

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

In the Matter of
North American Catholic Educational
Programming Foundation, Inc.
File No. EB-IHD-19-00029570
NAL/Acct. No.: 202132080008
FRN: 0006686018

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. In this Notice of Apparent Liability for Forfeiture, we propose a forfeiture penalty of \$8,268,000 against

1 47 CFR § 27.1214(b)(1) (2019).

2 47 CFR § 27.1201(a)(4) (2019).

the North American Catholic Educational Programming Foundation, Inc. (NACEPF or the Foundation) 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 the Foundation 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, the Foundation 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, the Foundation 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, the Foundation 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

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

⁴ In July 2019, Commissioner Brendan Carr sent a letter to the Foundation requesting information regarding its compliance with these requirements for EBS licensees. Letter from Brendan Carr, Commissioner, Federal Communications Commission, to John Primeau, President, North American Catholic Educational Programming Foundation, Inc. (July 8, 2019) (on file in EB-IHD-19-00029570) (Carr Letter). The Enforcement Bureau subsequently issued a Letter of Inquiry to the Foundation, 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 John Primeau, President, North American Catholic Educational Programming Foundation, Inc. (Aug. 6, 2019) (on file in EB-IHD-19-00029570) (LOI).

⁵ According to the Foundation, as of September 2018, the value of its assets attributable to revenue collected over the years from EBS licenses is \$63,686,445. Revised Response to Letter of Inquiry, from Stephanie Weiner, Counsel for North American Catholic Educational Programming Foundation, Inc., to Kalun Lee, Enforcement Bureau, FCC, at 25 (Nov. 20, 2019) (on file in EB-19-00029570) (Foundation Revised Response). The Foundation states that its cash reserves are "intended to make it possible for NACEPF to meet its regulatory obligations and continue to provide broadband services, in the event that its Leases expire or are otherwise no longer in effect, including – if it became necessary – the ability to build and operate its own broadband spectrum." Foundation Revised Response at 27.

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*), recon. 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*).

universities providing a formal educational and cultural development to enrolled students” through video, data, or voice transmissions.⁹

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,

⁹ 47 CFR § 27.1203(b) (2019).

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.*

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 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 Commission’s 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

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, 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).

requirement is “appl[ied] spectrally over the licensee’s whole actual service area.”²⁹ Although the 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, lang[ua]ge 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

²⁹ *Id.*

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) (*2018 EBS NPRM*); *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.

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 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.

⁴⁰ *Id.* at 56, para. 16.

⁴¹ *Id.* at 56, para. 17.

⁴² *Id.* at 60-62, paras. 25-27.

⁴³ *Id.* at 62, para. 28.

⁴⁴ *See id.* at 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 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”).

B. Factual Background

14. The North American Catholic Educational Programming Foundation is a Rhode Island nonprofit corporation formed in 1989.⁵² The Foundation is the sole owner and parent of Educational Broadband Service Agency LLC, which does business under the name Mobile Beacon.⁵³ Mobile Beacon was formed for the primary purpose “of distributing the broadband service and devices to which the Foundation is entitled under its Leases to qualified educational and nonprofit entities throughout the United States. Mobile Beacon’s mission is directly tied to the Foundation’s, which is to expand access to educational opportunities and resources through its activities.”⁵⁴ The Foundation holds 53 EBS licenses⁵⁵ and has entered into spectrum leasing agreements for all but one of its licenses.⁵⁶ All the spectrum leasing agreements are with Clearwire Corporation (hereinafter Sprint),⁵⁷ and include a provision that the licensee reserves a 5% educational spectrum capacity for use by the Foundation.⁵⁸

15. The Foundation asserts that its mission is to “expand access to educational opportunities and resources through its activities”⁵⁹ as well as “provide religious and educational programming and broadband access to schools, libraries, and other nonprofit organizations.”⁶⁰ To support its activities, the Foundation asserts that its “educational purposes include, but are not limited to, making online educational programming available to schools and broadband services available to accredited educational institutions and governmental organizations within NACEPF’s license areas to further those institutions’ educational missions.”⁶¹ While its mission is ostensibly educational in nature, the Foundation’s primary focus is on its broadband service distributed through Mobile Beacon.⁶² Through its leases with Sprint, the Foundation provides free or low cost mobile broadband service to accredited schools, libraries and other

⁵² Foundation Revised Response at 1, 5. The Foundation is recognized as a tax-exempt corporation under Section 501(c)(3) of the Internal Revenue Code. *Id.* at 1; *see also* 26 U.S.C. § 501(c)(3).

