

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

In the Matter of)	
)	
Viacom Inc.)	File No.: EB-IHD-13-00011468
)	NAL/Acct. No. 201432080027
)	FRN: 0014247977
)	
ESPN Inc.)	File No.: EB-IHD-13-00011476
)	NAL/Acct. No. 201432080029
)	FRN: 0001548064

FORFEITURE ORDER

Adopted: January 16, 2015

Released: January 20, 2015

By the Commission:

I. INTRODUCTION

1. The Emergency Alert System (EAS) is a national public warning system that requires broadcasters, cable television 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 is well known to the American public as the nationwide warning system used to address the public in national or local emergencies. The specific sounds comprising the EAS tones are defined in our rules, and are designed to alert the public and activate the emergency communication system when necessary. To preserve the unique purpose of the EAS tones, the Federal Communications Commission (Commission) enforces laws that prohibit the use of the tones, or simulations of them, except in actual emergencies or authorized tests of the EAS. As many of the complaints about EAS abuse have said, misuse of the tones creates a “Cry Wolf” scenario, which risks desensitizing the public to the significance of the tones in a real emergency. In this Forfeiture Order, we assess monetary forfeitures of \$1,120,000 against Viacom Inc. (Viacom) and \$280,000 against ESPN Inc. (ESPN), respectively, for violations of the Commission’s laws that prohibit misuse of tones reserved for the EAS. When Viacom and ESPN (collectively, the Companies) transmitted or caused the transmission of advertisements containing actual EAS tones, they violated the law and jeopardized the essential and exclusive function of the EAS – to immediately alert the public to an actual emergency.

2. We therefore affirm the findings in our Notice of Apparent Liability for Forfeiture (NAL):¹ (1) that Viacom committed 108 violations of the Communications Act of 1934, as amended (Act), and the Commission’s rules by transmitting or causing the transmission of the EAS tone in a promotional announcement for the movie, “Olympus Has Fallen,” on seven cable networks a total of 108

¹ See *Viacom Inc., NBCUniversal Media LLC, and ESPN, Inc.*, Notice of Apparent Liability for Forfeiture, 29 FCC Rcd 2548 (2014) (NAL). This Forfeiture Order does not include NBCUniversal Media LLC (NBCUniversal) as a party, as NBCUniversal elected to pay the forfeiture in response to the NAL. Letter from Margaret Tobey, Vice President, Regulatory Affairs, NBCUniversal, to Terry Cavanaugh, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission (Mar. 31, 2014).

times;² and (2) that ESPN committed 13 violations of the Act and the Commission's rules by transmitting or causing the transmission of the same promotional announcement containing the EAS tone 13 times on three cable networks.³

3. We reject Viacom's and ESPN's arguments in their responses to the *NAL* urging us to reduce or rescind the forfeitures proposed in the *NAL*.⁴ We further underscore the importance of compliance with the laws prohibiting EAS misuse, which are grounded in protecting the public from the frivolous and casual use of the EAS tones that undermines the effectiveness of these special tones for their public safety purposes.

4. For the reasons described herein and as previously detailed in the *NAL*, we assess monetary forfeitures in the amounts of one million, one hundred twenty thousand dollars (\$1,120,000) against Viacom and two hundred eighty thousand dollars (\$280,000) against ESPN, respectively, for willfully and repeatedly violating Section 325(a) of the Act⁵ and Section 11.45 of the Commission's rules⁶ 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.

II. BACKGROUND

5. As discussed in the *NAL*,⁷ 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 Tones⁸ during a commercial for the movie *Olympus Has Fallen* (the *No Surrender Trailer*).⁹

6. Preliminarily, we note that the Companies have at no time disputed these key facts: (1) they included the *No Surrender Trailer* in the programming supplied to cable and satellite systems for distribution to subscribers; (2) the *No Surrender Trailer* included actual EAS Tones; and (3) their inclusion of EAS Tones in such programming was not done in connection with an actual national, state or local area emergency or authorized EAS test.¹⁰ Despite these facts, the Companies dispute that their actions should be subject to liability under the Act and our rules.

III. DISCUSSION

7. In their responses to the *NAL*, the Companies request that the proposed forfeitures be rescinded or substantially reduced.¹¹ The Companies' *NAL* Responses largely reiterate the same

² See *NAL*, 29 FCC Rcd at 2556, para. 22.

³ See *id.*

⁴ See Viacom, Inc., Response to Notice of Apparent Liability for Forfeiture at 1, 7, 14 (Apr. 2, 2014) (on file in EB-IHD-13-00011468) (Viacom *NAL* Response); ESPN, Inc. Opposition to Notice of Apparent Liability for Forfeiture of ESPN, Inc. and Statement Seeking Rescission or Reduction of Proposed Forfeiture at ii-iii, 2, 4, 7, 11, 12, 15, 16 (Apr. 2, 2014) (on file in EB-IHD-13-00011476) (ESPN *NAL* Response).

⁵ See 47 U.S.C. § 325(a).

⁶ See 47 C.F.R. § 11.45.

⁷ See *NAL*, *supra* note 1.

