

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

In the Matter of
Clarendon Foundation, Inc.
File No.: EB-IHD-19-00029569
NAL/Acct. No: 202132080007
FRN: 0006054613

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

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By the Commission: Commissioners Rosenworcel and Starks dissenting and issuing separate statements.

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I. INTRODUCTION

1. Under the Federal Communications Commission’s (FCC or Commission) antecedent rules, an Educational Broadband Service (EBS) licensee that leased its spectrum had to reserve a minimum of 5% of its spectrum capacity and provide 20 hours minimum of educational use per channel per week, a licensee was also required to establish a Local Program Committee in each community where it did not have a local presence. Today, the Commission affirms that it will hold EBS licensees accountable for fulfilling these public interest obligations that were an integral part of their authorizations.

1 47 CFR § 27.1214(b)(1) (2019).

2 47 CFR § 27.1201(a)(4) (2019).

In this Notice of Apparent Liability for Forfeiture, we propose a forfeiture penalty of \$3,346,000 against Clarendon Foundation, Inc. (Clarendon) for its apparently willful violations of the Commission's EBS rules.

2. While the Commission's rules permitted EBS licensees to rely on the provision of broadband or video service in fulfilling the 20-hour requirement,³ based on our investigation,⁴ we find that Clarendon apparently is unable to demonstrate that the broadband service it offered to educational institutions ultimately met the Commission's threshold requirement to provide 20 hours per channel per week of educational use. Additionally, Clarendon apparently failed to comply with the Commission's long-standing rule requiring the maintenance of a Local Program Committee in each of the non-local communities it serves. In short, Clarendon appears to have taken on EBS licenses and enjoyed the flexibility afforded by the Commission to lease out most of the licensed spectrum for non-educational purposes—but did not act with the same diligence concerning its educational obligations. Instead, Clarendon reaped financial benefits from the leasing of its EBS licenses while failing to meet its requirements under the Commission's rules for holding these licenses.⁵

II. BACKGROUND

3. In 1963, the Commission established the Instructional Television Fixed Service (ITFS), the precursor to EBS, to enhance the educational experiences and opportunities for millions of America's students.⁶ In creating the ITFS, the Commission envisioned the 2500-2690 MHz band would be used for the transmission of “visual and accompanying aural instructional material to accredited public and private schools, colleges and universities for the formal education of students.”⁷ In 2004, the Commission reorganized the ITFS as the EBS and updated the rules to allow for greater technical flexibility in the use of this spectrum—while retaining specific educational obligations.⁸ The primary purpose of the service remained to “further the educational mission of accredited public and private schools, colleges and universities providing a formal educational and cultural development to enrolled students” through video, data, or voice transmissions.⁹

³ See, e.g., 47 CFR § 27.1201(a)(3) (2019).

⁴ In July 2019, Commissioner Brendan Carr sent a letter to Clarendon requesting information regarding its compliance with these requirements for EBS licensees. Letter from Brendan Carr, Commissioner, Federal Communications Commission, to Jeffrey Jones, President, Clarendon Foundation, Inc. (July 11, 2019) (on file in EB-IHD-19-00029569) (Carr Letter). The Enforcement Bureau subsequently issued a Letter of Inquiry to Clarendon, initiating an investigation into whether it violated the Commission's rules governing EBS licensing requirements. Letter of Inquiry from Jeffrey J. Gee, Chief, Investigations and Hearings Division, FCC Enforcement Bureau, to Jeffrey Jones, President, Clarendon Foundation, Inc. (Aug. 6, 2019) (on file in EB-IHD-19-00029569) (LOI).

⁵ According to Clarendon, as of 2017 the current value of its combined assets was approximately \$9,379,933 and its reported revenue was \$1,705,440. Response to Letter of Inquiry, from Clarendon Foundation, Inc., to Marlene H. Dortch, Secretary, FCC, at 32, CF-R4604 (Oct. 2, 2019) (on file in EB-19-00029569) (Clarendon Response) (Clarendon's Internal Revenue Form (IRS) Form 990, “Return of Organization Exempt from Tax,” 2017 tax year beginning July 1, 2017 and ending June 30, 2018).

⁶ See *Amendment of Parts 2 and 4 of the Commission Rules and Regulations to Establish a New Class of Educational Television Service for the Transmission of Instructional and Cultural Material to Multiple Receiving Locations on Channels in the 1990-2110 MC/S or 2500-2690 MC/S Frequency Band et al.*, Report and Order, 39 F.C.C. 846, 852-53, para. 25 (1963) (*Educational TV Order*), recons. denied, 39 F.C.C. 873 (1964).

⁷ See *Educational TV Order*, 39 F.C.C. at 852-53, para. 25.

⁸ *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands et al.*, WT Docket No. 03-66, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14165 (2004) (*2004 EBS Order*).

⁹ 47 CFR § 27.1203(b) (2019).

4. The FCC encumbered EBS licenses with unique eligibility and other regulatory requirements to ensure that this spectrum would be used to achieve those educational purposes. To ensure the continuity of the ITFS's educational purpose, the Commission imposed the existing ITFS requirements upon EBS licensees, including the establishment of a Local Program Committee in each community where the licensee does not have a local presence (the Local Program Committee requirement),¹⁰ and the requirement that a licensee entering into any spectrum lease must reserve a minimum of 5% of its spectrum capacity and provide 20 hours minimum of educational use per channel per week (the 20-hour requirement).¹¹ Upon obtaining their licenses, EBS licensees took on the responsibility to ensure that the EBS educational mission would be faithfully administered and delivered to the appropriate educational institutions and their students.

A. Legal Framework

1. EBS Minimum Educational Use Requirements

5. For over 50 years, from 1963¹² until repeal of the requirement effective April 27, 2020,¹³ the Commission's rules imposed an educational use requirement on all EBS licensees (or their ITFS predecessors). When the Commission established ITFS in the 2500-2690 MHz band,¹⁴ it envisioned that the band would be used for transmission of instructional material to accredited public and private schools, colleges, and universities for the formal education of students.¹⁵ The Commission also permitted ITFS licensees to use the channels to transmit cultural and entertainment material to educational institutions, and to transmit instructional material to non-educational institutions such as hospitals, nursing homes, training centers, clinics, rehabilitation centers, commercial and industrial establishments, and professional groups.¹⁶ ITFS licensees were also allowed to use their systems to perform related services directly concerned with formal or informal instruction and training, and to carry administrative traffic when not being used for educational purposes.¹⁷

6. The Commission expanded the kinds of services that would qualify as "educational use" over the years. For example, in light of the "increasing use of the Internet for educational purposes," the Commission permitted ITFS/EBS licensees of all types to take advantage of changes in technology, including the introduction of broadband.¹⁸ The Commission similarly no longer limited permitted services to "in-classroom instruction."¹⁹ In expanding permitted use, however, the Commission retained

¹⁰ See *2004 EBS Order*, 19 FCC Rcd at 14222, 14234, paras. 152, 181; see also 47 CFR § 27.1201(a)(4) (2019); *Amendment of Part 74 of the Commission's Rules and Regulations in Regard to the Instructional Television Fixed Service*, MM Docket No. 83-523, Second Report and Order, 101 F.C.C.2d 49, 62, paras. 28-29 (1985) (*1985 ITFS Report and Order*).