⁵³ Foundation Revised Response at 1. Mobile Beacon derives its tax-exempt status from the Foundation’s status.

⁵⁴ *Id.* at 2.

⁵⁵ *Id.* at 12.

⁵⁶ *Id.* at 2, 20-21. Call sign WQXS628 was recently granted by the Commission and is not under lease. *Id.* at 2.

⁵⁷ Clearwire Corporation is owned by Sprint. *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 Aug. 27, 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 Red 10578 (2019).

⁵⁸ The Foundation entered into two Master Lease Agreements with Clearwire Spectrum Holdings II, LLC and then separate Long Term *De Facto* Transfer Individual Use Agreements (IUAs) for each of its call signs with the exception of WQXS628 whose spectrum is not being leased. The Foundation is the licensee of Station WLX344, however, an IUA was provided for WLX334, not WLX344. *See* Educational Broadband Service Long Term *De Facto* Transfer Individual Use Agreement, dated July 31, 2006, by and between North American Catholic Educational Programming Foundation, Inc., and Clearwire Spectrum Holdings II LLC (Bates No. NACEPF LOI00016370) (referencing call sign WLX334). The Foundation is not the licensee of Station WLX334, thus it is possible that the IUA for WLX344 was prepared with the erroneous call sign of WL334.

⁵⁹ Foundation Revised Response at 2.

⁶⁰ *Id.* at 6. The Foundation provides “Catholic religious programming to the general public through various modes of communication and media.” *Id.* at 6. Additionally, the Foundation “produced and continues to offer online 20 full-semester distance learning courses.” *Id.* These courses are still available online, free of charge, to schools across the country. *Id.*

⁶¹ *Id.* at 8.

⁶² *Id.* at 2.

nonprofit entities.⁶³ Specifically, the Foundation states that it provides each of its educational institution receive sites, with portable hotspots, for the schools to gain access to the “Sprint wireless broadband network to connect to the internet. The Foundation gives schools the discretion to determine how they use the hotspots to advance their educational missions.”⁶⁴

16. The Foundation’s lease agreements, however, are silent regarding the 20-hour requirement.⁶⁵ The Foundation has converted its receive site information to an online database system (Database).⁶⁶ This Database appears to be the primary source of contact and information that the Foundation currently maintains with its receive sites. The Foundation’s Database, however, does not monitor how or whether its educational institutions are using their broadband services sufficiently enough to meet the 20-hour requirement.

17. The Foundation, by its own admission, also failed to maintain any active Local Program Committees.⁶⁷ The Foundation created Local Program Committees for each of its original EBS licenses,⁶⁸ but claims that regulatory changes vacated the legal requirement to maintain Local Program Committees, so that it no longer has any such committees.⁶⁹

III. DISCUSSION

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

18. Our LOI to the Foundation requested information regarding the status of its EBS licenses since 2009. Nonetheless, the statute of limitations for this action is one year,⁷⁰ and accordingly we focus our review on the Foundation’s EBS license compliance for the period from December 9, 2019 through April 27, 2020 when the educational use requirements were eliminated.⁷¹ The Foundation’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,⁷² and (2) provided at least 20 hours per licensed channel per week of EBS educational use.⁷³

⁶³ *Id.* at 6.

⁶⁴ *Id.* at 10.

⁶⁵ See 47 CFR § 27.1214(b)(1) (2019).

⁶⁶ Foundation Revised Response at 9; *see also id.* at Exh. A, Table 8c.

⁶⁷ *Id.* at 18.

⁶⁸ *Id.* at 17.

⁶⁹ *Id.* at 18.

⁷⁰ The applicable statute of limitations for these violations is one year. See 47 U.S.C. § 503(b)(6).

⁷¹ Although the educational use requirements of section 27.1214(b)(1) of the Commission’s rules were eliminated effective April 27, 2020, the Foundation and the Enforcement Bureau entered into a tolling agreement regarding the Enforcement Bureau’s investigation into the Foundation’s EBS practices. See Tolling Agreement Executed between NACEPF and Federal Communications Commission (executed Oct. 26, 2020) (on file in EB-IHD-19-00029570) (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.

⁷² 47 CFR § 27.1203(b)-(c) (2019).

⁷³ *Id.* § 27.1214(b)(1) (2019).