⁸ See Complaint, Form 2000D, Key No. 13-C00477601-1 (Mar. 4, 2013) (on file in EB-IHD-13-00011468 formerly EB-13-IH-0369); and E-mail complaint (Mar. 5, 2013) (on file in EB-IHD-13-00011476 formerly EB-13-IH-0370).

⁹ 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 Tones. That trailer is the subject of the *NAL* and this Forfeiture Order, and is referred to herein as the *No Surrender Trailer*.

¹⁰ See *NAL*, 29 FCC Rcd at 2555, para. 20.

¹¹ See Viacom *NAL* Response at 1, 7, 14; ESPN *NAL* Response at ii-iii, 2, 4, 7, 11, 12, 15, 16.

arguments they asserted in their LOI Responses, which the Commission considered, discussed and rejected in the *NAL*.¹² At their essence, many of the Companies' arguments rest on the assertion that they lacked notice that the Commission would enforce the EAS Rules against them with respect to transmission of the *No Surrender Trailer*.¹³ Viacom also argues that Section 11.45's prohibition of transmitting or causing the transmission of EAS Tones, "does not apply to intermediaries like [Viacom], which neither produced the Advertisement nor transmitted it directly to consumers."¹⁴ The Companies also repeat their assertion that the EAS Rules do not apply to what they deem "non-deceptive movie trailers."¹⁵ In addition, the Companies continue to disclaim liability because they argue they did not knowingly violate the EAS Rules.¹⁶ We reject these arguments, each of which was directly and fully addressed in the *NAL*, and briefly discuss them below only to reiterate the failings in their assertions and our bases for confirming the *NAL*'s findings. As discussed below, we also reject the Companies' argument that the proposed forfeitures exceed the amounts "authorized under the governing statute and the Commission's rules," and are "applied in an arbitrary and capricious manner."¹⁷

A. The Commission Gave Adequate Notice As To the Applicability of Section 11.45 of the Commission's Rules and Section 325(a) of the Act

8. The Companies contend that they did not have adequate notice of the requirements and applicability of the EAS Rules.¹⁸ We disagree. The *NAL* clearly notes the Commission's previous findings that misuse of emergency tones constitute false distress signals in violation of Section 325(a) of the Act.¹⁹ As the *NAL* also makes clear, the requirements of Section 11.45 have been well settled via rulemaking and administrative action for nearly 20 years.²⁰ On its face, the rule applies broadly to "persons" and does not exclude cable programmers.²¹ 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

¹² 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); 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).

¹³ Viacom *NAL* Response at 2, 13, 14; ESPN *NAL* Response at ii, 1, 3, 4, 7, 11.

¹⁴ Viacom *NAL* Response at 2.

¹⁵ *Id.* at 2, 6; ESPN *NAL* Response at ii, 3, 4.

¹⁶ Viacom *NAL* Response at 6; ESPN *NAL* Response at 6–7.

¹⁷ Viacom *NAL* Response at 14; ESPN *NAL* Response at 12–14.

¹⁸ See Viacom *NAL* Response at 2, 6–7, 9, 12–13; ESPN *NAL* Response at ii, 1–2, 3–4, 7–11.

¹⁹ See *NAL*, 29 FCC Rcd at 2564, para. 33 (citing, *inter alia*, *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*) ("[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.")). See also *Emmis Broadcasting Corp. of St. Louis*, Notice of Apparent Liability for Forfeiture, 6 FCC Rcd 2289, 228–90 (1991) (finding a radio station 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. *Id.*

²⁰ See *NAL*, 29 FCC Rcd at 2558–59, para. 23.

²¹ *Id.* Section 11.45 applies 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).

to a particular person or entity.²² Moreover, the rule explicitly applies to the “EAS codes or Attention Signal, or a recording or simulation thereof,”²³ and applies regardless of whether the transmission of the codes results in an inadvertent activation of the EAS.²⁴ In sum, as fully discussed in the *NAL*, the plain language of this long-standing rule gave unambiguous notice that the Companies’ actions would be subject to sanction.²⁵ Thus, we are not persuaded by the Companies’ arguments that they received inadequate notice of the EAS Rules’ requirements.

B. Section 11.45 of the Commission’s Rules Applies to Those Who Transmit or Cause the Transmission of the EAS Tones

9. Viacom argues that, as an “intermediary,” it did not cause the transmission of the EAS Tones.²⁶ Viacom further alleges that liability lies exclusively with Horizon Media, which produced the trailer and embedded the EAS Tones in the trailer, and the multichannel video program distributors (MVPDs), which transmitted the *No Surrender Trailer*.²⁷ We reject this argument for the reasons stated in the *NAL*.²⁸ In particular, we note that the Companies acknowledge that the *No Surrender Trailer* included the EAS Tones and that each Company reviewed the *No Surrender Trailer* prior to inserting it in their networks’ programming in the absence of an emergency or authorized test.²⁹ Furthermore, as stated in the *NAL*, 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.³⁰ Thus, each of the Companies transmitted or caused the transmission of the EAS Tones in violation of Section 11.45. Moreover, we reaffirm the Commission’s holding that entities acting as “conduits” for misconduct cannot shift blame to a third party.³¹ However, even if the Commission’s precedent acknowledged that such entities enjoy diminished liability due to their passive participation, Viacom cannot credibly argue on the facts of this case that it is entitled to such relief. In the instant case, Viacom was not a mere passive “intermediary” between Horizon Media and the MVPDs, because record evidence demonstrates it was an active participant in inserting the *No Surrender Trailer* into its programming feeds on multiple occasions. Viacom admits that it accepted the advertisement and distributed it through its networks.³² Furthermore, Viacom acknowledges that it reviewed the trailer prior to including it in its networks’ programming.³³ Indeed, according to Viacom’s own advertising guidelines, it retains the express right to review commercials “to ensure compliance with