¹¹ See *2004 EBS Order*, 19 FCC Rcd at 14234, para. 181; see also 47 CFR § 27.1214(b)(1) (2019).

¹² See *Educational TV Order*, 39 F.C.C. at 852-53, para. 25.

¹³ See *Transforming the 2.5 GHz Band*, 84 Fed. Reg. 57343 (Oct. 25, 2019) (*2.5 GHz Fed. Reg. Notice*); see also *Transforming the 2.5 GHz Band*, WT Docket No. 18-120, Report and Order, 34 FCC Rcd 5446, 5489-90, paras. 117, 124 (2019) (*2019 EBS Order*).

¹⁴ See generally *Educational TV Order*.

¹⁵ See *Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in Regard to Frequency Allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service et al.*, GN Docket No. 80-112, Report and Order, 94 F.C.C.2d 1203, 1208, para. 9 (1983) (*1983 R&O*) (citing *Educational TV Order*, 39 F.C.C. at 853, para. 25).

¹⁶ See *id.*

¹⁷ See *id.*

¹⁸ *2004 EBS Order*, 19 FCC Rcd at 14222, para. 151.

¹⁹ *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, (continued....)

its “content restrictions,” and emphasized that the purpose of this spectrum assignment would be to “maintain the traditional educational purposes” of the original ITFS service.²⁰ Thus, the Commission continued to require channels to be used to “further the educational mission of accredited schools offering formal educational courses to enrolled students.”²¹ The Commission repeatedly reaffirmed the applicability of the educational use requirement as a means of “safeguarding the primary educational purpose” of the spectrum.²²

7. In the 2000s, a series of Commission Orders rebranded ITFS to EBS and changed certain technical rules to better reflect the likely use of the band going forward.²³ Significant changes were made to the EBS band plan in 2004, in part because the existing band plan had been designed for broadcast services as opposed to broadband.²⁴ The Commission explicitly declined to relax the educational requirements or eligibility restrictions then in place, however, citing the public interest in the educational purpose of the band.²⁵ In 2006, the Commission made further changes to the band plan transition rules and mechanisms, but declined to make changes to any educational requirements.²⁶ The Commission again revisited certain issues regarding the band plan transition in 2008, and made a number of other small changes to the rules, but did not amend the educational use requirements.²⁷

8. Despite these modifications and revisions to this band, the Commission’s rules included a specific mandate for EBS licensees leasing their excess capacity and using digital transmissions to “provide at least 20 hours per licensed channel per week of EBS educational usage.”²⁸ This 20-hour requirement is “appl[ied] spectrally over the licensee’s whole actual service area.”²⁹ Although the

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WT Docket No. 03-66, Order on Reconsideration and Fifth Memorandum Opinion and Order and Third Memorandum Opinion and Order and Second Report and Order, 21 FCC Rcd 5606, 5718, para. 273 (2006) (*2006 EBS Order*); see also 47 CFR § 27.1203(c) (2019); *Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions*, MM Docket No. 97-217, Report and Order, 13 FCC Rcd 19112, 19154-55, para. 81 (1998) (*Two-Way Order*).

²⁰ *2004 EBS Order*, 19 FCC Rcd at 14222, 14234, paras. 152, 181; *accord Two-Way Order*, 13 FCC Rcd at 19159-60, paras. 89-90.

²¹ 47 CFR § 27.1203(b) (2019); see also *Two-Way Order*, 13 FCC Rcd at 19154, para. 81 & n.189 (noting that the transmissions also could be in furtherance of the educational mission of “other eligible institution[s]”).

²² *Two-Way Order*, 13 FCC Rcd at 19159-60, paras. 89-90; *accord 2006 EBS Order*, 21 FCC Rcd at 5701, para. 227; *2004 EBS Order*, 19 FCC Rcd at 14222, 14234, paras. 152, 181.

²³ *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands et al.*, WT Docket No. 03-66, Third Order on Reconsideration and Sixth Memorandum Opinion and Order and Fourth Memorandum Opinion and Order and Second Further Notice of Proposed Rulemaking and Declaratory Ruling, 23 FCC Rcd 5992, 5996 (2008) (*2008 EBS Order*). See *2006 EBS Order*, 21 FCC Rcd at 5612, para. 4; *2004 EBS Order*, 19 FCC Rcd at 14169, para. 6.

²⁴ See *2004 EBS Order*, 19 FCC Rcd at 14177, 14182-84, paras. 22, 36-39.

²⁵ See *id.* at 14223, para. 152; see also *id.* at 14234, para. 181.

²⁶ See *2006 EBS Order*, 21 FCC Rcd at 5699-701, paras. 223-28 (rejecting a proposal to increase the minimum educational use requirements and to provide guidance on meeting those requirements).

²⁷ See *2008 EBS Order*, 23 FCC Rcd at 6048-50, paras. 146-49.

²⁸ 47 CFR § 27.1214(b)(1) (2019).

²⁹ *Id.*

mandate applied “before leasing excess capacity,” i.e., as a prerequisite to any such lease, it extended throughout the lease term as well.³⁰

9. The Commission has long been loath to substitute its judgment for that of educational authorities concerning what content or use is regarded as educational, where such use otherwise complies with Commission requirements.³¹ Instead, the Commission stated that it would rely on the “good-faith efforts” of licensees to ensure compliance with the educational use requirements.³² The Commission cautioned, however, that licensees may bear the burden of proving compliance with the educational use requirements in audits and other situations.³³ In those situations, “licensees must be ready and able to describe *and document* how they complied with [the educational-use] requirements.”³⁴ The Commission’s rules also recognized that the services required of EBS licensees should be provided “in a manner and in a setting conducive to educational usage.”³⁵

2. EBS Local Program Committee Requirement

10. As part of ensuring that the educational purpose of the ITFS/EBS band was carried out, the Commission limited eligibility for ITFS licenses to entities meeting certain qualifications. The *Educational TV Order* limited eligibility to “institutional or governmental organization[s] engaged in the formal education of enrolled students or to a nonprofit organization formed for the purpose of providing instructional television material to such institutional or governmental organizations.”³⁶ The Commission declined to expand the categories of entities eligible to obtain licenses to include either “commercial organizations such as private vocational schools, professional associations, language schools, dancing academies, etc.,” or municipal services such as training police officers or public health workers, in order to ensure adequate spectrum availability to meet educational demands.³⁷ The strong focus on direct education of students was thus a cornerstone of the Commission’s eligibility requirements from the beginning of the ITFS/EBS service.