19. Based on our review of the record, the terms of the Foundation’s lease agreements, and the information provided in this investigation, the Foundation failed to provide sufficient documentation and information describing how it complied with and met the 20-hour requirement for leased spectrum.⁷⁴ The Foundation claims that it fulfills its 20-hour requirement by deploying “tens of thousands of broadband accounts which are used for educational purposes” and that this deployment is sufficient to satisfy the Commission’s 20-hour requirement.⁷⁵ No documentation was provided by the Foundation, however, to support this claim.⁷⁶ This is not surprising given that the Foundation’s primary list of receive sites with which it has a direct relationship consists of its online Database, which is used by schools to register for services or renew existing services.⁷⁷ The Foundation does not maintain or collect information from any educational institutions other than information voluntarily input by the receive sites into the Database.⁷⁸ While the online Database registration form asks the applicant { [REDACTED] }.⁷⁹ The limited information provided by the responding receive sites varies significantly, from { [REDACTED] }.⁸⁰ Without any accountability or monitoring, it is unclear how the Foundation is able to state or demonstrate that it is able to meet its 20-hour requirement for 52 of its EBS licenses in the authorized areas of operation.⁸¹ For

⁷⁴ *Id.*

⁷⁵ Note that confidential material is noted in yellow highlighting and double brackets. Foundation Revised Response at 23. *See contra* Foundation Revised Response, Exh. A, Table 8c – Receive Site Data Export ({ [REDACTED] }). The Foundation’s affiliate Mobile Beacon has created a broadband device donation program through TechSoup which donates thousands of mobile hot spots and wireless devices to schools, nonprofits, and public libraries. *Id.* at 7. Additionally, Mobile Beacon’s Digital Wish donation program has donated more than 3,100 devices and provided unlimited broadband accounts to schools throughout the United States. *Id.* As commendable as these donation programs are, the Foundation does not appear to associate them with its EBS licenses and it is not clear from the information provided by the Foundation whether any of the active educational institutions in its EBS licensed areas of operation are the beneficiaries of these programs. Since its licenses do not cover the entire United States, the Foundation cannot be certain that this information can be attributed to its current EBS program and licenses.

⁷⁶ The Foundation appears to open the door for monitoring the 20-hour requirement through several of its IUA’s in 2018 and 2019 by requiring that { [REDACTED] }. However, the Foundation did not provide any follow-up documentation or explanation supporting actual monitoring of this 20-hour requirement by its receive sites.

⁷⁷ Foundation Revised Response at 10; *id.* at Exh. A, Table 8c – Receive Site Data Export.

⁷⁸ { [REDACTED] }.

⁷⁹ { [REDACTED] }

⁸⁰ *Id.*

⁸¹ Although the Foundation holds 53 EBS licenses, call sign WQXS628 was recently granted by the Commission. This license is not subject to any lease agreement and thus was not required to comply with the 20-hour educational use rules. Foundation Revised Response at 9, n.9.

example, according to the { [REDACTED] }
[REDACTED] }⁸² Moreover, the
Foundation admits that the information in its Database { [REDACTED] }
[REDACTED] }⁸³

20. The Foundation claims that the phrase “whose purposes are educational” in former section 27.1201(a) of the Commission’s rules “necessarily includes activities *beyond* ‘providing educational and instructional television material to such accredited institutions and governmental organizations.’”⁸⁴ The Foundation further asserts that section 27.1201(a) does not preclude an EBS licensee from having other charitable purposes “so long as it maintains its educational purposes.”⁸⁵ The Foundation espouses the use of its broadband service, distributed through Mobile Beacon, across the country to support learning at every level.⁸⁶ In addition to providing service to schools, the Foundation also provides services to “libraries, housing authorities, public radio stations, nonprofits, emergency service/first responders, and digital inclusion nonprofits focused on serving low-income households.”⁸⁷ The Foundation states that its educational purpose includes “making online educational programming available to schools, and broadband services available to accredited educational institutions and governmental organizations, within NACEPF’s license areas to further those institutions’ educational missions.”⁸⁸ Despite this laudable educational purpose, the Foundation did not provide documentation or information necessary to demonstrate how it meets its 20-hour requirement in its EBS licensed areas.

21. The Commission’s EBS rules specifically stated that “[a]uthorized educational broadband channels must be used to further the educational mission of accredited schools offering formal educational courses to enrolled students.”⁸⁹ 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 the Foundation’s conduct here because the Foundation has not pointed us to any educational content in this case nor has the Foundation otherwise established that the content or use of the relevant EBS licenses meets the requirement in the Commission’s rules. In fact, the Foundation’s response indicates that the Foundation has no idea how or whether any of the educational institutions in its licensed areas are using its services.⁹⁰ The Commission relies on the “good faith efforts” of licensees to comply with its educational use requirements.⁹¹ 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.”⁹² 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.