²² *Id.*

²³ *Id.*; see 47 C.F.R. §11.45.

²⁴ See discussion of willfulness of the subject violations at *infra* paras. 15–16.

²⁵ See *NAL*, 29 FCC Rcd at 2558–59, para 23. See also *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328–29 (D.C. Cir. 1995) (discussing whether GE had adequate notice of EPA’s rule interpretation, and finding “[i]n such cases, we must ask whether the regulated party received, or should have received, notice of the agency’s interpretation in the most obvious way of all: by reading the regulations.”).

²⁶ Viacom *NAL* Response at 4.

²⁷ *Id.* at 6.

²⁸ See *NAL*, 29 FCC Rcd at 2562, paras. 28–29.

²⁹ See *NAL*, 29 FCC Rcd at 2551–52, paras. 9–12.

³⁰ See *id.* at 2556, para. 22.

³¹ See *Dialing Services LLC*, Notice of Apparent Liability for Forfeiture, 29 FCC Rcd 5537, 5542, para. 13 (2014) (*Dialing Services*) (rejecting carrier’s argument that it should not be liable because it acts as a “conduit” and “merely facilitates” illegal activity but does not itself engage in the practice).

³² See *NAL*, 29 FCC Rcd at 2551, para. 9.

³³ See *id.* at 2562, para. 29.

relevant government and industry regulations” and “reject any advertising that it determines . . . violates applicable law.”³⁴

10. We reiterate that staff at both Companies reviewed the content of the *No Surrender Trailer* and included it in their programming, which they then distributed to MVPDs with the expectation that it would be transmitted to the public.³⁵ The Companies neither denied nor refuted that this was their process, nor do they claim that the *NAL* mischaracterized it. Therefore, for the reasons stated in the *NAL*, we find that the Companies transmitted or caused the transmission of the EAS Tones in circumstances prohibited by the rule.

C. Section 11.45 of the Commission’s Rules and Section 325(a) of the Act Prohibit Misuse of the EAS Tones and Do Not Require a Showing that the Material is Deceptive

11. The Companies repeat their prior arguments that the EAS Rules pertain only if the material transmitted is “deceptive.”³⁶ We reiterate here our discussion of this argument in the *NAL*, and we address the particular assertions made in the *NAL* Responses on this topic.³⁷ In particular, Viacom contends that the *No Surrender Trailer* “did not cry wolf It simply advertised a movie portraying a fictional attack on the White House [T]here was no public outcry or reasonable public fear or confusion”³⁸ ESPN states that the *No Surrender Trailer* “created no such ‘misimpression’ of an actual emergency. To the contrary, the context and content of the spot clearly and immediately conveyed to ESPN’s audience that this was a commercial advertisement for a motion picture, not a genuine alert.”³⁹ The Companies argue that because Section 11.45 derives from Section 325 of the Act, which proscribes the transmission of false or fraudulent distress signals, liability under the rule must be limited to deceptive use of EAS Tones, and not for those embedded in the trailer.⁴⁰ With respect to Section 325(a), Viacom similarly contends that liability under Section 325(a) is “limited to false or fraudulent signals . . . [and] simply does not reach the [*No Surrender Trailer*],” and that the *No Surrender Trailer* was “nothing more than a commercial for a movie, not a false or fraudulent distress signal.”⁴¹

12. We reject these arguments for the reasons stated in the *NAL*.⁴² The plain language of the rule prohibits *any* transmission of the EAS Tones in the absence of an actual emergency or authorized

³⁴ See *id.*

³⁵ See *id.* at 2562, para. 28.

³⁶ See Viacom *NAL* Response at 6; ESPN *NAL* Response at 3–4 (both Companies asserting that Section 11.45 does not clearly prohibit network programming providers from using EAS Tones in dramatic programming or other “non-deceptive” circumstances).

³⁷ See *NAL*, 29 FCC Rcd 2548, 2562–63.

³⁸ Viacom *NAL* Response at 8.

³⁹ ESPN *NAL* Response at 6–7.

