether remedial efforts should reduce the forfeiture amount.<sup>138</sup> In these cases, Viacom and ESPN each assert that it changed its standards and review processes after receiving our LOIs;<sup>139</sup> NBCUniversal indicates that it is "in the process" of doing so.<sup>140</sup> In any event, such efforts do not mitigate the apparent violations addressed herein. It is well settled that remedial efforts taken after a Commission investigation or enforcement action do not excuse or mitigate a licensee's violation of a Commission rule.<sup>141</sup> Although we may consider pre-investigative remedial measures when we determine the sanction to be imposed for a rule violation,<sup>142</sup> no such remedial efforts were undertaken by the Companies.<sup>143</sup> Indeed, the record shows that one of the Companies, NBCUniversal, continued to transmit or cause the transmission of the *No Surrender Trailer* on March 9,

<sup>135</sup> See NBCUniversal Annual Report *supra* note 62 at 25, 28.

<sup>136</sup> See WDC Annual Report *supra* note 62 at 70.

<sup>137</sup> Specifically, the Commission found:

[O]n the other end of the spectrum of potential violators, we recognize that for large or highly profitable communications entities, the base forfeiture amounts . . . are generally low. In this regard, we are mindful that, as Congress has stated, for a forfeiture to be an effective deterrent against these entities, the forfeiture must be issued at a high level. For this reason, we caution all entities and individuals that, independent from the uniform base forfeiture amounts . . . we intend to take into account the subject violator's ability to pay in determining the amount of a forfeiture to guarantee that forfeitures issued against large or highly profitable entities are not considered merely an affordable cost of doing business. Such large or highly profitable entities should expect in this regard that the forfeiture amount set out in a Notice of Apparent Liability against them may in many cases be above, or even well above, the relevant base amount.

*Forfeiture Policy Statement*, 12 FCC Rcd at 17099–100, para. 24.

<sup>138</sup> See, e.g., *Guy Gannett Publishing Co.*, Memorandum Opinion and Order, 5 FCC Rcd 7688, 7689, para. 12 (Mass Media Bur. 1990) (*Guy Gannett Publishing*) ("[T]he Commission generally considers prompt and effective remedial action by a licensee as mitigative in determining the appropriate sanction level in an enforcement proceeding.").

<sup>139</sup> See Viacom LOI Response at 5; ESPN LOI Response at 8.

<sup>140</sup> See NBCUniversal LOI Response at 2.

<sup>141</sup> See, e.g., *Seawest Yacht Brokers*, Forfeiture Order, 9 FCC Rcd 6099 (1994) ("[C]orrective action taken to come into compliance with Commission rules or policy is expected, and does not nullify or mitigate any prior forfeitures or violations.") (citations omitted); *Colby-Sawyer College*, Forfeiture Order, 26 FCC Rcd 9302, 9303, para. 7 (Media Bur. 2011) (forfeiture paid) (*Colby-Sawyer College*) ("Corrective action taken to come into compliance with the Rules is expected, and does not mitigate, much less negate, any prior forfeitures or violations.").

<sup>142</sup> See *Guy Gannett Publishing* *supra* note 138.

<sup>143</sup> As noted above, each of the Companies' efforts to reform their standards and review processes were undertaken *after* the Companies received our LOIs and therefore may not be considered *pre-investigative* remedial measures. See Viacom LOI Response at 5; ESPN LOI Response at 8; NBCUniversal LOI Response at 2. Moreover, none of the Companies demonstrate that they took any steps to ameliorate the effects of their prior violations. See *Radio License Holding XI, LLC*, Forfeiture Order, FCC 14-10, 2014 WL 522633 at \*6, para. 15 (Feb. 10, 2014).

2013, even after it was alerted on March 7, 2013, that the EAS codes and Attention Signal were embedded in the trailer.<sup>144</sup>

42. Therefore, based on the number of transmissions at issue, the number of networks involved, the amount of time over which the transmissions took place, the nationwide scope of the Companies' audience reach, the Companies' ability to pay, and the serious public safety implications of the apparent violations, as well as the other factors as outlined in the Commission's *Forfeiture Policy Statement*, we find that a proposed forfeiture of one million, one hundred twenty thousand dollars (\$1,120,000) is appropriate against Viacom; a proposed forfeiture of five hundred thirty thousand dollars (\$530,000) is appropriate against NBCUniversal; and a proposed forfeiture of two hundred eighty thousand dollars (\$280,000) is appropriate against ESPN.<sup>145</sup>

#### IV. ORDERING CLAUSES

43. **ACCORDINGLY, IT IS ORDERED**, pursuant to Section 503(b) of the Communications Act of 1934, as amended,<sup>146</sup> and Section 1.80 of the Commission's rules,<sup>147</sup> that Viacom Inc. is hereby **NOTIFIED** of its **APPARENT LIABILITY FOR FORFEITURE** in the amount of one million, one hundred twenty thousand dollars (\$1,120,000) for apparently willfully and repeatedly violating Section 11.45 of the Commission's rules<sup>148</sup> and Section 325(a) of the Act.<sup>149</sup>