⁸² *Id.* at Exh. A, Table 8c – Receive Site Data Export.

⁸³ *Id.* at 1.

⁸⁴ *Id.* at 5-6 (emphasis in original); *see* 47 CFR § 27.1201(a) (2019).

⁸⁵ Foundation Revised Response at 6.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 8.

⁸⁹ 47 CFR § 27.1203(b) (2019).

⁹⁰ Indeed, the only tool used by the Foundation to ascertain whether an educational institution is still active is whether the { [REDACTED] } Foundation Revised Response at Exh. A, Table 8c – Revised Site Data Export.

⁹¹ *Two-Way Order*, 13 FCC Rcd at 19162, para.94; *see also 2006 EBS Order*, 21 FCC Rcd at 5701, para.227.

⁹² *Two-Way Order*, 13 FCC Rcd at 19162, para. 94 (emphasis added).

By choosing to lease out the spectrum associated with its EBS licenses, the Foundation became responsible for complying with the 20-hour requirement in former section 27.1214(b)(1) of the Commission's rules. The Foundation has failed to demonstrate that it satisfied this specific rule requirement.

22. The Foundation's lack of oversight and communication with the educational institutions in its EBS license areas became apparent when, in its response to our LOI, it stated that:

in the time allowed, NACEPF verified at least one school listed as 'Active' is located within the GSA associated with each EBS license. To confirm this, NACEPF determined the geolocation coordinates of each Receive Site using publicly available address information and used a public geocoding service to translate these addresses into latitudes and longitudes. Standard geospatial analysis techniques were then used to confirm that the resulting coordinates are located within the appropriate GSAs.⁹³

This, in sum, highlights the Foundation's complete lack of knowledge as to the location of its receive sites and whether they are located within the areas covered by its EBS licenses. By extension, it also reveals the Foundation's ignorance as to whether each license is meeting the 20-hour requirement. The Foundation's laissez-faire attitude towards complying with the Commission's 20-hour requirement has resulted in an apparent failure to meet its obligations as an EBS licensee, failure to meet the Commission's rule requirements, and failure to meet the educational needs of the affected students and faculty.

23. 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.⁹⁴ The Foundation's mere distribution of hardware to its educational institution receive sites failed to meet this requirement. It was incumbent upon the Foundation, as the EBS licensee, to ensure that the hardware was being put towards the 20-hour requirement. The Foundation, however, failed to conduct any follow-up with its receive sites to ensure that the hotspots were being put towards any use, let alone an educational one. We find that the Foundation 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.⁹⁵

B. The Foundation Failed to Maintain Local Program Committees

24. 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.⁹⁶ While the Commission created no "detailed regulatory requirements" concerning the composition of the committees, this did not permit them to dissolve.⁹⁷ 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."⁹⁸ 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

⁹³ Foundation Revised Response at 11.

⁹⁴ 47 CFR § 27.1201(a)(3) (2019).

⁹⁵ *Id.* § 27.1214(b)(1) (2019).

⁹⁶ 1985 *ITFS Report and Order*, 101 F.C.C.2d at 62, para. 28.

⁹⁷ *Id.* at 62, para. 29.

⁹⁸ *Id.*

Program Committee and “will aid in the selection, scheduling and production of the programming.”⁹⁹ 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.

25. The Foundation admits that, while it did establish Local Program Committees when it applied for each of its receive sites, it “has since ceased to operate LPCs, as its licenses are no longer used to transmit any form of pre-schedule programming.”¹⁰⁰ The Foundation’s apparent failure to comply with the Commission’s requirement for Local Program Committees means that the local communities that the Foundation was supposed to service via its 52 licenses lacked the mechanism for local input and feedback envisioned by the Commission’s rules.¹⁰¹ Indeed, were it the case that the Foundation had maintained Local Program Committees, it is possible that the Foundation 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.