11. In 1985, the Commission reexamined the eligibility requirements for the band.³⁸ At the time, many commenters asked the Commission to limit eligibility for ITFS licenses to local applicants.³⁹ The Commission recognized that “[l]ocally based educational entities have been convincingly demonstrated by the comment[e]rs to be the best authorities for evaluating their educational needs and the needs of others they propose to serve in their communities, for designing courses to suit those needs, and for scheduling courses during the school year.”⁴⁰ But because the Commission believed that national organizations could “have a significant role to play in the development and delivery of ITFS service,” the

³⁰ See, e.g., *id.* § 27.1214(b)(2) (2019); *2019 EBS Order*, 34 FCC Rcd at 5448, para. 7; *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands et al.*, WT Docket No. 03-66, Notice of Proposed Rulemaking, 33 FCC Rcd 4687, 4689, para. 4 (2018); *2004 EBS Order*, 19 FCC Rcd at 14234, para. 181.

³¹ *Two-Way Order*, 13 FCC Rcd at 19154, para. 81 n.188; see also *1985 ITFS Report and Order*, 101 F.C.C.2d at 80, para. 75.

³² *Two-Way Order*, 13 FCC Rcd at 19162, para. 94; see also *2006 EBS Order*, 21 FCC Rcd at 5701, para. 227.

³³ See *Two-Way Order*, 13 FCC Rcd at 19154, 19162, paras. 81 n.188, 94.

³⁴ *Id.* at 19162, para. 94 (emphasis added).

³⁵ 47 CFR § 27.1201(a)(3) (2019).

³⁶ See *Educational TV Order*, 39 F.C.C. at 864; see also *id.* at 853-54, paras. 27-29.

³⁷ See *id.* at 854, para. 28.

³⁸ See *1985 ITFS Report and Order*, 101 F.C.C.2d at 62, paras. 28-29.

³⁹ *Id.* at 54, para. 8.

⁴⁰ *Id.* at 56, para. 16.

Commission did not ban non-local applicants.⁴¹ Instead, recognizing the importance of ensuring adequate educational use of the service, the Commission established special requirements for non-local applicants, including a requirement to provide letters from local accredited educational institutions demonstrating that the applicant's programming would be incorporated into the institution's curriculum⁴² and a requirement to establish a Local Program Committee.⁴³

12. The Commission established the Local Program Committee requirement in the *1985 ITFS Report and Order* as part of an effort to adequately support and preserve the educational nature of the ITFS band.⁴⁴ The rule required that “[n]onlocal applicants, in addition to submitting letters from proposed receive sites, must demonstrate the establishment of a local program committee in each community where they apply.”⁴⁵ Each receive site letter was required to include confirmation that a member of the institution's staff would serve on the Local Program Committee and show that the representative would aid in the selection, scheduling, and production of the programming received over the system.⁴⁶ The Commission established this requirement to ensure that, when a licensee was not an accredited local educational institution, the licensee's spectrum nonetheless was used for educational purposes appropriate to the local community.⁴⁷

13. The Local Program Committee requirement remained in effect even while other alterations were made to reflect the changed regulatory circumstances of the band. In 2004, the Commission reorganized the original part 74 rules into part 27, but made no modifications to the rule text.⁴⁸ When the Commission modified several rules relating to EBS educational requirements in 2008, including certain other requirements for non-local licensees, it did not alter the Local Program Committee requirement.⁴⁹ Instead, the Commission modified section 27.1201(a)(3) of the Commission's rules to better accommodate both technological and regulatory developments.⁵⁰ While the expansion of services available through EBS licenses and spectrum has grown to include broadband and data services, EBS licensees remained obligated to use their channels to “further the educational mission of accredited schools offering formal educational courses to enrolled students.”⁵¹ EBS licensees were thus obligated to ensure they were meeting their requirement to deliver the content and educational use that was relevant to the local communities they serve.

B. Factual Background

14. Clarendon Foundation, Inc. is a Virginia not-for-profit corporation formed in 1991.⁵² Clarendon holds 22 EBS licenses⁵³ and has entered into spectrum leasing agreements for 21 of them.⁵⁴

⁴¹ *Id.* at 56, para. 17.

⁴² *Id.* at 60-62, paras. 25-27.

⁴³ *Id.* at 62, para. 28.

⁴⁴ *See id.* at 62, paras. 28-29.

⁴⁵ *See id.* at 110; 47 CFR § 74.932(a)(5) (1985); 47 CFR § 27.1201(a)(4) (2019).

⁴⁶ *See 1985 ITFS Report and Order*, 101 F.C.C.2d at 62, para. 29.

⁴⁷ *See id.* at 62, para. 28.

⁴⁸ *See 2004 EBS Order*, 19 FCC Rcd at 14236, para. 186.

⁴⁹ *See 2008 EBS Order*, 23 FCC Rcd at 6048-50, paras. 146-49.

⁵⁰ *Id.*

⁵¹ 47 CFR § 27.1203(b) (2019); *see also id.* § 27.1201(a)(3) (stating that where broadband or data services are proposed, the receive-site letter “should indicate that the data services will be used in furtherance of the institution's educational mission and will be provided to enrolled students, faculty and staff in a manner and in a setting conducive to educational usage”).

⁵² Clarendon Response at 1.

Most of its spectrum leasing agreements are with Sprint Corporation subsidiaries and affiliates.⁵⁵ Each lease agreement includes a provision that the licensee reserves a minimum channel capacity required by FCC rules without specifically referencing the 5% reserved channel capacity for educational use.⁵⁶

15. Clarendon asserts that it “operate[s] exclusively for the promotion of non-profit charitable and educational purposes.”⁵⁷ While its mission is ostensibly educational in nature, Clarendon’s primary focus is on its distribution of hardware for broadband data service to its remaining receive sites.⁵⁸ Specifically, Clarendon states that it provides each of its educational institution receive sites with hardware, such as portable tablets and modems, for the schools to gain access to the broadband data service offered over Clarendon’s licensed spectrum, at no charge, twenty-four hours a day, seven days a week.⁵⁹ Clarendon also claims that the educational institution receive sites use the broadband data service for the following purposes: (1) research outlets for students, teachers, and administration; (2) “connect[ing] attendance administrators to district resources while they are travelling to different schools within the district;” (3) supplementing teachers’ classroom capabilities; and (4) “teaching technical skills to students.”⁶⁰ Clarendon does not dictate how schools utilize its freely provided equipment; rather, Clarendon’s devices merely “support schools with access” to data service which the educational institutions determine how best to use in order to serve their students’ needs.⁶¹

16. Clarendon’s lease agreements, however, are silent regarding the 20-hour requirement.⁶² Clarendon states that it provides both broadband access via its free-of-charge equipment and access to educational materials via its nationwide “web-based content platform.”⁶³ Clarendon admits that it has ceased to provide service to nine of its receive sites for reasons ranging from “lack of communication” to

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⁵³ *Id.* at 1, 9-10. Clarendon also held a nationwide Citizens Broadband Radio Services authorization between 2009 and 2019. *See id.* at 5. Clarendon no longer provides service to nine of its receive sites. *Id.* at 8-14 (indicating Clarendon has not provided service to Polston Primary School since 2018, Evans Elementary School since 2018, Boyd Elementary School since 2018, Natrona County School District since 2018, Lubbock ISD since 2017, South Florida Community College since 2019, Sheridan Junior High School since 2016, Woodland Park Elementary School since 2016). *Id.* at 8-14.

