

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

In the Matter of
CBS Broadcasting Inc. d/b/a
CBS Television Network
CBS Television Stations, Inc.
CBS Stations Group of Texas LLC
CBS LITV LLC
File No.: EB-IHD-18-00027139
NAL/Acct. No.: 201932080017
FRN Nos.: 0003482189; 0004425773;
0023035348; 0021355177

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: September 4, 2019

Released: September 9, 2019

By the Commission: Commissioner Starks issuing a statement.

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I. INTRODUCTION

1. The Emergency Alert System (EAS) is a recognized and indispensable means of protecting the American public. The EAS is a national public warning system that requires broadcasters, cable television operators, wireless cable operators, wireline video service providers, satellite digital audio radio service providers, and direct broadcast satellite providers to supply communications capability to the President of the United States to address the American public during a national emergency.

1 See FEMA, Fact Sheet: Emergency Alert System (EAS) (2016), https://www.fema.gov/media-library-data/1465326763240-4152791226bbd49cf46aff8cd5f43bb1/Emergency_Alert_System_Fact_Sheet_2016.pdf.

CBS Corporation and its subsidiaries CBS Broadcasting Inc. d/b/a CBS Television Network (Broadcast Programming Network), CBS Television Stations, Inc., CBS Stations Group of Texas LLC, and CBS LITV LLC (Broadcasters) (collectively CBS or the Company)² for apparently willfully and repeatedly violating section 11.45 of the Commission’s rules (the Rule) by transmitting or causing the transmission of the Emergency Alert System codes or the Attention Signal, or recordings or simulations thereof (collectively EAS Tones or Tones) in the absence of an actual emergency, authorized test of the EAS, or a qualified public services announcement (PSA).³

2. Unauthorized use of the EAS Tones undermines the EAS and presents a substantial threat to public safety. The underlying policy concern is not limited only to potential listener confusion at the moment of the improper broadcast of the EAS Tones; the Commission also has warned that the use of simulated or actual EAS Tones for non-authorized purposes – such as commercial or entertainment purposes – can lead to a dangerous “cry-wolf effect” or “alert fatigue,” whereby the public becomes desensitized to the alerts, and questions or simply disregards whether a particular alert is intended to warn about a real, imminent threat or some other cause.⁴ Moreover, because the EAS Tones include operative data elements, the misuse of simulated or actual EAS Tones may result in false activations of the EAS that can spread false information or lock out legitimate activations of the EAS.⁵ To preserve the unique alerting function of the EAS Tones, the Commission is committed to enforcing laws that prohibit the use of the Tones, or simulations of them, except for specific Permitted Uses.⁶

3. In this Notice of Apparent Liability for Forfeiture, we find that CBS apparently willfully and repeatedly violated section 11.45 of the Commission’s rules when, on April 12, 2018, it transmitted simulated EAS Tones in the television program *Young Sheldon* over fifteen of its owned-and-operated television broadcast stations, as well as when the Broadcast Programming Network transmitted or caused the transmission in two feeds to its more than two-hundred television station affiliates, in the absence of any of the Permitted Uses. The prohibition on such transmissions has been in place for many years and

² Any entity that is a “Small Business Concern” as defined in the Small Business Act (Pub. L. 85-536, as amended) may avail itself of rights set forth in that Act, including rights set forth in 15 U.S.C. § 657, “Oversight of Regulatory Enforcement,” in addition to other rights set forth herein

³ Permitted uses of the EAS are limited to alerts of actual emergencies, authorized tests of the EAS, or qualified PSAs (collectively Permitted Uses). See 47 CFR § 11.45.

⁴ See *Viacom, Inc., ESPN, Inc.*, Forfeiture Order, 30 FCC Rcd 797, 797, para. 1 (2015) (*Viacom Forfeiture Order*) (“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.”). Concern about the problem of “alert fatigue” is not limited to the Commission. It has gained increasing attention in medical literature and studies, and across diverse industries and disciplines, including homeland security, cybersecurity, public and private health communications and patient safety, weather-related communications, and Wireless Emergency Alerts. See, e.g., *Homeland Security: Communication Protocols and Risk Communication Principles Can Assist in Refining the Advisory System*, U.S. General Accounting Office, Publication No. GAO-04-682 at 26 (June 2004) (available at <https://www.gao.gov/assets/250/243044.pdf>) (noting that in the homeland security risk context, some agencies and states reported that maintaining a code-orange alert level of security for more than a few days at a time “significantly drained their security resources – an effect federal agencies and states have identified as ‘code-orange alert fatigue’”); Greg Masters, *Crying Wolf: Combatting Cybersecurity Alert Fatigue*, SC Magazine (June 7, 2017), <https://www.scmagazine.com/home/security-news/in-depth/crying-wolf-combatting-cybersecurity-alert-fatigue/>; Jodi G. Daniel, *Addressing Liability and Clinical Decision Support: A Federal Government Role*, 5 St. Louis U.J. Health L. Policy 325 (2012); J.G. Baseman, D. Revere, I. Painter, M. Toyoji, H. Thieded, J. Duchin, *Public Health Communications and Alert Fatigue*, NIH Abstract, BMC Health Serv. Res. (Aug. 5, 2013), <https://www.ncbi.nlm.nih.gov/pubmed/23915324> (study results indicate that “information delivered too frequently and/or repetitively through numerous communication channels may have a negative effect on the ability of health care providers to effectively recall emergency information”); Josh Eachus, *Fighting Fatigue: The Role of Warning Frequency in the Weather Enterprise*, The Weather Social (Sept. 9, 2016),

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industry participants have long been on notice of the seriousness of such violations.⁷ Accordingly, based on our review of the facts and circumstances surrounding these apparent violations of section 11.45, we propose a forfeiture of \$272,000 against CBS.

II. BACKGROUND

A. Relevant Facts

4. CBS owns and operates a television broadcast network that produces and distributes programming on its 15 domestic television stations, and to its more than 200 domestic affiliate stations.⁸ The Company's owned and operated television stations include facilities located in the five largest, and fifteen of the top twenty, television markets in the U.S., and it maintains that it is one of the oldest and most sophisticated broadcasters in the business.⁹ This ownership structure enables the Company's owned and operated television stations to reach a wide audience across geographically diverse markets in the U.S.¹⁰

5. CBS also acquires or develops and schedules the entertainment programming presented on the CBS Television Network, which includes primetime comedy and drama series, reality-based programming, specials, children's programs, daytime dramas, game shows and late-night programs.¹¹ One of the network's most popular primetime comedy series is *Young Sheldon*.¹² CBS produces programming primarily for broadcast on network television, exhibition on basic cable and premium subscription services, streaming services, or distribution via first-run syndication.¹³

6. In April 2018, the Commission received information from multiple sources alleging that CBS had transmitted EAS attention signals, or simulations thereof, during the April 12, 2018, broadcast of the television program *Young Sheldon* absent an actual emergency or authorized EAS test.¹⁴ The Enforcement Bureau's Investigations and Hearings Division issued a letter of inquiry (LOI) on June 20,

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<https://thewsocial.com/2016/09/09/fighting-fatigue-the-role-of-warning-frequency-in-the-weather-enterprise/> (noting that existing studies “point to a delicate balance: too few exposures, and individuals cannot form an attitude about a message; too many exposures, and their attitudes trend increasingly negative.”); Tim Henderson, *U.S. Officials to Make Disaster Warnings Faster, Clearer About Life-Threatening Events*, Wash. Post, (July 13, 2019), https://www.washingtonpost.com/science/us-officials-to-make-disaster-warnings-faster-clearer-about-life-threatening-events/2019/07/12/dd750ae4-a258-11e9-bd56-eac6bb02d01d_story.html?utm_term=.bfbf73730a29 (“[E]xperts increasingly see ... two common reasons for unnecessary storm deaths: unfamiliar terrain that leads to bad decisions, and people ignoring too-familiar warnings that haven't panned out in the past.”).