26. The Foundation’s claims that “an LPC would serve no function” after the license has “transitioned away from any form of pre-schedule programming to the provision of high-speed internet connectivity”¹⁰² is meritless. While the Commission has modified the EBS rules throughout the years,¹⁰³ the Commission did not alter or eliminate the requirement for Local Program Committees until recently.¹⁰⁴ Although modifications to the Commission’s EBS rules in 2008 included adjustments to other requirements for non-local licensees, the Local Program Committee requirement remained intact.¹⁰⁵ 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, the Foundation’s failure to maintain Local Program Committees constituted an apparent violation of former section 27.1201(a)(4) of the Commission’s rules.¹⁰⁶ The Local Program Committee requirement cannot be “willed away” by the Foundation 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.

27. Finally, the Foundation’s creation of Local Program Committees as part of its original applications did not absolve the Foundation 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

⁹⁹ 47 CFR § 27.1201(a)(4) (2019); 47 CFR § 74.932(a)(5), note 3 (1985).

¹⁰⁰ Foundation Revised Response at 18.

¹⁰¹ Station WNC521 is located within the GSA containing the Foundation’s headquarters, thus the Foundation is a local licensee with respect to that license and was not subject to the Local Program Committee requirement. Additionally, the Foundation claims that the Commission did not require proof of a Local Program Committee when the Foundation filed its application for its Sierra Vista, Arizona license, call sign WQXS628. Foundation Revised Response at 18 n.15. This statement is inaccurate. When the Foundation originally filed its initial application in 1995, it did in fact include a Local Program Committee statement and letters. NACEPF Initial Application for ITFS Station in Sierra Vista, Arizona, File No. BPIF19951020JD, at Exh. 1 (filed Oct. 20, 1995).

¹⁰² Foundation Revised Response at 18.

¹⁰³ See, e.g., 2004 EBS Order.

¹⁰⁴ See 2019 EBS Order, 34 FCC Rcd at 5456, para. 25.

¹⁰⁵ See 2008 EBS Order, 23 FCC Rcd at 6048-50, paras. 146-49.

¹⁰⁶ 47 CFR § 27.1201(a)(4) (2019).

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 Program Committees could have informed the Foundation of the continued availability and quantity of services provided under the licenses—services which, as noted above, the Foundation 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 the Foundation 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

28. Commission precedent holds that the Commission’s rules in effect at the time of an apparent violation govern the conduct in question, even if the rules are later revised.¹⁰⁷ The Commission’s rules establish agency policy until such time as they are rescinded or amended in a notice-and-comment rulemaking.¹⁰⁸ The agency undertook a significant restructuring of the EBS band in 2019, including a new band plan, updated performance requirements, and a new geographic area licensing system for future licensees.¹⁰⁹ Under this new plan, incumbents retained their existing channels and service areas.¹¹⁰ Additionally, all previous eligibility requirements, including the various educational use requirements and Local Program Committee obligations, ceased being effective on April 27, 2020.¹¹¹ Until the Commission’s new rules established in the *2019 EBS Order* took effect, however, the Commission’s previous rules governed the actions of EBS licensees.¹¹²

29. 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.¹¹³ As the Commission’s rule changes were forward-looking in nature, a change to the Commission’s rules does not relieve the Foundation of its original obligations to have complied with the Commission’s rules in effect before the rule change.¹¹⁴

D. Proposed Forfeiture

30. 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”¹¹⁵ as well as

¹⁰⁷ 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).

¹⁰⁸ *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.”)).

¹⁰⁹ See generally *2019 EBS Order*, 34 FCC Rcd 5446.

¹¹⁰ *Id.* at 5459, para. 36.

¹¹¹ *Id.* at 5450-58, paras. 13-31. See also *2.5 GHz Fed. Reg. Notice*, 84 Fed. Reg. at 57365.

¹¹² *2.5 GHz Fed. Reg. Notice*, 84 Fed. Reg. at 57360. The Commission’s 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).

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

¹¹⁴ *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.”).

¹¹⁵ 47 U.S.C. § 503(b)(1)(A).

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.”¹¹⁶ Here, section 503(b)(2)(D) of the Act authorizes us to assess a forfeiture against North American Catholic Educational Programming Foundation, Inc., of up to \$20,489 for each day of a continuing violation, up to a statutory maximum of \$153,669 for a single act or failure to act.¹¹⁷ 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.”¹¹⁸

31. 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.¹¹⁹ 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 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.¹²⁰ Accordingly, we impose a forfeiture of \$8,000 for each week that the Foundation 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 the Foundation’s 52 licenses, out of its 53 total licenses, with lease agreements, resulting in a base forfeiture amount of \$7,904,000 for the Foundation’s apparent failure to comply with the Commission’s 20-hour requirement.