⁵⁴ *Id.* at 26-27. Clarendon has not entered into a lease agreement for Station WNC938.

⁵⁵ Two of the 21 license spectrum leases are directly with Clearwire Spectrum Holdings, LLC, two of the leases are with Clearwire Spectrum Holdings II, LLC, seven of the leases are with Clearwire Spectrum Holdings III, LLC, five of the leases are with American Telecasting Development, LLC, one of the leases is with American Telecasting of Columbus, LLC, three of the leases are with Rhino Communications, Inc., and one lease is with PCTV Gold II, LLC *Id.* at 26-27. All the named lessees except Rhino Communications, Inc. are owned by Sprint Corporation. *See* Sprint Corp., Annual Report (Form 10K) at Exh. 21 (May 29, 2019), <https://www.sec.gov/Archives/edgar/data/101830/000010183019000022/sprintcorp10-kexhibit21201.htm> (last visited Oct. 2, 2020). T-Mobile has since acquired Sprint in a merger that was approved by the Commission in 2019. *See Applications of T-Mobile US, Inc., and Sprint Corporation, et al., for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, Declaratory Ruling, and Order of Proposed Modification, 34 FCC Rcd 10578 (2019).

⁵⁶ Clarendon Response at 29.

⁵⁷ *Id.* at 5.

⁵⁸ *Id.* at 6.

⁵⁹ *Id.* (“Clarendon has 127 broadband modems and 117 data enabled tablets placed at receive sites.”).

⁶⁰ *Id.* at 8-14.

⁶¹ *Id.* at 6.

⁶² 47 CFR § 27.1214(b)(1) (2019).

⁶³ Clarendon Response at 6.

inoperable channels.⁶⁴ In addition, Clarendon acknowledged that, even where it maintains service, it lacks any documentation of usage because it asserts that “no such documentation was required.”⁶⁵

17. By its own admission, Clarendon also failed to maintain any Local Program Committees.⁶⁶ Clarendon claims that while Local Program Committees must have been formed for each of its licenses since those licenses were approved by the Commission, Clarendon lacks any documentation to demonstrate the formation of the Local Program Committees.⁶⁷ Clarendon also claims that, because regulatory changes vacated the legal requirement to maintain Local Program Committees, the Local Program Committees ceased to exist.⁶⁸

III. DISCUSSION

A. Clarendon Did Not Demonstrate Its Compliance with the Minimum Educational Use Requirement for EBS Licensees

18. Our LOI requested information regarding the status of Clarendon’s EBS licenses since 2009. Nonetheless, the statute of limitations for this action is one year,⁶⁹ and accordingly we focus our review on Clarendon’s EBS license compliance for the period from December 9, 2019, until April 27, 2020, when the educational use requirements were eliminated.⁷⁰ Clarendon’s violations, however, appear to extend back several years prior to this review period. During this period, the Commission’s EBS rules gave licensees the flexibility to enter into a spectrum leasing arrangement to transmit material other than educational programming if the licensee: (1) reserved a minimum of 5% of the capacity of its channels for educational uses consistent with section 27.1203(b) and (c) of the Commission’s rules,⁷¹ and (2) provided at least 20 hours per licensed channel per week of EBS educational use.⁷²

19. Based on our review of the record, the terms of Clarendon’s lease agreements, and the information provided in this investigation, Clarendon failed to provide sufficient documentation and information describing how it complied with and met the 20-hour requirement for leased spectrum.⁷³ Clarendon claims that it fulfilled its 20-hour requirement by providing equipment, such as portable hotspots, data-enabled devices, and modems, along with access to data services over the Sprint network to the receive sites located in its licensed areas.⁷⁴ Clarendon further asserts that it fulfilled the 20-hour requirement because the schools actually used the broadband service for a variety of educational

⁶⁴ See *supra* note 52 (identifying unserved receive sites).

⁶⁵ Clarendon Response at 7.

⁶⁶ *Id.* at 23.

⁶⁷ *Id.* at 20.

⁶⁸ *Id.* at 23-24.

⁶⁹ The applicable statute of limitations for these violations is one year. See 47 U.S.C. § 503(b)(6).

⁷⁰ Although the educational use requirements of section 27.1214(b)(1) of the Commission’s rules were eliminated effective April 27, 2020, Clarendon and the Enforcement Bureau entered into a tolling agreement regarding the Enforcement Bureau’s investigation into Clarendon’s EBS practices. See Tolling Agreement Executed between Clarendon Foundation, Inc. and Federal Communications Commission (executed Oct. 26, 2020) (on file in EB-IHD-19-00029569) (Tolling Agreement). The Tolling Agreement extended the relevant statute of limitations period for each potential violation for 30 calendar days. Thus, this Notice of Apparent Liability addresses apparent violations that occurred between December 9, 2019, and April 27, 2020.

⁷¹ 47 CFR § 27.1203(b)-(c) (2019).

⁷² *Id.* § 27.1214(b)(1) (2019).

⁷³ *Id.*

⁷⁴ Clarendon Response at 6, 8-14.

purposes.⁷⁵ No documentation was provided by Clarendon, however, to support this claim. Clarendon's distribution of hardware, however, only guarantees that the receive sites have equipment capable of receiving Clarendon's data service. It does not guarantee the use of that hardware or service by the educational institutions and does not show that any such use complies with the Commission's 20-hour requirement for EBS licensees that lease out their spectrum. Clarendon is unable to provide any evidence that it provided any equipment or service to its educational institutions that actually supported educational use by these receive sites.

20. Under Clarendon's plan, the access to broadband or data services did not occur unless and until an accredited institution or its enrolled students, faculty or staff took actions to successfully connect to and use the Internet connectivity using the provided connection devices (e.g., a portable hotspot or router). Under the Commission's rules, however, it is an educational institution's actual use of data services, not its mere ability to use them, that matters when determining whether an EBS licensee that leases its excess spectrum has satisfied the Commission's 20-hour requirement. Clarendon's *laissez-faire* attitude towards complying with the Commission's 20-hour requirement has resulted in apparent failures to meet its obligations as an EBS licensee, including failures to meet the rule's benchmark or, more fundamentally, to address the educational needs of the affected students and faculty.

21. Clarendon cannot describe or provide information regarding the state of its operations and educational use at the institutions within its license areas during the period under review. By its own admission, Clarendon neither collected nor submitted any documentation of educational use by its receive sites since 2011.⁷⁶ Indeed, service was halted to no less than four of Clarendon's receive sites in 2018 for blatant "lack of communication."⁷⁷ The Commission relies on the "good faith efforts" of licensees to comply with its educational use requirements.⁷⁸ But licensees bear the burden of proving compliance with the educational use—and "must be ready and able to describe *and document* how they complied with [the educational-use] requirements."⁷⁹ Without evidence or documentation of any use by the institutions in its licensed areas, Clarendon was derelict in fulfilling its responsibility to comply with the Commission's 20-hour requirement. Clarendon has failed to demonstrate that the schools and other institutions actually used the provided equipment to access the Internet or further their educational missions. This failure further highlights Clarendon's shortcomings in meeting the Commission's 20-hour requirement at the educational institutions located within its 21 leased EBS licenses.