44. **IT IS FURTHER ORDERED**, pursuant to Section 503(b) of the Communications Act of 1934, as amended,<sup>150</sup> and Section 1.80 of the Commission's rules,<sup>151</sup> that NBCUniversal Media, LLC is hereby **NOTIFIED** of its **APPARENT LIABILITY FOR FORFEITURE** in the amount of five hundred thirty thousand dollars (\$530,000) for apparently willfully and repeatedly violating Section 11.45 of the Commission's rules<sup>152</sup> and Section 325(a) of the Act.<sup>153</sup>

45. **IT IS FURTHER ORDERED**, pursuant to Section 503(b) of the Communications Act of 1934, as amended,<sup>154</sup> and Section 1.80 of the Commission's rules,<sup>155</sup> that ESPN Inc. is hereby **NOTIFIED** of its **APPARENT LIABILITY FOR FORFEITURE** in the amount of two hundred eighty thousand dollars (\$280,000) for apparently willfully and repeatedly violating Section 11.45 of the Commission's rules<sup>156</sup> and Section 325(a) of the Act.<sup>157</sup>

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<sup>144</sup> See NBCUniversal LOI Response at 2.

<sup>145</sup> See *SBC Communications Inc. v. FCC*, 373 F.3d 140, 152 (D.C. Cir. 2004) (noting that "substantial and widespread" behavior with a national scope may warrant an increased forfeiture, and that it is "reasonable to expect that a larger fine might be necessary to deter a large company . . ."); see also *Colby-Sawyer College supra* note 141.

<sup>146</sup> 47 U.S.C. § 503(b).

<sup>147</sup> 47 C.F.R. § 1.80.

<sup>148</sup> 47 C.F.R. § 11.45.

<sup>149</sup> 47 U.S.C. § 325(a).

<sup>150</sup> 47 U.S.C. § 503(b).

<sup>151</sup> 47 C.F.R. § 1.80.

<sup>152</sup> 47 C.F.R. § 11.45.

<sup>153</sup> 47 U.S.C. § 325(a).

<sup>154</sup> 47 U.S.C. § 503(b).

<sup>155</sup> 47 C.F.R. § 1.80.

<sup>156</sup> 47 C.F.R. § 11.45.

<sup>157</sup> 47 U.S.C. § 325(a).

46. **IT IS FURTHER ORDERED**, pursuant to Section 1.80 of the Commission's rules,<sup>158</sup> that within thirty (30) days of the release date of this *NAL*, Viacom Inc., NBCUniversal Media, LLC, and ESPN Inc., respectively, **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

47. Payment of the forfeiture must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account Numbers and FRNs referenced above. Viacom Inc., NBCUniversal Media, LLC, and ESPN Inc., respectively, shall send electronic notification of payment to Terry.Cavanaugh@fcc.gov, Jeffrey.Gee@fcc.gov, Kenneth.Scheibel@fcc.gov, and Jennifer.Lewis@fcc.gov, on the date said payment is made. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.<sup>159</sup> When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters "FORF" in block number 24A (payment type code). Below are additional instructions you should follow based on the form of payment you select:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

48. Any request for full payment over time under an installment plan should be sent to: Chief, Financial Officer—Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.<sup>160</sup> If there are questions regarding payment procedures, the respective Company should contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

49. The responses, if any, must be mailed to Theresa Z. Cavanaugh, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, SW, Room 4-C330, Washington, D.C. 20554, and **SHALL INCLUDE** the NAL/Acct. Number referenced above. In addition, to the extent practicable, a copy of the response, if any, should also be transmitted via e-mail to Terry.Cavanaugh@fcc.gov, Jeffrey.Gee@fcc.gov, Kenneth.Scheibel@fcc.gov, Jennifer.Lewis@fcc.gov, and Dana.Leavitt@fcc.gov.

50. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices

<sup>158</sup> 47 C.F.R. § 1.80.

<sup>159</sup> An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

<sup>160</sup> See 47 C.F.R. § 1.1914.

(GAAP); or (3) some other reliable and objective documentation that accurately reflects the respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

51. **IT IS FURTHER ORDERED**, that the Complaints referenced in this proceeding **ARE GRANTED** to the extent indicated herein and **ARE OTHERWISE DENIED**, and the complaint proceedings **ARE HEREBY TERMINATED**.<sup>161</sup>

52. **IT IS FURTHER ORDERED**, that copies of this NAL shall be sent, by First Class Mail and Certified Mail, to Meredith S. Senter, Jr., Esq. and Dennis P. Corbett, Esq., counsel to Viacom Inc., Lerman Senter PLLC, 2000 K Street, NW, Suite 600, Washington, DC 20006; David H. Solomon, Esq., counsel to NBCUniversal Media, LLC, Wilkinson Barker Knauer LLP, 2300 N Street, NW, Suite 700, Washington, DC 20037-1128; and Tom W. Davidson, Esq., counsel to ESPN Inc., Akin Gump Strauss Hauer & Feld LLP, 1333 New Hampshire Avenue, NW, Washington, DC 20036-1564.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>161</sup> For purposes of the forfeiture proceeding initiated by this NAL, Viacom Inc., NBCUniversal Media, LLC, and ESPN Inc. shall be the only parties to this proceeding.