⁵ See 47 CFR § 11.31(a). The EAS uses a four-part message for an emergency activation. The four parts are: Preamble and EAS Header Codes; audio Attention Signal; message; and Preamble and EAS End of Message (EOM) Codes. 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 comprises two Tones that are transmitted simultaneously.

⁶ See *id.*

⁷ See *Emergency Alert System: False, Fraudulent or Unauthorized Use of the Emergency Alert System Attention Signal and Codes is Strictly Prohibited*, Public Notice, DA 13-2123, 28 FCC Rcd 15438 (EB 2013) (2013 EAS Enforcement Advisory).

⁸ CBS Corporation, Annual Report (Form 10-K) at I-2 (Dec. 31, 2018), <https://investors.cbcorporation.com/static-files/01ada259-debb-4d51-bc5b-5cbbe56de5bf> (2018 Form 10-K).

⁹ *Id.* at I-10; <https://www.cbcorporation.com/about-cbs/> (last visited June 11, 2019).

2018,¹⁵ directing the Company to submit, among other things, recordings of the alleged episode of *Young Sheldon*, and sworn written statements as to whether it had transmitted, or caused the transmission of, the EAS Tones.¹⁶ The Company responded to the LOI on August 3, 2018.¹⁷

7. In its LOI Response, CBS admits that it transmitted the program *Young Sheldon* on April 12, 2018, which included a “tornado warning sound effect integral to a story line about a family’s visceral reaction to a life-threatening emergency and how surviving a tornado changed family relationships.”¹⁸ CBS states that *Young Sheldon* is produced by Chuck Lorre Productions in connection with Warner Bros. Television (an entity not affiliated with CBS).¹⁹ CBS explains that, according to the production team at Warner Bros. Television, during the sound mixing process, “sound producers modified a version of the EAS codes and Attention Signal downloaded from YouTube to: (i) alter the audio level of the tornado warning sound effect so it appeared behind the program dialogue; and (ii) shorten the Attention Signal to 3.4 seconds.”²⁰ CBS admits that the tornado warning sound effect “was based on a modified version of the actual EAS Tones, as defined in the FCC rules or a simulation thereof.”²¹ CBS further admits that its transmission of the program, and the sound effect, was not in connection with a Permitted Use.²²

8. CBS states that the CBS Television Network transmitted the episode of *Young Sheldon* via satellite in two feeds for stations in different time zones: one at 8:30 p.m. EDT for stations in the eastern and central sections of the country and a time-shifted feed at 11:30 p.m. EDT for stations on the West Coast.²³ These two signals (the East Coast feed and the West Coast feed) were sent via fiber-optic cable to geographically diverse satellite uplinks, where the signals were uplinked to two separate satellites. Local stations received the signals, which they retransmitted to viewers on a simultaneous or near-simultaneous basis.²⁴ CBS acknowledges that the April 12 episode of *Young Sheldon* was broadcast by 15 of its owned-and-operated television broadcast stations and 212 Network-affiliated television broadcast stations nationwide.²⁵

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¹⁰ 2018 Form 10-K at I-10.

¹¹ *Id.* at I-3.

¹² *See, e.g., Big Bang Theory and Young Sheldon Return, Give CBS Ratings Win, Deadline* (Apr. 5, 2019) at <https://deadline.com/2019/04/big-bang-theory-ratings-return-young-sheldon-greys-anatomy-in-the-dark-1202589169/> (“CBS was No. 1 on Thursday in the key 18-49 age bracket and total viewers as *The Big Bang Theory* (1.9, 11.93M) and *Young Sheldon* (1.4, 10.32M) returned to easily beat combined competition and finish as primetime’s most watched shows.”).

¹³ 2018 Form 10-K at I-4. After the programming’s initial exhibition over its television network, the Company distributes it on basic cable or premium subscription service for secondary domestic exhibition on television stations, cable networks or streaming services, including Amazon, Netflix, DIRECTV NOW and Hulu, among others.

¹⁴ *See, e.g., The Broadcasting Club Facebook Group Post*, dated April 14, 2018 (on file in EB-IHD-18-00027023).

¹⁵ Letter of Inquiry from Christopher Sova, Deputy Chief, Investigations and Hearings Division, FCC Enforcement Bureau, to Anne Lucey, Senior Vice President and Regulatory Policy, CBS Broadcasting Inc., et al. (June 20, 2018) (on file in EB-IHD-18-00027023).

¹⁶ *Id.*

¹⁷ *See* Letter from Kathleen A. Kirby, Eve Klindera Reed, Ari. S. Meltzer, and Kathleen Scott, Counsel for CBS Corporation to Marlene H. Dortch, Secretary, Federal Communications Commission (Aug. 3, 2018) (on file in EB-IHD-18-00027139) (LOI Response).

¹⁸ *Id.* at 2.

¹⁹ *Id.* at 15.

B. Legal Framework

9. Pursuant to section 503(b)(1) of the Communications Act of 1934, as amended (Act),²⁶ 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.²⁷ 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.²⁸ 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,²⁹ and the Commission has so interpreted the term in the section 503(b) context.³⁰ The Commission may also assess a forfeiture for violations that are merely repeated, and not willful.³¹ “Repeated” means that the act was committed or omitted more than once, or lasts more than one day.³² 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.³³ 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.³⁴

10. Under section 11.45, “[n]o person may transmit or cause to transmit the EAS codes or Attention Signal, or a recording or simulation thereof, in any circumstance other than in an actual National, State or Local Area emergency or authorized test of the EAS, or as specified in [sections] 10.520(d), 11.46, and 11.61 of this chapter.”³⁵ The Commission adopted the Rule to protect the integrity and operation of the EAS,³⁶ acknowledging that while existing laws prohibited false distress signals and broadcast hoaxes, “a specific prohibition against the misuse of the EAS attention signal and codes is necessary . . . because it is more specific and directly addresses the proper use of EAS codes and Tones.”³⁷

11. Notably, in adopting section 11.45, the Commission cited section 706 of the Act as the Rule’s statutory foundation and stated that the EAS rules “are designed to enable the President to exercise

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²⁰ *Id.*

²¹ *Id.* at 13.

²² *Id.* at 14.

²³ *Id.* at 10-11. CBS clarified in the LOI Response that its stations in the Central and Mountain Time Zones received the programming via the East Coast feed.

²⁴ *Id.*

²⁵ *Id.* at 12, 33 & CBS Affiliates Master Worksheet: 2017-2018 Season.

²⁶ 47 U.S.C. § 151 *et seq.*

²⁷ 47 U.S.C. § 503(b)(1)(B); 47 CFR § 1.80(a)(2).

²⁸ 47 U.S.C. § 312(f)(1).

²⁹ H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982) (“This provision [inserted in section 312] defines the terms ‘willful’ and ‘repeated’ for purposes of section 312, and for any other relevant section of the act (e.g., [s]ection 503) As defined[,] . . . ‘willful’ means that the licensee knew that he was doing the act in question, regardless of whether there was an intent to violate the law. ‘Repeated’ means more than once, or where the act is continuous, for more than one day. Whether an act is considered to be ‘continuous’ would depend upon the circumstances in each case. The definitions are intended primarily to clarify the language in [s]ections 312 and 503, and are consistent with the Commission’s application of those terms”).

³⁰ 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).

... quickly and efficiently” the specific communications-related powers set forth in section 706.³⁸ Section 706 addresses the emergency use of communications systems.³⁹ Thus, the prohibition on the misuse of EAS Tones in section 11.45 must be understood in the context of protecting the EAS, an essential national defense, emergency, and public safety system. Section 11.45 protects the integrity of the EAS by helping to avoid: (1) immediate confusion in the event of a public threat or emergency; (2) public alert fatigue over time; and (3) false triggering of the EAS. Accordingly, in enforcing section 11.45, the Commission explained:

The plain language of the rule prohibits *any* transmission of the EAS Tones in the absence of an actual emergency or authorized test . . . Moreover, [s]ection 11.45 contains no provision limiting liability under the rule to cases where intent to deceive exists, nor does the rule make 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.⁴⁰

12. As the Commission has previously explained, it is noteworthy that section 11.45 separately prohibits “simulation” of the EAS codes or Attention Signal. That separate prohibition would be superfluous if the only sounds that qualify as a “simulation” of the EAS codes or Attention Signal, are actual EAS codes or Attention Signals or recordings thereof.⁴¹ Under section 11.45, a “simulation” therefore means something other than an exact copy or recording of the actual EAS sounds,⁴² and encompasses the transmission of sounds that mimic or are substantially similar to the sounds made by the transmission of EAS codes or the EAS Attention Signal.⁴³

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³¹ 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).