⁴⁰ See ESPN *NAL* Response at 6–7; Viacom *NAL* Response at 6–8. The Companies also attempt to link the deception argument to the notice argument, contending that the Commission’s prior actions relating to Section 11.45 did not provide adequate notice that a non-deceptive use of EAS Tones might result in a monetary fine or other punishment. See Viacom *NAL* Response at 13; ESPN *NAL* Response at 1–4, 7. ESPN offers a related argument, contending its liability should be mitigated due to the lack of adequate notice given by the Commission that “a non-deceptive use of EAS-like tones in what was clearly a commercial advertisement for a movie could give rise to liability.” ESPN *NAL* Response at 15. We again reject these arguments for the reasons discussed in the *NAL* and at *supra* para. 8.

⁴¹ Viacom *NAL* Response at 7.

⁴² See *NAL*, 29 FCC Rcd at 2562–63, paras. 30–32.

test, and the Companies have cited no authority holding otherwise.⁴³ Moreover, Section 11.45 contains no provision limiting liability under the rule to cases where intent to deceive exists, nor does the rule make 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.⁴⁴ Moreover, for the reasons set forth in the *NAL*, we give no weight to Viacom’s suggestion that deception is a necessary element for enforcement of either Section 325(a) or Section 11.45.⁴⁵ Therefore, it is not necessary to demonstrate that the Companies’ use of the EAS Tones was intended to deceive or resulted in actual deception, because it is sufficient to demonstrate that they transmitted or caused the transmission of the EAS Tones, when, as the Companies admit, there was no actual emergency or authorized test.⁴⁶ In addition, as noted in the *NAL*, the record belies the Companies’ claims. In this case, viewers *were* confused and thus harmed because they associated the tones in the *No Surrender Trailer* with emergencies that did not exist.⁴⁷

13. Even if we were to accept the Companies’ revision of Section 11.45 to require deception, which we do not, we emphasize that transmission of the EAS Tones in a commercial advertisement is inherently deceptive and potentially harmful. A commercial advertisement is, by its nature, program material designed to promote a product or service, not a *bona fide* alert of an emergency situation or authorized test of the EAS system. This misuse can cause the public to believe there is an emergency when there is none. This harm is not remedied by arguing that the listener or viewer should quickly realize that he or she has been fooled into paying attention to a mere commercial message. On the contrary, encouraging the perception that the EAS Tones may signal anything other than an actual emergency or test harms the integrity of the EAS in exactly the way Section 11.45 was designed to prevent.⁴⁸

14. A similar argument applies to the violations of Section 325(a). As explained in the *NAL*, the use of EAS Tones, whose sole purpose is 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), which prohibits false *or* fraudulent signals of distress.⁴⁹ As stated in the *NAL*, 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).⁵⁰ Moreover, as noted above, we reiterate that viewers *were* confused and thus harmed because they associated the tones with emergencies that did not exist.⁵¹ We further emphasize that preserving the integrity of the EAS system has been, and continues to be, of paramount importance, and that it is imperative that the public not be desensitized to the serious implications of the transmission of the EAS Tones.⁵²

⁴³ See 47 C.F.R. § 11.45; *NAL*, 29 FCC Rcd at 2563, para. 31.

⁴⁴ 47 C.F.R. § 11.45; *see NAL*, 29 FCC Rcd at 2563, para. 31.

⁴⁵ *See NAL*, 29 FCC Rcd at 2563, para. 31. *See also 1994 EBS Order*, 10 FCC Rcd at 1815, para. 84; Viacom *NAL Response* at 6.

⁴⁶ *See NAL*, 29 FCC Rcd at 2563, para. 31.

⁴⁷ *Id.* at 2563, para. 32.

⁴⁸ *Id.* at 2563, para. 31 (citing *1994 EBS Order*, 10 FCC Rcd at 1815, para. 84).

⁴⁹ 47 U.S.C. § 325(a); *see NAL*, 29 FCC Rcd at 2565, para. 35.

⁵⁰ *See supra* note 45. *See also Turner Broad. Sys., Inc.*, Notice of Apparent Liability for Forfeiture, 29 FCC Rcd 752 (2014) (*Turner II*); *Turner Broad. Sys., Inc.*, Notice of Apparent Liability for Forfeiture, 28 FCC Rcd 15455 (Enf. Bur. 2013) (*Turner I*).

⁵¹ *See NAL*, 29 FCC Rcd at 2563, para. 32.

⁵² *See id.* at 2564–65, paras. 34–35.

D. The Companies Willfully Violated Section 325 of the Act and Section 11.45 of the Commission's Rules

15. Viacom argues that it could not have violated Section 325 of the Act or Section 11.45 of the Commission's rules because it lacked the necessary scienter to do so.⁵³ In support, it asserts that it did not intend to violate Section 11.45 and, furthermore, "the Rule was not on the compliance radar of any of the Program Providers."⁵⁴ Viacom, however, misconstrues the applicable standards. As clearly stated in the *NAL*, Section 503(b)(1)(B) of the Act authorizes the Commission to impose a forfeiture penalty on any person who willfully fails to comply with any provisions of the Act or of any rule, regulation or Commission order.⁵⁵ Section 312(f)(1) of the Act defines "willful" as the "conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.⁵⁶ 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,⁵⁷ and the Commission has so interpreted the term in the Section 503(b) context.⁵⁸ As such, Viacom's assertion that it did not intend to violate the law is unavailing.⁵⁹

16. Viacom's further assertion that the EAS Rules were not on its internal compliance checklist is likewise unavailing as the Commission has consistently held that ignorance or mistake of law are not exculpatory or mitigating factors when assessing a forfeiture.⁶⁰ As described above, the Companies had ample notice that misuse of the EAS Tones was prohibited. Moreover, the record demonstrates that the Companies knowingly transmitted, or caused the transmission of, the *No Surrender Trailer*, because staff at each Company reviewed the content of the trailer, and affirmatively inserted it into each Company's programming feed, over multiple channels, over multiple days.⁶¹ We find that the

⁵³ Viacom *NAL* Response at 6–8.