22. Clarendon claims that it provides a full elementary curriculum to 11 of its receive sites, and that up to 45% of its corporate time is devoted to the creation and distribution of web-based educational content accessible by anyone nationwide.⁸⁰ Clarendon never demonstrated, however, which (if any) receive sites actually engaged with the provided curriculum, or whether those sites' use of

⁷⁵ *Id.* (explaining how Clarendon believes each receive site utilizes its service and equipment).

⁷⁶ *See id.* at 7 (noting Clarendon has not submitted any documentation of receive site use to the Commission.); *see also id.* at 30 (noting that, notwithstanding the LOI's direction that Clarendon supply all documents supporting its claims of receive site use, only the 2011 substantial service demonstrations create the foundation for its responses concerning use, and providing no other correspondence with receives sites to support its assertions of educational use at pages 8-14 of the Response).

⁷⁷ *Id.* at 9-10 (referencing three receive sites for WNC802 and one receive site for WQCR282).

⁷⁸ *Two-Way Order*, 13 FCC Rcd at 19162, para. 94; *see also 2006 EBS Order*, 21 FCC Rcd at 5701, para. 227.

⁷⁹ *Two-Way Order*, 13 FCC Rcd at 19162, para. 94 (emphasis added).

⁸⁰ Clarendon Response at 6, 8-14. Although Clarendon cites its curriculum as an offering to receive sites in addition to its hardware provisions, the curriculum was not truly "given" to receive sites. Instead, receive sites had the option to access Clarendon's curriculum if they chose to via Clarendon's free and publicly accessible database of educational resources. *Id.* at 6. Thus, just like providing a modem does not guarantee the recipient will use the modem, offering "access" to an already-accessible database of free curriculum similarly does not guarantee use by the recipient. This means that even Clarendon's curriculum offerings to certain receive sites were likewise insufficient to show educational use.

Clarendon's educational content ever met the 20-hour requirement during any given week of the relevant period.

23. The Commission's reluctance to substitute its judgment for that of educational authorities concerning what content or use is regarded as educational does not excuse Clarendon's conduct here because Clarendon has not pointed us to the use of *any* educational content in this case nor has Clarendon otherwise established that the content or use of the relevant EBS licenses satisfy the Commission's rules. In fact, Clarendon's response indicates that Clarendon has no idea how or whether any of the educational institutions in its licensed areas are using its services. There may be a case where a question arises about whether particular content does or does not qualify as sufficiently educational in nature, but this does not appear to be one of those cases. By choosing to lease out the spectrum associated with its EBS licenses, Clarendon became responsible for complying with the 20-hour requirement in former section 27.1214(b)(1) of the Commission's rules. Clarendon has failed to demonstrate that it satisfied this specific rule requirement.

24. The Commission's rules contemplated that broadband and data services would be used to further the receive site's educational mission and would be provided to enrolled students, faculty, and staff in a manner and in a setting conducive to educational uses.⁸¹ Clarendon's mere distribution of hardware to its educational institution receive sites failed to meet this requirement. It was incumbent upon Clarendon, as the EBS licensee, to ensure that the hardware was being put towards that 20-hour requirement. Clarendon, however, failed to conduct any follow-up with its receive sites to ensure that the provided hardware or curriculum was being put towards any use, let alone an educational one. We find that Clarendon has failed to demonstrate that it provided 20 hours per licensed channel per week of EBS educational use and was therefore in apparent violation of former section 27.1214(b)(1) of the Commission's rules.⁸²

B. Clarendon Failed to Maintain Local Program Committees

25. Beginning 25 years ago, the Commission's rules required non-local ITFS applicants to establish a Local Program Committee in each community they proposed to serve.⁸³ While the Commission created no "detailed regulatory requirements" concerning the composition of the committees, this did not permit them to dissolve.⁸⁴ Instead, the Commission made clear from the beginning that these committees must persist, noting that "[e]ach receive site, however, should have some representation so that its particular programming and scheduling needs will be considered."⁸⁵ Since its adoption in section 74.932(a)(5) note 3, and until recently as section 27.1201(a)(4), the language of the rule required the appointment of a member of the receive site's staff who "will serve" on the Local Program Committee and "will aid in the selection, scheduling and production of the programming."⁸⁶ The Commission relied upon this statement in the future tense, indicating an ongoing and continuing state of affairs, in approving these licenses. Moreover, the rule's reference to "scheduling" similarly indicates that the Commission intended for the Local Program Committee to provide ongoing assistance throughout the license term.

26. Clarendon admits that while it did establish Local Program Committees when it applied for each of its receive sites, it "does not currently have any local program committees in the communities served by its EBS stations" and does not offer evidence that local programming committees existed during the period under review in this investigation. Clarendon's apparent failure to comply with the

⁸¹ 47 CFR § 27.1201(a)(3) (2019).

⁸² *Id.* § 27.1214(b)(1) (2019).

⁸³ *1985 ITFS Report and Order*, 101 F.C.C.2d at 62, para. 28.

⁸⁴ *Id.* at 62, para. 29.

⁸⁵ *Id.*

⁸⁶ 47 CFR § 27.1201(a)(4) (2019); 47 CFR § 7.932(a)(5), note 3 (1985).

Commission's requirement for Local Program Committees means that the local communities that Clarendon was supposed to serve via its 22 licenses lacked the mechanism for local input and feedback envisioned by the Commission's rules. Indeed, were it the case that Clarendon had maintained Local Program Committees, it is possible that Clarendon would have also been more careful about its responsibility to confirm that the programming substitute was actually provided to the educational and public institutions, instead of simply being offered without any follow-up.

27. Clarendon's claims that with the transition to wireless broadband service, the "concept of a local program committee is no longer relevant"⁸⁷ is meritless. While the Commission has modified the EBS rules throughout the years,⁸⁸ the Commission did not alter or eliminate the requirement for Local Program Committees until recently.⁸⁹ Although modifications to the EBS rules in 2008 included adjustments to other requirements for non-local licensees, the Local Program Committee requirement remained intact.⁹⁰ The 2008 rule revisions demonstrated that the Commission was aware of the changed circumstances for the ITFS/EBS band since 1985, and nonetheless chose to retain the Local Program Committee requirement. Thus, Clarendon's failure to maintain Local Program Committees constituted an apparent violation of former section 27.1201(a)(4) of the Commission's rules.⁹¹ The Local Program Committee requirement cannot be "willed away" by Clarendon or any other licensee because of a self-serving belief that the technological changes in the EBS service obviated an explicit requirement in the Commission's rules. The responsibility for determining the elimination or modification of a Commission rule lies with the Commission, not a licensee.