32. As to the failure to maintain a Local Program Committee, section 1.80(b)(9) 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 use that amount (\$7,000).¹²¹ As

¹¹⁶ *Id.* § 503(b)(1)(B).

¹¹⁷ See 47 U.S.C. § 503(b)(2)(D); 47 CFR § 1.80(b)(9). *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).

¹¹⁸ *Id.* § 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).

¹¹⁹ See 47 CFR § 1.80, Note to para. (b)(9); *Forfeiture Policy Statement*, 12 FCC Rcd at 17101, para. 27.

¹²⁰ 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)).

¹²¹ 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.

(continued...)

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 the Foundation holds 52 non-local licenses,¹²² 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 the Foundation apparently failed to maintain a Local Program Committee, resulting in a base forfeiture amount of \$364,000 for apparent failure to comply with the Commission's Local Program Committee requirement.

33. Based on the facts and record in this case, we have determined that the Foundation 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 52 of its 53 EBS licenses; and (2) failing to maintain its Local Program Committee obligations in the service area of 52 of its EBS licenses. In total, the Foundation's apparent violations incurs a cumulative base forfeiture of \$8,268,000.

34. 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.¹²³ Based on the totality of the facts in the record, we have determined to not adjust this amount upwards or downwards. Accordingly, we find the Foundation apparently liable for a forfeiture of \$8,268,000.¹²⁴

IV. ORDERING CLAUSES

35. Accordingly, **IT IS ORDERED** that, pursuant to section 503(b) of the Act, and 1.80 of the Commission's rules,¹²⁵ North American Catholic Educational Programming Foundation, Inc., is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A FORFEITURE** in the amount of eight million, two hundred and sixty eight thousand dollars (\$8,268,000) for apparently willfully and repeatedly violating former sections 27.1201(a)(4) and 27.1214(b)(1) of the Commission's rules.¹²⁶

36. **IT IS FURTHER ORDERED** that, pursuant to section 1.80 of the Commission's rules,¹²⁷ within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture, the Foundation **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture consistent with paragraph 39 below.

37. North American Catholic Educational Programming Foundation, Inc., shall send electronic notification of payment to Georgina Feigen, Enforcement Bureau, Federal Communications Commission, at Georgina.Feigen@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

(Continued from previous page) _____

29 (1987) (stating that "th[e] interaction between the station and the community would foster responsive programming").

¹²² As previously noted, call sign WNC521 is located within the GSA containing the Foundation's headquarters, thus the Foundation is a local licensee with respect to that EBS license.

¹²³ 47 U.S.C. § 503(b)(2)(E).

¹²⁴ We note that 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.

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

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

¹²⁷ *Id.* § 1.80.

Commission's Fee Filer (the Commission's online payment system),¹²⁸ 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:¹²⁹

- 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).¹³⁰ 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.
- 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.

38. 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. 20554.¹³¹ 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.

39. 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.¹³² The written statement must be mailed to Jeffrey J. Gee, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 L Street NE, Washington, D.C. 20554, and must include the NAL

¹²⁸ Payments made using the Commission's Fee Filer system do not require the submission of an FCC Form 159.

¹²⁹ 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.

¹³⁰ Instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

¹³¹ See 47 CFR § 1.1914.

¹³² *Id.* §§ 1.16, 1.80(f)(3).

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 Georgina Feigen at Georgina.Feigen@fcc.gov.

40. 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.¹³³ Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted. 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.¹³⁴

41. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture and Order shall be sent by certified mail, return receipt requested, and first-class mail to Stephanie Weiner, Esq., Counsel for North American Catholic Educational Programming Foundation, Inc., Harris, Wiltshire & Grannis LLP, 1919 M Street, NW, 8th Floor, Washington, D.C. 20036, and John Primeau, President, NACEPF, c/o Stephanie Weiner, Esq., Harris, Wiltshire & Grannis LLP, 1919 M Street, NW, 8th Floor, Washington, D.C. 20036.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹³³ 47 U.S.C. § 503(b)(2)(E).

¹³⁴ 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).

**STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL
DISSENTING**

Re: *In the Matter of North American Catholic Educational Programming Foundation, Inc.*, Notice of Apparent Liability for Forfeiture, File No. EB-IHD-19-00029570.

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 North American Catholic Educational Programming Foundation, Inc.*, Notice of Apparent Liability for Forfeiture, File No. EB-IHD-19-00029570.

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

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).

elimination of the rules in question. But the NALs are based on Letters of Inquiry that covered the 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.").