⁵⁴ *Id.* at n.18.

⁵⁵ *NAL*, 29 FCC Rcd at 2554, para. 18 (citing 47 U.S.C. § 503(b)(1)(B)).

⁵⁶ 47 U.S.C. § 312(f)(1).

⁵⁷ H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982), reprinted in 1982 U.S.C.A.N. 2294-95 ("This provision [inserted in Section 312] defines the term[s] 'willful' [. . .] for purposes of section 312 and for any other relevant section of the act (e.g., Section 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. . . . The definitions are intended primarily to clarify the language in Section 312 and 503, and are consistent with the Commission's application of those terms").

⁵⁸ *See, e.g., S. Cal. Broad. Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388, para. 5 (1991), *recons. denied*, 7 FCC Rcd 3454 (1992).

⁵⁹ Viacom argues that because it did not intend to violate Section 11.45, it lacks the requisite scienter to be found liable. Viacom *NAL* Response at 6-7. Viacom cites *CBS Corp. v. FCC*, 535 F.3d 167 (3rd Cir. 2008) (CBS), noting that the Third Circuit remanded that case, in part, on the issue of scienter, holding that "scienter is the constitutional minimum showing for penalizing the speech or expression of broadcasters . . ." 535 F.3d at 205-06. Viacom further argues that "[f]or scienter to exist, an offending party must have prior knowledge that the act in question is wrong, or at least have acted recklessly." Viacom *NAL* Response at 7. Even assuming, *arguendo*, that such standard applies here, we disagree that the Companies lacked scienter. The undisputed record in this case demonstrates that the Companies knew that the EAS tones were embedded in the material that they transmitted. *See NAL*, 29 FCC Rcd at 2562, para. 29. Moreover, as demonstrated in the *NAL* and herein, the Companies cannot credibly argue that they did not know that misuse of the EAS tones was prohibited. Therefore, because the Companies knew that they transmitted the subject material and knew, or should have known, that such material was prohibited by law, they cannot reasonably argue that they lacked scienter in fact or law.

⁶⁰ *See, e.g., Constellium Rolled Prods. Ravenswood, LLC*, 29 FCC Rcd 6277, 6284, para. 14 (citing *Profit Enters., Inc.*, Forfeiture Order, 8 FCC Rcd 2846, 2846, para. 5 (1993) (where Commission found target's claim of mistake or ignorance of law neither exculpatory nor mitigating); *Lakewood Broad. Serv., Inc.*, Memorandum Opinion and Order, 37 FCC 2d 437, 438, para. 6 (1972) (same)).

⁶¹ *See NAL*, 29 FCC Rcd at 2550–53, 2555–58, paras. 8–14, 21–22.

Companies willfully violated Section 325 of the Act and Section 11.45 of the Commission's rules, and we reject the assertion that they lacked the necessary scienter to do so.

E. Enforcement Against the Companies is Within the Commission's Discretion and Authority

17. Viacom further suggests that because the Commission did not commence parallel enforcement actions against Horizon Media or the MVPDs, it is obliged to forbear with respect to Viacom.⁶² We reject this argument and note that Viacom has failed to cite any authority in support of its contention. The Commission has prosecutorial discretion in choosing to initiate investigations, and the absence of action against any or all potentially liable entities does not preclude it from enforcing against a specific violator.⁶³ Moreover, the courts have generally found that the Commission "is best positioned to weigh the benefits of pursuing an adjudication against the costs to the agency (including financial and opportunity costs) and the likelihood of success."⁶⁴

18. The Companies further contend that enforcement is inappropriate because they did not receive complaints about the *No Surrender Trailer* after it was carried on their networks.⁶⁵ More particularly, ESPN contends, without citing any authority, that we may not investigate or sanction ESPN prompted by a complaint from a Commission employee who viewed the programming.⁶⁶ We reject ESPN's argument. The complainant at issue is an engineer employed in the Commission's Atlanta field office, who viewed the *No Surrender Trailer* on ESPN while off duty from his work at the Commission. Moreover, Section 403 of the Act gives the Commission discretion to initiate investigations on its own motion, so long as the matter is within the agency's jurisdiction.⁶⁷

F. The Forfeiture Amounts Proposed in the NAL Are Appropriate Under the Circumstances of this Case

19. Based upon the evidence before us, we find that each of the Companies 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.⁶⁸ 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(b)(8) 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 other such matters as justice may require.⁶⁹

⁶² See Viacom NAL Response at 10.