28. Finally, Clarendon's creation of Local Program Committees as part of its original applications did not absolve Clarendon from its continuing obligation to maintain and convene such committees. The purpose of the Local Program Committees was to ensure that each educational institution being served would have local representation so that its particular programming and scheduling needs would be considered. The educational content for a school in New York City, for example, may be different than what is useful to a school in Helena, Montana. As technology evolved, the input by members of the local community could have served as a valuable resource to ensure that the educational institution and overall community received services that reflected the needs of the community. At a minimum, Local Programming Committees could have informed Clarendon of the continued availability and quantity of services provided under the licenses—services which, as noted above, Clarendon cannot substantiate were ever provided during the relevant investigation period. Both the plain language of the rule and the policy justifications underlying adoption of the rule compelled Clarendon to maintain a connection with its non-local educational institutions throughout the terms of its licenses.

C. Rules in Effect at Time of Violation Govern Conduct in Question

29. Commission precedent holds that the rules in effect at the time of an apparent violation govern the conduct in question, even if the rules are later revised.⁹² The Commission's rules establish agency policy until such time as they are rescinded or amended in a notice-and-comment rulemaking.⁹³ The agency undertook a significant restructuring of the EBS band in 2019, including a new band plan,

⁸⁷ Clarendon Response at 23-24.

⁸⁸ See, e.g., 2004 EBS Order.

⁸⁹ See 2019 EBS Order, 34 FCC Rcd at 5456, para. 25.

⁹⁰ See 2008 EBS Order, 23 FCC Rcd at 6048-50, paras. 146-49.

⁹¹ 47 CFR § 27.1201(a)(4) (2019).

⁹² See, e.g., 1993 Annual Access Tariff Filings Phase I et al., CC Docket No. 93-193, Order Terminating Investigation, 20 FCC Rcd 7672, 7693, para. 49 (2005) (1993 Access Tariff Order); Alarm Devices, Mfg. Co., Order to Show Cause, 49 F.C.C.2d 143, 145, para. 8 (1974).

⁹³ 1993 Access Tariff Order, 20 FCC Rcd at 7693, para. 49; see also *Adams Telecom, Inc. v. FCC*, 38 F.3d 576, 582 (D.C. Cir. 1994) (quoting *Reuters Ltd. v. FCC*, 781 F.2d 946, 950 (D.C. Cir. 1986) ("[I]t is elementary that an agency must adhere to its own rules and regulations.")).

updated performance requirements, and a new geographic area licensing system for future licensees.⁹⁴ Under this new plan, incumbents retained their existing channels and service area.⁹⁵ Additionally, all previous eligibility requirements, including the various educational use requirements and Local Program Committee obligations, ceased being effective on April 27, 2020.⁹⁶ Until the new rules established in the 2019 EBS Order took effect, however, the Commission's previous rules governed the actions of EBS licensees.⁹⁷

30. The former EBS rules required EBS licensees leasing their excess spectrum to provide "at least 20 hours per licensed channel per week of EBS educational usage" as well as maintain a Local Program Committee in areas where the licensee was considered a non-local applicant.⁹⁸ As the Commission's rule changes were forward-looking in nature, a change to those regulations does not relieve Clarendon of its original obligations to have complied with the rules in effect before the change.⁹⁹

D. Proposed Forfeiture

31. Section 503(b) of the Act authorizes the Commission to impose a forfeiture against any entity that "willfully or repeatedly fail[s] to comply substantially with the terms and conditions of any license, permit, certificate or other instrument or authorization issued by the Commission"¹⁰⁰ as well as against any entity that "willfully or repeatedly fail[s] to comply with any of the provisions of [the Act] or of any rule, regulation, or order issued by the Commission."¹⁰¹ Here, section 503(b)(2)(D) of the Act authorizes us to assess a forfeiture against Clarendon of up to \$20,489 for each violation or each day of a continuing violation, up to a statutory maximum of \$153,669 for a single act or failure to act.¹⁰² In exercising the Commission's forfeiture authority, we must consider the "nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."¹⁰³

32. In determining a proposed forfeiture amount, the Commission starts with the base forfeiture amount for the apparent violation, as set forth in the Commission's forfeiture guidelines.¹⁰⁴ While section 1.80(b)(9) does not establish a specific base forfeiture amount for a violation of the Commission's EBS educational use requirement, we find that the base forfeiture amount of \$8,000 for a

⁹⁴ See generally 2019 EBS Order, 34 FCC Rcd 5446.

⁹⁵ *Id.* at 5459, para. 36.

⁹⁶ *Id.* at 5450-58, paras. 13-31; see also 2.5 GHz Fed. Reg. Notice, 84 Fed. Reg. at 57365.

⁹⁷ 2.5 GHz Fed. Reg. Notice, 84 Fed. Reg. at 57360. The new EBS rules became effective on April 27, 2020. See 2019 EBS Order, 34 FCC Rcd at 5489, para. 117 (deferring the effective date until six months from the date of the Order's publication in the Federal Register). See *contra* Clarendon Response at 24 (asserting that "the concept of a local program committee is no longer relevant, and Licensee does not believe that the Commission then required or now requires that non-local EBS licensees maintain local program committees in circumstances where the EBS licensee (such as Licensee) does not select and provide broadcast-style video programming to receive sites").

⁹⁸ 47 CFR §§ 27.1201(a)(4), 27.1214(b)(1) (2019).

⁹⁹ *Kenai Educational Media, Inc.*, Consent Decree, 34 FCC Rcd 4865, 4867 n.3 (2019) ("A recent rule change does not relieve a licensee from its obligation to comply with the rule while it is in effect.").

¹⁰⁰ 47 U.S.C. § 503(b)(1)(A).

¹⁰¹ *Id.* § 503(b)(1)(B).

¹⁰² See 47 U.S.C. § 503(b)(2)(D); 47 CFR § 1.80(b)(9); see also *Amendment of Section 1.80(b) of the Commission's Rules, Adjustment of Civil Monetary Penalties to Reflect Inflation*, Order, 34 FCC Rcd 12824 (EB 2019).

¹⁰³ 47 U.S.C. § 503(b)(2)(E); see also 47 CFR § 1.80(b)(9); *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, 17100-01, para. 27 (1997) (*Forfeiture Policy Statement*), *recons. denied*, 15 FCC Rcd 303 (1999).

¹⁰⁴ See 47 CFR § 1.80, note to para. (b)(8); *Forfeiture Policy Statement*, 12 FCC Rcd at 17101, para. 27.

violation of the children's television commercialization or programming requirements is most analogous to the Commission's EBS educational use requirement since they govern the amount of children's programming to be provided within a prescribed time span.¹⁰⁵ Accordingly, we impose a forfeiture of \$8,000 for each week that Clarendon apparently failed to comply with the Commission's requirement that licensees supply 20 hours of educational use per channel per week. Using December 9, 2019 as the Commission's starting point until the Commission's rules sunset, on April 27, 2020, we impose a base forfeiture of \$8,000 multiplied by the 19 weeks that the apparent violation occurred (\$152,000). We then multiply this by each of Clarendon's 21 leased EBS licenses, resulting in a base forfeiture amount of \$3,192,000 for Clarendon's apparent failure to comply with the Commission's 20-hour requirement.