³² See, e.g., *Southern California*, 6 FCC Rcd at 4388, para. 5; *Callais Cablevision*, 16 FCC Rcd at 1362, para. 9.

³³ 47 U.S.C. § 503(b); 47 CFR § 1.80(f).

³⁴ See, e.g., *SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591, para. 4 (2002) (forfeiture paid).

³⁵ 47 CFR § 11.45. Section 10.520(d) provides that “no person may transmit or cause to transmit the WEA common audio 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, except as designed and used for Public Service Announcements.” *Id.* § 10.520(d). Section 11.46 provides that “EAS Participants may use the EAS Attention Signal and a simulation of the EAS codes as provided by FEMA in EAS Public Service Announcements (PSAs) (including commercially-sponsored announcements, infomercials, or programs) provided by federal, state, and local government entities, or non-governmental organizations, to raise public awareness about emergency alerting.” *Id.* § 11.46. Section 11.61 provides that “EAS Participants shall conduct tests [of EAS procedures] at regular intervals.” *Id.* § 11.61.

³⁶ See *Amendment of Part 73, Subpart G, of the Commission’s Rules Regarding the Emergency Broadcast System*, FO Docket Nos. 91–301 and 91–171, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 7 FCC Rcd 6903, 6907, para. 39 (1992) (*1992 EBS Notice*).

13. The Commission has taken a similarly straightforward approach to considering the “persons” subject to enforcement action under section 11.45. In 2013, the Enforcement Bureau released an Enforcement Advisory that noted:

[Section 11.45] applies to any ‘person’ who ‘transmits’ or ‘causes to transmit’ a prohibited signal. The prohibition thus applies 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.⁴⁴

Thus, it has been clear for many years that the Commission may take enforcement action under section 11.45 with respect to both programming networks⁴⁵ and broadcast station licensees.⁴⁶

III. DISCUSSION

14. Based on the uncontested facts of the case, it appears that the April 12, 2018 episode of *Young Sheldon* includes audio material that constitutes a simulation of the EAS codes and Attention Signal. In its LOI Response, CBS admits that the programming in question included a tone that was “based on a modified version of the actual EAS Tones, as defined in the FCC rules or a simulation thereof.”⁴⁷ CBS further admits that the CBS Television Network transmitted the program to at least two-hundred twenty seven stations in two time zones.⁴⁸ Finally, CBS admits to broadcasting the program over

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³⁷ *Amendment of Part 73, Subpart G, of the Commission’s Rules Regarding the Emergency Broadcast System*, FO Docket Nos. 91–301 and 91–171, Report and Order and Further Notice of Proposed Rulemaking, 10 FCC Rcd 1786, 1815, para. 84 (1994) (*1994 EBS Order*).

³⁸ *See Amendment of Part 73, Subpart G of the Commission’s Rules Regarding the Emergency Broadcast System*, Report and Order, 10 FCC Rcd 1786, 1789 (1994) (*1994 EAS Order*); *see also* 47 U.S.C. § 606 (war powers of the President). *See also id.* § 544(g) (requiring cable subscribers to be afforded the same emergency information afforded by EBS rules to broadcast audiences).

³⁹ 47 U.S.C. §706.

⁴⁰ *Viacom Forfeiture Order*, 30 FCC Rcd at 801-02, para. 12.

⁴¹ *See Turner Broadcasting System, Inc.*, Notice of Apparent Liability for Forfeiture, 28 FCC Rcd 15455, 15457, para. 6 (EB 2013) (*Turner I*); *Turner Broadcasting System, Inc.*, Notice of Apparent Liability for Forfeiture, 29 FCC Rcd 752, 754, para. 7 (2014) (*Turner II*).

⁴² *See United States Telecom Association v. FCC*, 227 F.3d 450, 463 (D.C. Cir. 2000) (finding, in relevant part, that the FCC followed “the well-accepted principle of statutory construction that requires every provision of a statute to be given effect”) (citing *Washington Market Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879) (“We are not at liberty to construe any statute so as to deny effect to any part of its language.”)); *see also, e.g.*, Black’s Law Dictionary 1596 (10th ed. 2014) (“simulation (14c) 1. An assumption of an appearance that is feigned, false, or deceptive.”).

⁴³ *2013 EAS Enforcement Advisory*, 28 FCC Rcd at 15440; *Turner I*, 28 FCC Rcd at 15457, para. 6; *Turner II*, 29 FCC Rcd at 754, para. 7.

⁴⁴ *2013 EAS Enforcement Advisory*, 28 FCC Rcd at 15440.

⁴⁵ *See, e.g., Turner II*, 29 FCC Rcd at 752.

15 of its owned-and-operated television broadcast stations.⁴⁹

15. While the audio material may not have included embedded EAS data, a “simulation” need not be an exact copy or recording of the EAS codes.⁵⁰ Nor does the rule require the inclusion of embedded EAS data.⁵¹ Based on both CBS’s admission that a modified recording of the EAS Tones and Attention Signal was included in its programming, and our review of a recording of the April 12, 2018 *Young Sheldon* program provided by CBS as part of the LOI Response, we find that the audio elements used in the episode were substantially similar to the EAS Tones such that an average listener could reasonably mistake the sounds for actual EAS Tones.⁵² CBS admits that none of the material in question was transmitted in connection with a Permitted Use.⁵³ We therefore find that CBS’s transmissions of the April 12, 2018 episode of *Young Sheldon* apparently violated section 11.45.

16. CBS defends its transmissions of the EAS Tones, citing both technical and legal grounds. We have considered CBS’s arguments and are not persuaded, for the reasons set forth below.

A. Liability May Be Found Whether EAS Tones Are Actual or Simulated

17. CBS contends that the tone at issue in the *Young Sheldon* episode was a “tornado warning sound effect” that was deliberately edited and mixed so as not to confuse viewers that an actual emergency existed.⁵⁴ CBS asserts that its control process included passing the edited tone through three quality control rooms “that are equipped with EAS decoders to prescreen CBS network programming.”⁵⁵ These steps, CBS argues, should mitigate any liability the Commission might find. We do not find this contention availing. Even though CBS utilized a “modified” version of the EAS codes and Attention Signal downloaded from YouTube, that factor is not controlling in our liability determination. Rather, CBS’s error lay in utilizing a tone that, despite being softer in volume⁵⁶ and shorter in duration,⁵⁷ nonetheless possessed the same dual-tone frequency, pitch, and timbre as the actual EAS Tones, and was recognizable by viewers or listeners as substantially similar to the EAS Tones.

18. CBS argues that no reasonable viewer would have mistaken any message or depiction presented in its programming for an actual EAS tone.⁵⁸ In support, CBS argues that in an actual emergency or authorized test, any programming being transmitted at the time is pre-empted, both visually

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⁴⁶ See, e.g., *Tegna, Inc.*, Order and Consent Decree, 32 FCC Rcd 4582 (EB 2017) (*Tegna CD*).

⁴⁷ LOI Response at 13.

⁴⁸ *Id.* at 3.

⁴⁹ *Id.* at 12.

⁵⁰ See, e.g., *2013 EAS Enforcement Advisory*, 28 FCC Rcd at 15440.

⁵¹ See 47 CFR § 11.45.

⁵² See LOI Response, DVD Attachment.

⁵³ *Id.* at 14.

⁵⁴ *Id.* at 3.

⁵⁵ *Id.*

⁵⁶ LOI Response at 3.