⁶³ See 47 U.S.C. § 503; see also *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("[A]n agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion.").

⁶⁴ *Radio One Licenses, LLC*, Forfeiture Order, 19 FCC Rcd 23922, 23932, para. 24 (2004) (citing *N.Y. State Dept. of Law v. FCC*, 984 F.2d 1209, 1213 (D.C. Cir. 1993)).

⁶⁵ See Viacom NAL Response at 8; ESPN LOI Response at 7.

⁶⁶ ESPN NAL Response at 11–12.

⁶⁷ 47 U.S.C. § 403. See also *Spanish Broad. Sys. Holding Co., Inc.*, Forfeiture Order, 27 FCC Rcd 11956, 11959, para. 8 n. 30 (Enf. Bur. 2012) (holding that Section 403 provides broad discretion as to the type of complaints that the agency may investigate and subject to enforcement action).

⁶⁸ 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*).

⁶⁹ See 47 U.S.C. § 503(b)(2)(E); 47 C.F.R. § 1.80(b)(8).

20. As explained in the *NAL*, our forfeiture determination in this case is based on multiple factors associated with the nature of the violation and the violator.⁷⁰ No single factor (e.g., the number of transmissions) is controlling; rather, all of the statutory factors are given appropriate weight. When applying the statutory factors concerning the nature of the violations in this case, we considered 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 was triggered).⁷¹ Each of the above-described factors was carefully described and considered with respect to each of the Companies in the *NAL*.⁷²

21. With respect to the nature of the violations, as explained in the *NAL*, each of the Companies 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.⁷³ Although Viacom objects to the *NAL*'s separately counting the East Coast and West Coast Transmissions, that argument is unavailing. As noted in the *NAL*, these feeds represented separate transmissions that occurred three hours apart.⁷⁴ Moreover, nothing in the record indicates that the Companies removed the No Surrender Trailer from the second feed where such second feeds existed.⁷⁵ As the rule clearly applies to each transmission, each separate transmission represents a separate violation and Viacom cites no authority to the contrary. Moreover, the vast audience reach of each Company's programming greatly increased the extent and gravity of the violations.⁷⁶ Given the public safety implications raised by the transmissions, and for the reasons set forth in the *NAL*, we find that the instant violations, due to their egregiousness, warrant the upwardly adjusted forfeiture amounts detailed by the Commission.⁷⁷

22. With respect to the violators in this case, we noted in the *NAL* that Viacom reported annual revenues in excess of \$13.7 billion as of September 30, 2013.⁷⁸ 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.⁷⁹ As the Commission made clear in the *Forfeiture Policy Statement*, entities with substantial revenues, such as the Companies, may expect the imposition of forfeitures well above the base amounts in order to deter improper behavior.⁸⁰ In calculating the

⁷⁰ See *NAL*, 29 FCC Rcd at 2566, para. 37; *Turner II*, 29 FCC Rcd 752, 757, para. 13 (2014).

⁷¹ *NAL*, 29 FCC Rcd at 2566, para. 37; see *Turner II*, 29 FCC Rcd at 757, para. 13.

⁷² See *NAL*, 29 FCC Rcd at 2566–68, paras. 38–42.

⁷³ See *id.* at 2550–53, 2555–58, paras. 8–14, 21–22.

⁷⁴ See *id.* at 2556–57, para. 22.

⁷⁵ *Id.*

⁷⁶ See *id.* at 2566, para. 38.

⁷⁷ See 47 C.F.R. § 1.80(b)(8), note (providing upward adjustment criteria for forfeitures); *Greater Boston Radio, Inc.*, Forfeiture Order, 28 FCC Rcd 1951, 1957, para. 12 (Enf. Bur. 2013) (where Bureau found, consistent with discretion afforded agency under Section 1.80, that comparatively egregious nature of violation warranted upward adjustment); *Entercom Wichita License, LLC*, Forfeiture Order, 24 FCC Rcd 1270, 1273, para. 8 (Enf. Bur. 2009) (same); see also *Net One Int'l, Inc.*, Notice of Apparent Liability for Forfeiture, FCC 14-100, 2014 WL 3468905, para. 8 (2014) (*Net One NAL*) (finding an upward adjustment of forfeiture appropriate under egregious circumstances).

⁷⁸ See *NAL*, 29 FCC Rcd at 2566, para. 39.

⁷⁹ See *id.*

⁸⁰ See *id.* In the *Forfeiture Policy Statement*, the Commission found:

(continued)

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.⁸¹ Thus, the Commission carefully considered and applied the statutory factors in the *NAL*. Nevertheless, the Companies object to the proposed forfeitures on several grounds, as discussed below, none of which we find persuasive.