33. As to the failure to maintain a Local Program Committee, section 1.80(b)(8) does not establish a specific base forfeiture amount for a violation of that requirement. Again, in the absence of a specified base forfeiture, we select a base forfeiture for an analogous violation. We find that the violation is most analogous to a violation of the former main studio rule and will, therefore, use that amount (\$7,000).¹⁰⁶ As with the Local Program Committee requirement, the Commission designed the former main studio rule to allow licensees to be responsive to the individual programming needs of their local communities. As Clarendon holds 22 EBS licenses, none which maintained a Local Program Committee between December 2019 and April 2020, we impose a base forfeiture of \$7,000 for each license for which Clarendon apparently failed to maintain a Local Program Committee, resulting in a base forfeiture amount of \$154,000 for failure to comply with the Commission's Local Program Committee requirement.

34. Based on the facts and record in this case, we have determined that Clarendon apparently violated former sections 27.1201(a)(4) and 27.1214(b)(1) of the Commission's rules by: (1) failing to provide at least 20 hours per licensed channel per week of EBS educational use during a 19 week period at 21 of its 22 EBS licenses; and (2) failing to maintain its Local Program Committee obligations in the service area of its 22 EBS licenses. In total, Clarendon's apparent violations incur a cumulative base forfeiture of \$3,346,000.

35. The Commission may also adjust the total proposed forfeiture by taking into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.¹⁰⁷

¹⁰⁵ If the Commission has not previously established a base forfeiture amount for that particular violation, "it has looked to the base forfeitures established or issued in analogous cases for guidance." *Cumulus Radio, LLC et al.*, Notice of Apparent Liability for Forfeiture, 34 FCC Rcd 7289, 7294, para. 14 (2019) (citing *Long Distance Direct, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 3297, 3304, para. 19 (2000)).

¹⁰⁶ See 47 CFR § 1.80(b)(8), note to para. (b)(8) (2017); see also *id.* § 73.1125(a) (2017). The main studio rule, which was eliminated in 2017, required the licensee of a broadcast station to maintain a main studio in order "to serve the needs and interests of the residents of the station's community of license." *Amendment of Sections 73.1125 and 73.1130 of the Commission's Rules, the Main Studio and Program Origination Rules for Radio and Television Broadcast Stations*, MM Docket No. 86-406, Memorandum Opinion and Order, 3 FCC Rcd 5024, 5026, para. 23 (1988) (*1988 Main Studio Order*); see also *Elimination of Main Studio Rule*, MB Docket No. 17-106, Report and Order, 32 FCC Rcd 8158, 8160-61, paras. 6-7 (2017). Among other things, the Commission required each broadcast station to "maintain a meaningful management and staff presence" at the main studio to "help expose stations to community activities, help them identify community needs and interests and thereby meet their community service requirements." *1988 Main Studio Order*, 3 FCC Rcd at 5026, para. 24; see also *Amendment of Sections 73.1125 and 73.1130 of the Commission's Rules, the Main Studio and Program Origination Rules for Radio and Television Broadcast Stations*, MM Docket No. 86-406, Report and Order, 2 FCC Rcd 3215, 3218, para. 29 (1987) (stating that "[th[e]] interaction between the station and the community would foster responsive programming").

¹⁰⁷ 47 U.S.C. § 503(b)(2)(E).

Based on the totality of the facts in the record, we have determined to not adjust this amount upwards or downwards. Accordingly, we find Clarendon apparently liable for a forfeiture of \$3,346,000.¹⁰⁸

IV. ORDERING CLAUSES

36. Accordingly, **IT IS ORDERED** that, pursuant to section 503(b) of the Act, and 1.80 of the Commission's rules,¹⁰⁹ Clarendon Foundation, Inc. is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A FORFEITURE** in the amount of three million dollars, three hundred forty-six thousand dollars (\$3,346,000) for apparently willfully and repeatedly violating former sections 27.1201(a)(4) and 27.1214(b)(1) of the Commission's rules.¹¹⁰

37. **IT IS FURTHER ORDERED** that, pursuant to section 1.80 of the Commission's rules,¹¹¹ within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture, Clarendon **SHALL PAY** the full amount of its proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture consistent with paragraph 40 below.

38. Clarendon Foundation Inc. shall send electronic notification of payment to Ryan McDonald, Enforcement Bureau, Federal Communications Commission, at Ryan.McDonald@fcc.gov on the date said payment is made. Payment of the forfeiture must be made by credit card, ACH (Automated Clearing House) debit from a bank account using the Commission's Fee Filer (the Commission's online payment system),¹¹² 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:¹¹³

- 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).¹¹⁴ For additional detail and wire transfer instructions, go to <https://www.fcc.gov/licensingdatabases/fees/wire-transfer>.
- Payment by credit card must be made by using the Commission's Fee Filer website at <https://apps.fcc.gov/FeeFiler/login.cfm>. To pay by credit card, log-in using the FRN captioned above. If payment must be split across FRNs, complete this process for each FRN. Next, select "Pay bills" on the Fee Filer Menu, and select the bill number associated with the NAL Account – the bill number is the NAL Account number with the first two digits excluded – and then choose the "Pay by Credit Card" option. Please note that there is a \$24,999.99 limit on credit card transactions.

¹⁰⁸ 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.

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

¹¹⁰ 47 CFR §§ 27.1201(a)(4), 27.1214(b)(1) (2019).

¹¹¹ *Id.* § 1.80.

¹¹² Payments made using the Commission's Fee Filer system do not require the submission of an FCC Form 159.

¹¹³ 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.

¹¹⁴ 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.

39. Any request for making full payment over time under an installment plan should be sent to: Chief Financial Officer – Financial Operations, Federal Communications Commission, 45 L Street NE, Washington, D.C. 20554.¹¹⁵ If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

40. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to sections 1.16 and 1.80(f)(3) of the Commission’s rules.¹¹⁶ The written statement must be mailed to Jeffrey J. Gee, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 45 L Street NE, Washington, D.C. 20554, and must include the NAL account number referenced in the caption. The written statement shall also be e-mailed to Jeffrey J. Gee at Jeffrey.Gee@fcc.gov and to Ryan McDonald at Ryan.McDonald@fcc.gov.

41. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits the following documentation: (1) federal tax returns for the past three years; (2) financial statements for the past three years prepared according to generally accepted accounting principles; or (3) some other reliable and objective documentation that accurately reflects the petitioner’s current financial status.¹¹⁷ Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation. Inability to pay, however, is only one of several factors that the Commission will consider in determining the appropriate forfeiture, and we retain the discretion to decline reducing or canceling the forfeiture if other prongs of 47 U.S.C. § 503(b)(2)(E) support that result.¹¹⁸

¹¹⁵ See 47 CFR § 1.1914.