⁵⁷ *Id.* at 3 (CBS states that it “alter[ed] the audio level of the tornado warning sound effect so that it could be heard only behind the program dialogue (rather than interrupting such dialogue as an actual EAS alert would have)” and shortened the Attention Signal to 3.4 seconds.).

⁵⁸ LOI Response. at 4.

and audibly, and an EAS graphic covers the full screen, while the EAS Tones sound off in isolation.⁵⁹ CBS contends that, by contrast, in the scene at issue, the initial sounds were included on a separate audio track deliberately obscured under the dialogue of a Bugs Bunny cartoon.⁶⁰ This step, CBS argues, ensured that the sounds were so obscured by spoken words, both in the cartoon and dialogue spoken by the *Young Sheldon* cast, that no reasonable viewer would confuse or mistake the presentation for actual EAS Tones.⁶¹ CBS further argues that any possible viewer confusion was further obviated by the programming's on-screen visuals, which, by making reference to a red emergency banner appearing on the television set depicted in the fictional scene, compel viewers to realize that the tornado warning depicted was part of a fictional event, and not a present-day EAS alert.⁶²

19. CBS's rationale and arguments are unconvincing. CBS asserts that it "modified" the EAS Tones by shortening their duration and having dialogue spoken at the same time.⁶³ Neither of these modifications, which essentially amount to making the EAS Tones somewhat shorter and quieter, altered the fundamental and distinctive dual-tone frequency, pitch, and timbre characteristics of the EAS Tones themselves. And it is important to note that the simulated EAS Tones used here were clearly audible to viewers. Moreover, CBS's suggestion that an average viewer would clearly differentiate its "modified" EAS Tones from real EAS Tones because it was 3.4 seconds instead of 8 seconds is untenable—and contradicted by the third-party information we received in connection with this matter, including an industry blog and a Facebook post discussing the content of the transmission⁶⁴ Finally, CBS's argument pertaining to the on-screen visuals that accompanied the use of the simulated EAS tones does not account for the fact that some viewers likely were listening to the program, but not watching the screen at the time the tones were used.⁶⁵

20. CBS itself characterizes the sounds used in the program as a "dramatic portrayal" of the EAS Tones and contends that the programming was intended to realistically portray a tornado warning.⁶⁶ It is illogical, however, for CBS to contend that its use of the EAS Tones was designed to "*accurately portray[]*" an emergency (emphasis added) while also maintaining that no reasonable person could be confused by this "portrayal." In making this argument, CBS essentially admits that it has appropriated the meaning of the EAS Tones for non-emergency dramatic purposes. The temptation to do so is obvious given that the federal government has invested considerable resources over the years to infuse the EAS Tones with their real emergency-alert meaning. The rule, however, prohibits such appropriation because non-emergency uses of the EAS Tones actually dilute their real meaning over time (i.e., "it isn't a real emergency; it's just another TV show").

21. On a fundamental level, CBS appears to misunderstand the nature of section 11.45's prohibition. Arguing that a "real" EAS activation lacks dialogue or employs different visuals disregards

⁵⁹ *Id.*

⁶⁰ *See id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 3.

⁶⁴ *See, e.g.,* The Broadcasting Club Facebook Group Post, dated April 14, 2018 (on file in EB-IHD-18-00027023); *SBE EAS Exchange*, dated April 13, 2018, <https://pairlist7.pair.net/pipermail/sbe-eas/Week-of-Mon-20180409/004406.html> (on file in EB-IHD-18-00027023).

⁶⁵ *See, e.g., Viacom, Inc., NBC Universal Media, LLC, ESPN, Inc., Notice of Apparent Liability for Forfeiture*, 29 FCC Rcd 2548, 2550, para. 6 (*Viacom NAL*) (citing complaints where viewers/listeners in another room heard EAS Tones in a commercial, and "came running to the TV" while a child "started to quickly get out of the bathtub thinking there was an emergency").

⁶⁶ LOI Response at 2-3.

the plain meaning and purpose of the Rule. The issue is not whether the program, taken as a whole, is a convincing simulation of an EAS activation. The issue is whether the program included actual or simulated EAS Tones—even if only for a few moments—in the absence of a Permitted Use. By focusing on the overall context in which the EAS Tones appear, CBS avoids addressing the simpler question of whether the Tones, as modified, were cognizable simulations prohibited by section 11.45.

22. Mindful of CBS’s arguments, we have reviewed the programming in question and conclude that the sounds that CBS used in *Young Sheldon* simulated the actual EAS Tones. Indeed, the Tones at issue are exactly the type of “simulation” that the Commission’s rules seek to address, and the Commission has acted against broadcasters in cases involving less accurate simulations than those presented here.⁶⁷

B. CBS Is Liable as Both Broadcast Programming Network and Licensee

23. The Commission has been clear that section 11.45 applies to any “person” who “transmits” or “causes to transmit” a prohibited signal.⁶⁸ Accordingly, the Commission has taken enforcement actions against both programming networks⁶⁹ and broadcast station licensees.⁷⁰ In this case, based on the evidence before us, we find that CBS took actions as a programming network that apparently violated section 11.45. We also find that CBS took actions as a multi-station broadcast licensee that apparently violated section 11.45. In its capacity as a broadcast programming network, CBS made two transmissions of the April 12, 2018 episode of *Young Sheldon* for subsequent broadcast by over two hundred affiliated television stations (once for the East Coast and once for the West Coast).⁷¹ In its capacity as a broadcast licensee, CBS broadcast the April 12, 2018, episode of *Young Sheldon* over each of its 15 television broadcast stations.⁷² These were separate actions that resulted in separate transmissions of the simulated EAS Tones.

24. In its LOI Response, CBS asserts that “the FCC has concluded that it need not consider the simultaneous or near simultaneous retransmission of a program when determining how many transmissions occurred.”⁷³ The Commission, however, has never reached such a conclusion.⁷⁴ To the contrary, the *2013 Enforcement Advisory* clearly states that the prohibition applies equally to the programmer that distributes the programming to the delivery platform and the broadcaster that transmits the material directly to the public.⁷⁵ Moreover, such a conclusion would run directly counter to the

⁶⁷ The Commission has acted against broadcasters in cases involving less accurate simulations, unlike the present matter, which involves the use of a slightly modified recording of an EAS tone. See *MMK License LLC, Licensee of Station WNYK (DT), Bowling Green, Kentucky*, Order and Consent Decree, 28 FCC Rcd 15443 (EB 2013) (*MMK License LLC CD*) (finding violation where a television advertisement stopped in the middle of the commercial and sounded a simulation of the EAS).

⁶⁸ *2013 EAS Enforcement Advisory*, 28 FCC Rcd at 15440.

⁶⁹ See, e.g., *Turner II*, 29 FCC Rcd at 752; *Viacom NAL*, 29 FCC Rcd at 2560-2561.

⁷⁰ See, e.g., *MMK License LLC CD*; *Tegna CD*.

⁷¹ LOI Response at 12, 33 & CBS Affiliates Master Worksheet: 2017-2018 Season.

⁷² *Id.*

⁷³ *Id.* at 10.

⁷⁴ CBS cites to several cases in which enforcement actions were taken against programming networks or program originators as evidence that liability is limited to such entities. LOI Response at 10 (citing *SM Radio Productions, Inc. Westin, Connecticut*, Citation and Order, 29 FCC Rcd 14313 (EB 2014); *Turner I*, 28 FCC Rcd at 15457-58, para. 7; *Turner II*, 29 FCC Rcd at 757, para. 14; and *Viacom NAL*, 29 FCC Rcd at 2556-57, para. 22). However, the cases cited by CBS do not expressly conclude that additional transmissions by other entities such as broadcast network affiliated television stations may not incur separate liability.