23. Viacom asserts that the forfeiture amount is "grossly excessive" under the governing statute because the Commission failed to carefully apply the statutory factors and failed to take into account various mitigating circumstances, in particular, a lack of culpability on Viacom's part.⁸² Specifically, Viacom argues that the *NAL* failed to take into account that the trailer was produced by a third party; that Section 11.45 was poorly known among programmers; and that Viacom ceased including the trailer in programming feeds as soon as it learned of a potential problem.⁸³ As set forth in the *NAL* and further described above, however, the Commission considered the statutory factors in making its forfeiture determinations.⁸⁴ Moreover, none of the "mitigating" factors cited by Viacom reduce the Companies' culpability or otherwise warrant a downward adjustment to the proposed forfeiture. As noted above, the Commission has held that entities acting as "conduits" for improper behavior cannot divest themselves of liability by shifting blame to a third party.⁸⁵ In the EAS context, the Commission has previously held a cable programmer such as Viacom responsible for transmitting objectionable material produced by a third party.⁸⁶ Moreover, as previously discussed, ignorance or mistake of law are neither exculpatory nor mitigating factors when assessing a forfeiture.⁸⁷ Likewise, it is well settled precedent that subsequent remedial actions do not excuse or nullify a licensee's violation of a Commission rule.⁸⁸

24. Viacom further asserts that the forfeiture amounts exceed statutory maximums because its conduct, at most, constituted a single violation or a unitary "continuing violation" that lasted just five

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[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.

⁸¹ See *NAL*, 29 FCC Rcd at 2567, para. 40.

⁸² See Viacom *NAL* Response at 3, 14–15.

⁸³ *Id.*

⁸⁴ See *NAL*, 29 FCC Rcd at 2566–68, paras. 38–42.

⁸⁵ See *Dialing Services*, *supra* note 31.

⁸⁶ See *Turner II*, *supra* note 50.

⁸⁷ See *supra* note 60 and accompanying text.

⁸⁸ See *Turner I*, 28 FCC Rcd 15455, 15460, para. 14 (Enf. Bur. 2013) (citing *Seawest Yacht Brokers dba San Juan Marina Friday Harbor*, Notice of Forfeiture, 9 FCC Rcd 6099 (1994) (noting that "corrective action taken to come into compliance with Commission rules or policy is expected, and does not nullify or mitigate any prior forfeitures or violations"); *Station KGVL, Inc.*, Memorandum Opinion and Order, 42 FCC 2d 258, 259, para. 6 (1973); *Exec. Broad. Corp.*, Memorandum Opinion and Order, 3 FCC 2d 699, 699, para. 6 (1966) ("The fact that prompt corrective action was taken . . . does not excuse the prior violations.")).

days.⁸⁹ We do not agree. In determining the proposed forfeiture amounts, we appropriately found that each transmission of *The No Surrender Trailer* constituted a separate and distinct violation.⁹⁰ The Companies actively and willfully inserted each transmission multiple times into their programming feeds for multiple networks, potentially reaching different audiences throughout the country.⁹¹ The Commission's finding that these actions constituted multiple, separate violations is consistent with other circumstances in which multiple violations of the same rule are counted as separate and distinct violations for the purpose of forfeiture calculation.⁹² Thus, contrary to Viacom's claim, the forfeiture amounts proposed in the *NAL* do not exceed the maximum monetary forfeitures permissible under the Act and the rules.⁹³

25. ESPN asserts that the Commission "fails to explain or justify the much higher per-occurrence forfeiture assessed against ESPN as compared to Viacom and NBC, especially considering that ESPN distributed the [*No Surrender Trailer*] fewer times than either Viacom or NBC."⁹⁴ ESPN's objection, however, incorrectly assumes that the instant forfeiture determination was based solely on a "per occurrence" calculation. ESPN's mistaken surmise ignores several other important factors that we duly took into consideration in determining the forfeiture amount, including the relative audience reach of the transmissions at issue, the violator's ability to pay, and the other factors described above.⁹⁵ For example, all of ESPN's violations occurred on channels with nationwide reach, whereas some of

⁸⁹ Viacom *NAL* Response at 3, 16–17.

⁹⁰ See *NAL*, 29 FCC Rcd at 2565–66, paras. 36–38. See also 47 U.S.C. § 312(f)(2) (providing that "[t]he term 'repeated,' when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day"). The Commission has followed this approach to calculate forfeitures in many enforcement areas, including sponsorship identification, cramming, and junk fax enforcement. See *Radio License Holding XI, LLC*, 29 FCC Rcd 1623, 1628 at para. 12 (2014) (where Commission found that eleven deficient broadcasts that failed to include required sponsorship disclosures constituted eleven discrete violations, not a single violation); see also *Net One International, Inc.*, Notice of Apparent Liability for Forfeiture, 2014 WL 3468905 at paras. 9–10, FCC 14-100 (2014) (*Net One NAL*), citing *Consumer Telcom, Inc.*, Notice of Apparent Liability for Forfeiture, 28 FCC Rcd 17196 at 17208, n.79; *Scott Malcolm DSM Supply, LLC, Somaticare, LLC*, Notice of Apparent Liability for Forfeiture, 29 FCC Rcd 2476, 2484 at para. 20 (2014) (finding that each junk fax violation constitutes a separate and distinct rule violation).

⁹¹ See *NAL*, 29 FCC Rcd at 2551–52, paras. 9, 12. Note that Viacom transmitted the *No Surrender Trailer* on seven networks and ESPN transmitted the *No Surrender Trailer* on three networks. *Id.* at 2551–52, paras. 8, 11.