¹¹⁶ *Id.* §§ 1.16, 1.80(f)(3).

¹¹⁷ 47 U.S.C. § 503(b)(2)(E).

¹¹⁸ See, e.g., *Ocean Adrian Hinson, Surry County, North Carolina*, Forfeiture Order, 34 FCC Rcd 7619, 7621, para. 9 & n.21 (2019); *Vearl Pennington and Michael Williamson*, Forfeiture Order, 34 FCC Rcd 770, paras. 18–21 (2019); *Fabrice Polynice, Harold Sido and Veronise Sido, North Miami, Florida*, Forfeiture Order, 33 FCC Rcd 6852, 6860–62, paras. 21–25 (2018); *Adrian Abramovich, Marketing Strategy Leaders, Inc., and Marketing Leaders, Inc.*, Forfeiture Order, 33 FCC Rcd 4663, 4678-79, paras. 44-45 (2018); *Purple Communications, Inc.*, Forfeiture Order, 30 FCC Rcd 14892, 14903-904, paras. 32-33 (2015); *TV Max, Inc., et al.*, Forfeiture Order, 29 FCC Rcd 8648, 8661, para. 25 (2014).

42. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture and Order shall be sent by first class mail and certified mail, return receipt requested, to Jeffrey Jones, President, Clarendon Foundation, Inc., 9430 South Fairway View Drive, Sandy, Utah, 84070.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

**STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL
DISSENTING**

Re: *In the Matter of Clarendon Foundation, Inc.*, Notice of Apparent Liability for Forfeiture, File No. EB-IHD-19-00029569.

In this series of enforcement decisions, the Federal Communications Commission proposes novel fines totaling more than \$47 million on non-profit organizations for failing to comply with policies the agency eliminated from its rulebooks more than a year ago. These decisions suffer from a number of substantive and procedural infirmities. But most troubling is that the fines imposed here on the North American Catholic Educational Programming Foundation, the Hispanic Information and Telecommunications Network, Northern Arizona University Foundation, and other similar non-profit entities with programs to expand educational internet access lack any appropriate sense of proportion. Moreover, they are an unfortunate commentary on the priorities of this agency. During a pandemic when millions of people are struggling to get the connectivity they need to maintain some semblance of modern life, this is a strange use of agency resources. Instead of taking these unreasonably punitive actions, we should be leading with our humanity and finding ways to connect more people to the broadband services they need in crisis.

I dissent.

**STATEMENT OF
COMMISSIONER GEOFFREY STARKS
DISSENTING**

Re: *In the Matter of Clarendon Foundation, Inc.*, Notice of Apparent Liability for Forfeiture, File No. EB-IHD-19-00029569.

Today the Commission proposes extraordinary penalties against organizations whose mission is to help those most in need. For fifty years, schools and students around the country have received free communications service through the program that has become the Educational Broadband Service (EBS). Nearly 18 months ago, ignoring calls to reform and revitalize the EBS program, the majority at that time made the spectrum on which the program relies generally available for auction and assignment. Today's actions double down on that decision, proposing forfeitures that threaten the financial survival of some of the program's most visible participants. These decisions represent a waste of Commission resources in an unlawful and unfair attack on a program that has helped people around the country.

As an initial matter, the EBS licensees lacked sufficient notice of the legal interpretations underlying the Notices of Apparent Liability (NALs) to be subject to monetary penalties. Basic principles of administrative law establish that "an agency cannot sanction an individual for violating the agency's rules unless the individual had 'fair notice' of those rules."¹ Notice is fair when it allows regulated parties to identify, with "ascertainable certainty," the standards with which the agency expects them to conform.²

The EBS licensees lacked such fair notice of the majority's interpretation of the now-eliminated educational use³ and Local Programming Committee rules.⁴ When it authorized wireless broadband service for the EBS program, the Commission rejected requests from the EBS community to clarify its educational use rules⁵; instead, the agency said it would simply rely on the good faith efforts of licensees to "provide . . . educational usage." Thus, there are no ascertainable standards that EBS licensees could have followed to avoid liability.

Similarly, the Commission did not give fair notice of its current interpretation of the local programming committee rules. The plain language of the rules appears to apply only to the *formation* of a committee for application purposes, yet the NALs conclude that these committees must remain in place after license grant, even though their oversight of "programming" no longer makes sense in the wireless broadband context. Indeed, the NALs' legal interpretations generally do not make sense when applied to the services at issue.

The proposed forfeiture calculations are also fundamentally flawed. First, the NALs are based on the period from December 9, 2019 through April 27, 2020, the effective date of the Commission's elimination of the rules in question. But the NALs are based on Letters of Inquiry that covered the

¹ *SNR Wireless License Co., LLC v. FCC*, 868 F.3d 1021, 1043 (D.C. Cir. 2017).

² *Id.*

³ 47 C.F.R. § 27.1214(b)(2) (2019) (licensees must "provide at least 20 hours per licensed channel per week of EBS educational usage").

⁴ 47 CFR § 27.1201(a)(4) (2019).

⁵ See *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, WT Docket No. 03-66, Order on Reconsideration and Fifth Memorandum Opinion and Order and Third Memorandum Opinion and Order and Second Report and Order, 21 FCC Rcd 5606, 5699-701, paras. 223-28 (2006) (rejecting a proposal to provide guidance on meeting the educational use requirements).

licensees' conduct only until August 26, 2019. Thus, we appear to have no evidence about the period subject to forfeiture penalty.

Moreover, because there is no base forfeiture for violations of the EBS rules, the NALs refer to the base forfeiture penalties for arguably analogous rules like the children's programming requirements and the main studio rule. But the NALs apply these penalties in a manner that is completely inconsistent with FCC precedent. Typical enforcement actions for violations of these rules propose forfeitures of hundreds of dollars per violation. In this case, however, the majority proposes penalties of \$8,000 per week for each license, resulting in proposed forfeitures ranging from nearly \$1.6 million to over \$14 million against a group of non-profit entities.

These eye-popping forfeitures are not only inconsistent with applicable precedent, but ignore numerous mitigating factors under our statute and rules.⁶ While some of the NALs upwardly adjust the forfeitures, none of the items consider any mitigating factors, including the licensees' respective histories of compliance, the lack of any discernible harm, and the Commission's finding that the rules at issue no longer serve a good policy purpose.

Broadband access has never been more critical, and EBS licensees are on the front lines in our effort to close the digital divide that has become a monstrous COVID-19 divide. The pandemic has forced schools across the country to close, and many students have been engaging in distance learning for months. EBS service allows schools and their students to continue their educational instruction remotely. Targeting these organizations for a legally suspect, unnecessary, and excessive attack undermines their mission to provide an essential service to schools in need of a broadband connection. I dissent.

⁶ In proposing a forfeiture, the Communications Act requires the Commission to consider "the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require. 47 U.S.C. 503(b)(2)(E). *See also* 47 CFR 1.80(b)(9) ("In determining the amount of the forfeiture penalty, the Commission or its designee will take into account the nature, circumstances, extent and gravity of the violations and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.").