⁷⁵ *2013 EAS Enforcement Advisory*, 28 FCC Rcd at 15440.

bedrock principle that broadcast licensees are accountable for the material they broadcast.⁷⁶ Accordingly, we find CBS responsible both for transmitting the program containing the simulated EAS Tones to its affiliates nationwide for broadcast and for broadcasting the simulated EAS Tones during the April 12, 2018, episode of *Young Sheldon* over 15 stations that it owns and operates.

C. Enforcement of Section 11.45 Complies with the First Amendment

25. We also disagree with CBS's assertion that sanctions in this matter could violate the company's freedom of speech. CBS asserts that because it took "numerous steps" to avoid any potential confusion with the real EAS Tones,⁷⁷ the doctrine of "constitutional avoidance" requires the Commission to construe the Act and its rules to avoid these "substantial constitutional questions."⁷⁸ CBS further contends that prohibiting a dramatic presentation of the EAS Tones "that are neither false or fraudulent nor reasonably cause confusion" is not the "least restrictive means" to achieve the government's goals, and therefore enforcement action would fail a "strict scrutiny" First Amendment review.⁷⁹ CBS recognizes that the Rule applies beyond just a "false and fraudulent" distress signal to any unauthorized transmission of the EAS Tones,⁸⁰ but asserts that the Rule's broader reach remains subject to First Amendment constraints.

26. In addition, CBS argues that applying section 11.45 to a "dramatic portrayal" renders the FCC's interpretation of the Rule void for vagueness. "Here," CBS argues, "the statute and the rules—as well as the Commission's enforcement decisions and guidance—fail to address non-misleading dramatic portrayals, and applying the prohibition to such portrayals would result in unconstitutional vagueness in the prohibition's application."⁸¹ In a similar vein, CBS suggests that Commission precedent in enforcing the Rule has largely been in the context of commercials and promotions, "leading an average speaker protected by the First Amendment to believe the prohibition focuses on that type of commercial speech."⁸² In sum, CBS argues, "the FCC's vague interpretation of its rules gives rise to a chilling effect on broadcaster's speech."⁸³

⁷⁶ The Commission has long held that licensees are liable for their programming, regardless of such programming's source, or their lack of awareness of its content. *Rubber City Radio Group*, Notice of Apparent Liability for Forfeiture, 17 FCC Rcd 14745, 14747 at para. 8 (EB 2002) (forfeiture paid) (citing *Mr. Steve Bridges*, Letter, 9 FCC Rcd 1681 (MMB 1994); *Community Broadcasters, Inc.*, Memorandum Opinion and Order, 55 FCC 2d 28, 35 at para. 18 (1975)).

⁷⁷ LOI Response at 5.

⁷⁸ *Id.* (citing *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Fifth Report and Order, 27CC Rcd 6529, 6536, para. 11 (2012) (subsequent history omitted); *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1240 (10th Cir. 1999) (vacating CPNI rules because "the FCC failed to adequately consider the constitutional ramifications of the regulations"), *cert. denied sub nom. Competition Policy Institute v. U.S. West, Inc.*, 530 U.S. 1213 (2000), *clarified on remand, Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*; *see also, e.g., Clark v. Martinez*, 543 U.S. 371, 380□81 (2005) (holding that if one interpretation of a statute "would raise a multitude of constitutional problems, the other should prevail").

⁷⁹ LOI Response at 6 (citing *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126, 131 (1989)).

⁸⁰ *Id.* ("the contrast between the statute [Section 325(a) of the Act] and the FCC's rule is instructive").

⁸¹ *Id.* at 8–9 (citing *Connally v. General Construction Company*, 269 U.S. 385, 391 (1926); *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 327 (2d Cir. 2010) (subsequent history omitted); *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972); *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 499 (1982)).

⁸² LOI Response at 9.

⁸³ *Id.* (citing *Nebraska Press Association v. Stuart*, 427 U.S. 539, 599 (1976)).

27. CBS, however, fundamentally misconstrues the Commission’s rules and precedent, while also misapplying the relevant constitutional analysis. At the outset, we disagree with CBS’s contention that enforcement of the Rule is necessarily subject to the highest level of constitutional review under the First Amendment.⁸⁴ With respect to broadcasters, the programming in question is entitled only to intermediate scrutiny, the less rigorous standard applied to content-based restrictions on that medium.⁸⁵ Under the intermediate scrutiny test, restrictions are upheld when the government interest advances “important governmental interests unrelated to the suppression of free speech” and does not “burden substantially more speech than necessary to further those interests.”⁸⁶ Even assuming, however, that the most searching level of First Amendment review applies, the Rule and the Commission’s enforcement of it satisfies strict scrutiny: The government’s interest here is “compelling,” and the Rule is both “narrowly tailored” to further that interest and the “least restrictive means” available to serve that goal.⁸⁷

28. *Compelling government interest.* CBS does not argue that the overarching government objective of section 11.45, the preservation of the EAS’s effectiveness in helping to protect life and property, is neither important nor compelling. As explained above, this overarching goal is embodied in three distinct but related concerns. In barring the use of the EAS Tones or simulations for any reasons other than alerting the public to a real emergency, testing the technical operation of the EAS, or educating the public through qualified PSAs about the EAS Tones’ true meaning, the Rule works to (1) prevent consumer confusion at the moment of a broadcast of the Tones, (2) prevent the inadvertent technical triggering of additional EAS warnings, and (3) prevent the accretion of non-emergency uses of the Tones that will dull consumers’ attentiveness to the public-safety import of the sounds.

29. CBS appears to recognize the first two concerns but disregards the third. The legal argument in its LOI Response focuses on its contention that no reasonable viewer could mistake the EAS Tones broadcast during the *Young Sheldon* episode as signaling an actual emergency. This contention rests largely on the supposition that a viewer would only be exposed to the Tones if he or she was concentrating on both the video and audio aspects of the program at the time—a supposition that overlooks the potential for the EAS Tones to be heard out of context and possibly from another room altogether, as has happened in the past.⁸⁸ As for the second concern, i.e., the possibility that code embedded in the broadcast of the EAS Tones could set off a cascade of EAS warnings across other outlets and platforms, CBS states that the program producer did not replicate such coding in simulating the EAS

⁸⁴ LOI Response at 6 (citing *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 811-16 (2000) (under strict scrutiny review, Court found total ban on speech overreaching where less intrusive remedy of channeling indecent material to safe-harbor hours available, which preserved governmental interest in protecting younger viewers while also accommodating free speech rights of programmer)).

⁸⁵ See *FCC v. League of Women Voters*, 468 U.S. 364, 380-81 (1984) (invalidating under the First Amendment a statute forbidding any non-commercial educational station that receives a grant from the CPB to “engage in editorializing”). While a content-based regulation of speech is typically subject to strict scrutiny, the Supreme Court has described First Amendment review of broadcast regulation as “less rigorous” than in other contexts, based on the spectrum scarcity rationale. See *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 637 (1994) (citing *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388-89 (1969) (*Turner*)); see also *League of Women Voters*, 468 U.S. at 377 (“our cases have taught that, given spectrum scarcity, those who are granted a license to broadcast must serve in a sense as fiduciaries for the public by presenting ‘those views and voices which are representative of [their] community and which would otherwise, by necessity, be barred from the airwaves’”) (quoting *Red Lion*, 395 U.S. at 389).

⁸⁶ See *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 189 (1997); *Turner*, 512 U.S. at 637.

⁸⁷ See *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000).

⁸⁸ See *Viacom NAL*, 29 FCC Rcd at 2550, para. 6.

Tones for use in *Young Sheldon*, and the record currently contains no evidence to the contrary.⁸⁹

30. CBS is silent, however, with respect to the third concern served by our enforcement of section 11.45: protecting the communicative power of the distinctive EAS Tones by prohibiting indiscriminate use of them for non-emergency purposes. The Commission has noted on multiple occasions that unauthorized uses of the EAS Tones raise the risk of cry-wolf effect or “alert fatigue,” whereby the public may become desensitized to, and consequently ignore, potentially life-saving emergency alerts and information.⁹⁰ The dangers of alert fatigue are widely recognized in the public health and other safety-oriented fields and have been acknowledged by commenters in our EAS proceedings.⁹¹ Recently, several tornado emergencies ravaged the heartland of the United States during TV prime time hours, i.e., during the daypart in which programs such as *Young Sheldon* air,⁹² which could create confusion about whether actual alerts were merely part of some scripted televised entertainment programming. Although CBS’s LOI Response makes no explicit reference to alert fatigue, we believe that the government’s interest in protecting the public from potentially deadly destruction and protecting against alert fatigue is a compelling one.