⁹² See, e.g., *Radio License Holding XI, LLC*, Forfeiture Order, 29 FCC Rcd 1623, 1628, para. 12 (2014) (where Commission found that eleven deficient broadcasts that failed to include required sponsorship disclosures constituted eleven discrete violations, not a single violation); see also *Net One NAL*, 2014 WL 3468905 at paras. 9–10 (applying base forfeiture to each of 20 cramming violations) (citing *Consumer Telcom, Inc.*, Notice of Apparent Liability for Forfeiture, 28 FCC Rcd 17196, 17208 n.79); *Scott Malcolm DSM Supply, LLC, Somaticare, LLC*, Notice of Apparent Liability for Forfeiture, 29 FCC Rcd 2476, 2484, para. 20 (2014) (finding that each junk fax violation constitutes a separate and distinct rule violation).

⁹³ See *NAL*, 29 FCC Rcd at 2565–66, para. 36; see also 47 U.S.C. § 503(b)(2); 47 C.F.R. § 1.80(b); 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).

⁹⁴ ESPN *NAL* Response at 12.

⁹⁵ See *supra* para. 20; *NAL*, 29 FCC Rcd at 2565–68, paras. 36–42.

NBCUniversal's violations occurred on regional channels.⁹⁶

26. Finally, both Companies argue that imposition of the forfeitures is arbitrary and capricious because the Companies lacked notice with respect to Section 11.45's application.⁹⁷ For the reasons set forth in the *NAL*, and as further amplified above, we disagree.⁹⁸ Therefore, we find that imposition of the proposed forfeitures is fully warranted.

27. In conclusion, 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 serious public safety implications of the violations, the Companies' degree of culpability and ability to pay, as well as the other factors as outlined in the Commission's *Forfeiture Policy Statement*, we confirm that a forfeiture of one million, one hundred twenty thousand dollars (\$1,120,000) is appropriate against Viacom; and a forfeiture of two hundred eighty thousand dollars (\$280,000) is appropriate against ESPN.⁹⁹

IV. ORDERING CLAUSES

28. **ACCORDINGLY, IT IS ORDERED**, pursuant to Section 503(b) of the Act,¹⁰⁰ and Section 1.80 of the Commission's rules,¹⁰¹ that Viacom Inc. **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of one million, one hundred twenty thousand dollars (\$1,120,000) for willfully and repeatedly violating Section 11.45 of the Commission's rules¹⁰² and Section 325(a) of the Act.¹⁰³

29. **IT IS FURTHER ORDERED**, pursuant to Section 503(b) of the Act,¹⁰⁴ and Section 1.80 of the Commission's rules,¹⁰⁵ that ESPN Inc. **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of two hundred eighty thousand dollars (\$280,000) for willfully and repeatedly violating Section 11.45 of the Commission's rules¹⁰⁶ and Section 325(a) of the Act.¹⁰⁷

30. Payment of the forfeiture must be made by check or similar instrument, wire transfer, or credit card within thirty (30) calendar days of the release date of this Forfeiture Order, and must include the *NAL*/Account Numbers and FRNs referenced above. If the forfeiture is not paid within the period specified, the case may be referred to the U.S. Department of Justice for enforcement of the forfeiture

⁹⁶ See *NAL*, 29 FCC Rcd at 2556–58. ESPN further argues that the forfeiture amount proposed against it is inconsistent with that assessed against Turner Broadcasting in *Turner II*, because in that case Turner committed more violations. ESPN's argument, however, ignores that its instant violations occurred over more channels than in Turner's case and fails to recognize that the corresponding harm caused thereby requires greater redress.

⁹⁷ Viacom *NAL* Response at 14; ESPN *NAL* Response at 12–14.

⁹⁸ See *supra* para. 8; *NAL*, 29 FCC Rcd at 2558–60, paras. 23–25.

⁹⁹ See *SBC Commc'ns Inc. v. FCC*, 373 F.3d 140, 152 (D.C. Cir. 2004) (noting that “substantial and widespread” behavior with a multistate 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 [from future violations]”).

¹⁰⁰ 47 U.S.C. § 503(b).

¹⁰¹ 47 C.F.R. § 1.80.

¹⁰² 47 C.F.R. § 11.45.

¹⁰³ 47 U.S.C. § 325(a).

¹⁰⁴ 47 U.S.C. § 503(b).

¹⁰⁵ 47 C.F.R. § 1.80.

¹⁰⁶ 47 C.F.R. § 11.45.

¹⁰⁷ 47 U.S.C. § 325(a).

pursuant to Section 504(a) of the Act.¹⁰⁸ Viacom Inc. 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.¹⁰⁹ 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 Viacom Inc. and ESPN Inc. should follow based on the form of payment they 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.

31. 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. 20554.¹¹⁰ 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

32. **IT IS FURTHER ORDERED**, that copies of this Forfeiture Order 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, and to 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

¹⁰⁸ 47 U.S.C. § 504(a).

¹⁰⁹ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

¹¹⁰ See 47 C.F.R. § 1.1914.