31. *Narrow tailoring.* In light of these important and compelling governmental concerns, the prohibition set forth in section 11.45 is narrowly crafted to avoid burdening any more speech than necessary to serve the purposes of preventing immediate listener confusion, long-term listener fatigue, and/or the triggering of a false EAS activation. The Rule explicitly identifies the restricted sounds—the distinctive EAS Tones, meaning the codes and/or Attention Signal and any recording or simulation thereof—and these are the sounds, in particular, that can give rise to immediate listener confusion and long-term listener fatigue.

32. *Least restrictive means.* Even assuming that the strict scrutiny test applies here, our proposed sanction also satisfies the final prong of that level of constitutional analysis. As noted above, the Rule’s restriction applies only to the EAS Tones or simulations of them,⁹³ such as the one in this case,

⁸⁹ This concern is not a hypothetical one, however. See *iHeart Communications, Inc.*, Order and Consent Decree, 30 FCC Rcd 4442 (EB 2015) (*iHeart Communications CD*) (radio broadcaster admitted that it transmitted EAS Tones during an entertainment program that “ultimately caus[ed] a multi-state activation of the EAS.”).

⁹⁰ See *Viacom Forfeiture Order*, 30 FCC Rcd at 797, para. 1; *Viacom NAL*, 29 FCC Rcd at 2563, paras. 32-34; *2013 EAS Enforcement Advisory*, 28 FCC Rcd at 15440; *Amendment of Part 11 of the Commission’s Rules Regarding the Emergency Alert System Wireless Emergency Alerts*, PS Docket Nos. 15-94, 15-91, Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 11112, 11127, paras. 18-19, 11146-50, paras. 50, 55-56 (2016).

⁹¹ See *Amendment of Part 11 of the Commission’s Rules Regarding the Emergency Alert System Wireless Emergency Alerts*, PS Docket Nos. 15-94, 15-91, Report and Order and Further Notice of Proposed Rulemaking, 33 FCC Rcd 7086, 7090, para. 9 (2018) (citing Comments of APCO International at 2-3 (discussing comments cautioning against overuse of the EAS Attention Signal and over-testing and supporting improved geo-targeting to avoid alert fatigue and promote greater trust of WEA alerts); Reply Comments of National Association of Broadcasters at 2 (discussing comments acknowledging that overuse of the EAS Attention Signal “can cause public fatigue”)); see also *Amendment of Part 11 of the Commission’s Rules Regarding the Emergency Alert System Wireless Emergency Alerts*, PS Docket Nos. 15-94, 15-91, Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 11112, 11149-50, paras. 55-56 (2016) (discussing multiple commenters’ concerns that over-alerting may lead to alert fatigue, which, in turn, may cause the public to ignore alert messages and desensitization).

⁹² See *Three Victims Identified in Deadly Storm Near Golden City, MO, KY3*, (May 22, 2019), <https://www.ky3.com/content/news/3-die-in-storm-Wednesday-night-near-Golden-City-Mo-510310801.html>; Ian Livingston, *At Least 225 Twisters in 12 Days: A Historic Tornado Outbreak Ravages the U.S.*, *The Washington Post* (May 29, 2019), https://www.washingtonpost.com/weather/2019/05/29/least-twisters-days-historic-tornado-outbreak-ravages-us/?noredirect=on&utm_term=.40a2c19e1b58.

⁹³ See 47 CFR § 11.31(a).

which CBS admits was derived from a recording of the Tones themselves. Protecting the alerting power of the EAS Tones requires government attention to police against inappropriate use of those sounds, but the restriction goes no further. Program producers and distributors remain free to use any other type of sound, alarm, klaxon, bell, whistle, or other signal to serve their expressive purposes in entertainment programming, and there is no limitation whatsoever on depictions of emergencies.⁹⁴

33. We also disagree with CBS's argument that the Commission should or must limit its enforcement of the Rule to commercials and promotions.⁹⁵ Such a step would make no sense. There is no basis for asserting that indiscriminate, non-emergency uses of the EAS Tones in dramatic, comedic, or educational programming are per se any less likely to confuse listeners or engender alert fatigue than are commercial or promotional uses of the tone. We note that it was an entertainment program, not a commercial, that caused a multi-state false activation of the EAS by misusing the EAS Tones during a 2014 broadcast.⁹⁶ CBS provides no evidence to bolster its suggestion beyond its own selective reading of Commission precedent.⁹⁷ There is nothing in the language of section 11.45 or the government interests it serves that would justify "channeling" the restriction to only certain types or classes of programming, and we decline to do so.

34. Moreover, to the extent that CBS suggests that the Commission should distinguish CBS' "delicate and tasteful use" of the EAS Tones in *Young Sheldon* from more obviously commercial uses of the EAS Tones in other programs, we reject that concept.⁹⁸ In other enforcement contexts, the Commission has resisted considering the relative "worthiness" of programming in determining the gravity of rule violations because the agency is mindful of the First Amendment constraints on its authority.⁹⁹ More importantly, such a content-based approach would not serve the fundamental government purpose of protecting the communicative meaning of the EAS Tones. It also seems likely to lead to greater industry confusion than the current standard.

35. *Void for vagueness.* Finally, we disagree with CBS's contention that section 11.45 is impermissibly vague on its face or as applied in the context of the enforcement action contemplated here. To the contrary, it is difficult to imagine a more specific description of what is prohibited than the plain language of section 11.45. In addition, the Commission's enforcement precedent has been straightforward and consistent. Any use of the EAS Tones, or a recording or simulation thereof, is prohibited except in actual emergencies or in the two other narrowly-defined Permitted Uses that are integral to the functioning of the system. CBS's claim that the Commission has failed to address non-

⁹⁴ See *2013 EAS Enforcement Advisory*, 28 FCC Rcd at 15440.

⁹⁵ See LOI Response at 9.

⁹⁶ See *iHeart Communications CD*.

⁹⁷ See *id.* CBS does not specifically explain how the Commission advisories and cases it has cited support its argument that entertainment programming warrants an explicit carve-out from the Rule while other programming content does not. See *2013 EAS Advisory*, 28 FCC Rcd 15438; *Viacom NAL*, 29 FCC Rcd 2548; *Viacom Forfeiture Order*, 30 FCC Rcd 797; *Waiver of Section 11.45 of the Commission's Rules to Allow Broadcast of Public Service Announcements by the Federal Emergency Management Agency to Educate the Public on the Wireless Emergency Alert System*, Order, 28 FCC Rcd 8176 (2013); *MMK License LLC CD*; *iHeart Communications CD*, 30 FCC Rcd 4442; *American Broadcasting Companies, Inc.*, Memorandum Opinion and Order, 83 FCC 2d 302, 306, para. 10 (1980).

⁹⁸ LOI Response at 7.

⁹⁹ See, e.g., *Fox Television Stations, Inc.*, Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 3964, 3970-71, paras. 15-17 (EB 2011), *aff'd*, Forfeiture Order, 26 FCC Rcd 9485 (EB 2011) (adjusting penalty based on consideration of the value of the content would "intrude on editorial judgment" of licensee, contrary to the protections of the First Amendment and Section 326 of the Act).

misleading dramatic portrayals is wrong. The Rule is constructed to plainly identify the few Permitted Uses of the EAS tones and prohibit all other uses. Furthermore, the Commission subsequently stated that “[s]ection 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.”¹⁰⁰ We affirm that guidance here.

IV. PROPOSED FORFEITURE

36. The Commission has previously applied an \$8,000 base forfeiture for violations of section 11.45.¹⁰¹ We find CBS responsible both for transmitting the program containing the simulated EAS Tones to its affiliates nationwide for broadcast and for broadcasting the simulated EAS Tones during the April 12, 2018, episode of *Young Sheldon* over 15 stations that it owns and operates. These were separate actions that resulted in separate transmissions of the simulated EAS Tones. In its capacity distributing *Young Sheldon* as a broadcast programming network, CBS made two transmissions of the April 12, 2018 episode of *Young Sheldon*, once for its East Coast affiliates and once for its West Coast affiliates.¹⁰² Thus, the base forfeiture is \$16,000 with respect to CBS’s actions as a broadcast programming network. In its capacity as a broadcast licensee, CBS broadcast the April 12, 2018, episode of *Young Sheldon* one time over each of its 15 television broadcast stations.¹⁰³ Thus, the base forfeiture is \$120,000 with respect to CBS’s actions as a broadcast licensee.

37. In exercising our forfeiture authority, however, we must consider the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, substantial economic gain, and such other matters as justice may require.¹⁰⁴ We have discretion to upwardly or downwardly adjust from the base forfeiture, taking into account the particular facts of each individual case.¹⁰⁵ The nature of EAS violations requires particularly serious consideration because, among other issues, such violations undermine the integrity of the EAS. 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.¹⁰⁶ Nonetheless, no single factor (e.g., the number of transmissions) is controlling. When applying the statutory factors concerning the circumstances, extent, and gravity of an EAS violation, we take into account a number of specific factors, including: (1) the number of repetitions (i.e., the number of individual transmissions); (2) the duration of the violation (i.e., the number of days or months over which the violation occurred); (3) the audience reach of the transmissions (e.g., nationwide, regional, or local); and (4) the extent of the public

¹⁰⁰ *Viacom Forfeiture Order*, 30 FCC Rcd at 801-02, para. 12.

¹⁰¹ See *Viacom Forfeiture Order*, 30 FCC Rcd at 804, para. 19; *Turner I*, 28 FCC Rcd at 15459, para. 11; *Turner II*, 29 FCC Rcd at 757, para. 12.

¹⁰² LOI Response at 12, 33 & CBS Affiliates Master Worksheet: 2017-2018 Season.

¹⁰³ *Id.*

¹⁰⁴ 47 U.S.C. § 503(b)(2)(E); 47 CFR § 1.80(b)(8), Note § II (articulating criteria for upward adjustments (egregious misconduct, ability to pay/relative disincentive, intentional violation, substantial harm, prior violations of any FCC requirements, substantial economic gain, and repeated or continuous violation) and downward adjustments (minor violation, good faith or voluntary disclosure, history of overall compliance, and inability to pay)).

¹⁰⁵ *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17098-99, para. 22 (1997) (*1997 Forfeiture Policy Statement*) (noting that “[a]lthough we have adopted the base forfeiture amounts as guidelines to provide a measure of predictability to the forfeiture process, we retain our discretion to depart from the guidelines and issue forfeitures on a case-by-case basis, under our general forfeiture authority contained in Section 503 of the Act”), *recons. denied*, Memorandum Opinion and Order, 15 FCC Rcd 303 (1999).

¹⁰⁶ See *Turner II*, 29 FCC Rcd at 757, para. 13.

safety impact (e.g., whether an EAS activation is triggered).¹⁰⁷

38. Reviewing these factors in this case, we find that an upward adjustment is warranted. With respect to the audience reach of its television broadcast stations, the Company stated in its most recent annual report that the Company's television stations are located in the five largest, and fifteen of the top twenty, television markets in the U.S. As such, the audience reach of each of the CBS owned and operated stations is considerable. In its capacity as a broadcast programming network, CBS transmitted the program twice—once to its East Coast affiliates and once to its West Coast affiliates.¹⁰⁸ CBS Television Network programming is broadcast by more than 200 broadcast affiliates nationwide. The fact that the Company's programming reached such potentially vast audiences increases the extent and gravity of the violations and therefore supports an upward adjustment. Other factors do not support an upward adjustment. With respect to the duration of the violations and the extent of the public safety impact, we note that the violations were limited to a single day and that there is no evidence that the transmissions of the EAS Tones by the CBS Television Network and the CBS owned and operated broadcast stations caused any activations of the EAS. Therefore, taking all of the factors into account, we find that doubling the proposed forfeiture to \$272,000 is appropriate in this case.

39. In contrast, we found nothing in the record that would warrant a reduction to the proposed forfeiture amounts. CBS's compliance history does not support a reduced forfeiture in this case.¹⁰⁹ CBS did not voluntarily disclose the violations, and there is nothing in the record that would indicate an inability to pay the proposed forfeiture.

40. Section 503(b)(2)(A) of the Act authorizes us to assess a forfeiture against CBS of up to \$50,334 per violation or for each day of a continuing violation, up to a statutory maximum of \$503,349 for a single act or failure to act.¹¹⁰ We note that the forfeiture amount proposed for the multiple apparent violations here does not exceed the maximum monetary forfeiture permissible under the Act and the Rules¹¹¹ and faithfully applies the statutory factors. Therefore, we find that a proposed forfeiture of

¹⁰⁷ *Id.*

¹⁰⁸ The LOI Response explains that Central and Mountain time stations used the East Coast feed to transmit the Programming.

¹⁰⁹ CBS has been the subject of recent enforcement actions in 2015, 2012, 2011, 2010, and 2009. *See CBS Radio Stations, Inc.*, Notice of Violation, 2015 WL 6870737 (EB 2015) (notice of violation for interference); *CBS Radio Holdings, Inc.*, Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 10099 (EB-IHD 2012) (violation of the contest rule) (forfeiture paid); *CBS Communications Services, Inc.*, Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 6151 (EB-WR 2011) (violation of antenna rule requirements) (forfeiture paid); *CBS Radio East*, Order and Consent Decree, 25 FCC Rcd 4390 (EB 2010) (settling alleged violation of contest rule); *CBS Radio Inc. of Philadelphia*, Order and Consent Decree, 24 FCC Rcd 12047 (EB 2009) (settling alleged violation of contest rule).

¹¹⁰ 47 U.S.C. § 503(b)(2)(A); 47 CFR § 1.80(b)(1). These amounts reflect inflation adjustments of the forfeitures specified in section 503(b)(2)(A). The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. No 114-74, § 701, 129 Stat. 584, 599 (2015 Inflation Adjustment Act) requires agencies, starting in 2017, to adjust annually the civil monetary penalties covered thereunder, and to publish each such annual adjustment by January 15. The 2015 Inflation Adjustment Act amended the Federal Civil Penalties Inflation Adjustment Act of 1990, which is codified, as amended, at 28 U.S.C. § 2461 note (Inflation Adjustment Act). The Bureau released the order making the 2019 annual adjustment on December 19, 2018. *See Amendment of Section 1.80(b) of the Commission's Rules, Adjustment of Civil Monetary Penalties to Reflect Inflation*, Order, DA 18-1272 (EB Dec. 19, 2018), 2018 WL 6722625; *see also Annual Adjustment of Civil Monetary Penalties to Reflect Inflation*, 83 Fed. Reg. 4600 (Feb. 1, 2019) (setting February 1, 2019, as the effective date for the increases). The 2015 Inflation Adjustment Act provides that the new penalty levels shall apply to penalties assessed after the effective date of the increase, "including [penalties] whose associated violation predated such increase." *See* 28 U.S.C. § 2461 note, citing Inflation Adjustment Act, as amended, § 6.

¹¹¹ *See* 47 U.S.C. § 503(b)(2)(D); 47 CFR § 1.80(b)(7).

\$272,000 is appropriate against CBS.¹¹²

V. ORDERING CLAUSES

41. Accordingly, **IT IS ORDERED**, pursuant to section 503(b) of the Act¹¹³ and section 1.80 of the Rules,¹¹⁴ that CBS Broadcasting, Inc. (in its own right and as parent of CBS Television Stations, Inc., CBS Stations Group of Texas LLC and CBS LITC, LLC) is hereby **NOTIFIED** of its **APPARENT LIABILITY FOR FORFEITURE** in the amount of \$272,000 for apparently willfully and repeatedly violating section 11.45.¹¹⁵

42. **IT IS FURTHER ORDERED**, pursuant to section 1.80 of the Rules,¹¹⁶ that within 30 calendar days of the release date of this Notice of Apparent Liability for Forfeiture, CBS, **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture consistent with paragraphs 45 and 46 below.

43. Payment of the forfeiture must be made by credit card, ACH (Automated Clearing House) debit from a bank account using the Commission's Fee Filer (the Commission's online payment system),¹¹⁷ or by wire transfer. The Commission no longer accepts forfeiture payments by check or money order. Below are instructions that payors should follow based on the form of payment selected:¹¹⁸

- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. A completed Form 159 must be faxed to the Federal Communications Commission at 202-418-2843 or e-mailed to RROGWireFaxes@fcc.gov on the same business day the wire transfer is initiated. Failure to provide all required information in Form 159 may result in payment not being recognized as having been received. When completing FCC Form 159, enter the Account Number in block number 23A (call sign/other ID), enter the letters "FORF" in block number 24A (payment type code), and enter in block number 11 the FRN(s) captioned above (Payor FRN).¹¹⁹ For additional detail and wire transfer instructions, go to <https://www.fcc.gov/licensing-databases/fees/wire-transfer>.
- Payment by credit card must be made by using the Commission's Fee Filer website at <https://apps.fcc.gov/FeeFiler/login.cfm>. To pay by credit card, log-in using the FRN captioned above. If payment must be split across FRNs, complete this process for each FRN. Next, select "Pay bills" on the Fee Filer Menu, and select the bill number associated with the NAL Account – the bill number is the NAL Account number with the first two digits excluded – and then choose the "Pay by Credit Card" option. Please note that there is a \$24,999.99-dollar limitation on credit card transactions.

¹¹² 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").

¹¹³ 47 U.S.C. § 503(b).

¹¹⁴ 47 CFR § 1.80.

¹¹⁵ *Id.* § 11.45.

¹¹⁶ 47 CFR § 1.80.

¹¹⁷ Payments made using the Commission's Fee Filer system do not require the submission of an FCC Form 159.

¹¹⁸ For questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone at 1-877-480-3201 (option #6), or by e-mail at ARINQUIRIES@fcc.gov.

¹¹⁹ Instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

- Payment by ACH must be made by using the Commission’s Fee Filer website at <https://apps.fcc.gov/FeeFiler/login.cfm>. To pay by ACH, log in using the FRN captioned above. If payment must be split across FRNs, complete this process for each FRN. Next, select “Pay bills” on the Fee Filer Menu and then select the bill number associated to the NAL Account – the bill number is the NAL Account number with the first two digits excluded – and choose the “Pay from Bank Account” option. Please contact the appropriate financial institution to confirm the correct Routing Number and the correct account number from which payment will be made and verify with that financial institution that the designated account has authorization to accept ACH transactions.

44. 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, SW, Room 1-A625, Washington, DC 20554.¹²⁰ Questions regarding payment procedures should be directed to the Financial Operations Group Help Desk, by phone at (877) 480-3201, or by e-mail at ARINQUIRIES@fcc.gov.

45. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to sections 1.16 and 1.80(f)(3) of the Rules.¹²¹ The written statement must be mailed to the Office of the Secretary, Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554, ATTN: Enforcement Bureau – Investigations & Hearings Division, and must include the NAL/Account Number referenced in the caption. The statement must also be e-mailed to Jeffrey Gee at Jeffrey.Gee@fcc.gov, Christopher Sova at Christopher.Sova@fcc.gov, Kenneth Scheibel at Kenneth.Scheibel@fcc.gov, and Jennifer A. Lewis at Jennifer.Lewis@fcc.gov.

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

47. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture shall be sent by first class mail and certified mail, return receipt requested, to Ms. Anne Lucey, Esq., Senior Vice President and Regulatory Policy, CBS Broadcasting Inc., 1725 DeSales Street, NW, Suite 501, Washington, DC 20036, with a copy to Kathleen A. Kirby, Esq., Eve Klindera Reed, Esq., Ari S. Meltzer, Esq., and Kathleen Scott, Esq., Counsel for CBS, Wiley Rein LLP, 1776 K Street, NW, Washington, DC 20006.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹²⁰ See 47 CFR § 1.1914.

¹²¹ *Id.* §§ 1.16, 1.80(f)(3).

**STATEMENT OF
COMMISSIONER GEOFFREY STARKS**

Re: *In the matter of CBS Broadcasting Inc., et al.*, File No. EB-IHD-18-00027139.

The Emergency Alert System (EAS) and Wireless Emergency Alert (WEA) tones that we use are sacrosanct. The only times a consumer should hear these actual or simulated tones blaring out of a television, radio, or wireless device are in the midst of an actual emergency, to be shortly followed by critical public safety information, or during a clearly defined test of the systems or Public Service Announcement about the systems. I support today's action, which appropriately holds a broadcaster accountable for misusing the tones.

Today's item is compelling, and includes analysis persuasively finding that the broadcaster apparently violated section 11.45 of the Commission's rules. I also would have supported a finding of apparent violations of section 325(a) of the Communications Act of 1934, as amended, prohibiting false distress communications.¹ Given the facts presented, I believe that such a finding would have been amply supported by Commission precedent² and Enforcement Bureau guidance.³

I appreciate the work of the Enforcement Bureau to prosecute this and other recent cases.⁴ Should broadcasters continue to run afoul of the clear and simple requirements imposed upon them by the Act and our Rules regarding the use of EAS tones, I would welcome additional enforcement action. When broadcasters make choices that negatively impact our ability to efficiently convey critical information in situations where life and limb are at risk, we must always be vigilant and respond appropriately.

¹ 47 U.S.C. § 325(a).

² See *Viacom, Inc., ESPN, Inc.*, Forfeiture Order, 30 FCC Rcd 797, 803, para. 14 (2015) (“...[T]he use of EAS Tones, whose sole purpose is to alert the public to emergency situations, in a nonemergency context, is by its nature false and constitutes a violation of Section 325(a), which prohibits false or fraudulent signals of distress.”); *Turner Broadcasting System, Inc.*, Notice of Apparent Liability for Forfeiture, 28 FCC Rcd 15455 (EB 2013) (*Turner I*); *Turner Broadcasting System, Inc.*, Notice of Apparent Liability for Forfeiture, 29 FCC Rcd 752 (2014) (*Turner II*); *Emmis Broadcasting Corp. of St. Louis*, Notice of Apparent Liability for Forfeiture, 6 FCC Rcd 2289 (1991).

³ See *Emergency Alert System: False, Fraudulent or Unauthorized Use of the Emergency Alert System Attention Signal and Codes is Strictly Prohibited*, Public Notice, DA 13-2123, 28 FCC Rcd 15438 (EB 2013); *False, Fraudulent or Unauthorized Use of the Emergency Alert System or Wireless Emergency Alert Codes or Attention Signals is Strictly Prohibited*, DA 19-758 (EB Aug. 15, 2019) (“False or fraudulent use of the EAS codes or EAS and WEA Attention Signals (or simulations thereof) also may violate section 325(a) of the Communications Act of 1934, as amended (Act), which prohibits transmission of false distress signals.”).

⁴ See *Tegna, Inc.*, Order and Consent Decree, 32 FCC Rcd 4582 (EB 2017); *Meruelo Radio Holdings, LLC*, Order and Consent Decree, DA 19-165 (EB Aug. 15, 2019); *ABC, Inc.*, Order and Consent Decree, DA 19-620 (EB Aug. 15, 2019); *AMC Networks, Inc.*, Order and Consent Decree, DA 19-621 (EB Aug. 15, 2019); *Discovery, Inc.*, Order and Consent Decree, DA 19-626 (EB Aug. 15, 2019).