

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

In the Matter of )
National Conference on Citizenship )
File No. EB-IHD-19-00029567
NAL/Acct. No: 202132080005
FRN: 0006106371

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: January 6, 2021

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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 leases 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;1 a licensee was also required to establish a Local Program Committee in each community where it did not have a local presence.2 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 \$1,590,000 against National Conference on Citizenship (NCOC or Conference) for its apparently willful violations of the Commission’s EBS rules.

1 47 CFR § 27.1214(b)(1) (2019).
2 47 CFR § 27.1201(a)(4) (2019).

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,<sup>3</sup> based on our investigation,<sup>4</sup> we find that the Conference is apparently 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 Conference 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 Conference 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 Conference 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.<sup>5</sup>

## 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. 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."<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup>

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

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<sup>3</sup> See, e.g., 47 CFR § 27.1201(a)(3) (2019).

<sup>4</sup> In July 2019, Commissioner Brendan Carr sent a letter to NCOC requesting information regarding NCOC's compliance with these requirements for EBS licensees. Letter from Brendan Carr, Commissioner, Federal Communications Commission, to Sterling Speirn, Chief Executive Officer, National Conference on Citizenship (July 17, 2019) (on file in EB-IHD-19-00029567) (Carr Letter). The Enforcement Bureau subsequently issued a Letter of Inquiry (LOI) to NCOC, initiating an investigation into whether NCOC 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 Nicholas Mele, Chief Executive Officer, National Conference on Citizenship (Aug. 6, 2019) (on file in EB-IHD-19-00029567) (NCOC LOI).

<sup>5</sup> NCOC reports that approximately 55% of its assets are attributable to revenue from its EBS licenses. Response to Letter of Inquiry, from Nicolas Mele, Interim Chief Executive Officer, National Conference on Citizenship, to Marlene H. Dortch, Secretary, FCC, at 21 (Oct. 4, 2019) (NCOC LOI Response) (on file in EB-IHD-19-00029567). As of June 30, 2018, NCOC reported \$3,740,818 in "total assets" and \$2,912,434 in "net assets." *Id.*, Appx. 18 at Lines 20 and 22 (NCOC'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).

<sup>6</sup> 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).

<sup>7</sup> *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*).

<sup>8</sup> 47 CFR § 27.1203(b) (2019).

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),<sup>9</sup> 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).<sup>10</sup> 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 1963<sup>11</sup> until repeal of the requirement effective April 27, 2020,<sup>12</sup> 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,<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup>

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.<sup>17</sup> The Commission similarly no longer limited permitted services to "in-classroom instruction."<sup>18</sup> In expanding permitted use, however, the Commission retained

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<sup>9</sup> 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*).

<sup>10</sup> See *2004 EBS Order*, 19 FCC Rcd at 14234, para. 181; see also 47 CFR § 27.1214(b)(1) (2019).

<sup>11</sup> See *Educational TV Order*, 39 F.C.C. at 852-53, para. 25.

<sup>12</sup> See *Transforming the 2.5 GHz Band*, 84 Fed. Reg. 57343, 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, 5490, paras. 117, 124 (2019) (*2019 EBS Order*).

<sup>13</sup> See generally *Educational TV Order*.

<sup>14</sup> 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).

<sup>15</sup> See *id.*

<sup>16</sup> See *id.*

<sup>17</sup> *2004 EBS Order*, 19 FCC Rcd at 14222, para. 151.

<sup>18</sup> *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*

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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.<sup>19</sup> 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.”<sup>20</sup> The Commission repeatedly reaffirmed the applicability of the educational use requirement as a means of “safeguarding the primary educational purpose” of the spectrum.<sup>21</sup>

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.<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup> In 2006, the Commission made further changes to the band plan transition rules and mechanisms but declined to make changes to any educational requirements.<sup>25</sup> 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.<sup>26</sup>

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.”<sup>27</sup> This 20-hour requirement is “appl[ied] spectrally over the licensee’s whole actual service area.”<sup>28</sup> 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.<sup>29</sup>

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*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*).

<sup>19</sup> *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.

<sup>20</sup> 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]”).

<sup>21</sup> *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.

<sup>22</sup> *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 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*); *2006 EBS Order*, 21 FCC Rcd at 5612, para. 4; *2004 EBS Order*, 19 FCC Rcd at 14169, para. 6.

<sup>23</sup> *See 2004 EBS Order*, 19 FCC Rcd at 14177, 14182-84, paras. 22, 36-39.

<sup>24</sup> *See id.* at 14223, para. 152; *see also id.* at 14234, para. 181.

<sup>25</sup> *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).

<sup>26</sup> *See 2008 EBS Order*, 23 FCC Rcd at 6048-50, paras. 146-49.

<sup>27</sup> 47 CFR § 27.1214(b)(1) (2019).

<sup>28</sup> *Id.*

<sup>29</sup> *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-

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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.<sup>30</sup> Instead, the Commission stated that it would rely on the “good-faith efforts” of licensees to ensure compliance with the educational use requirements.<sup>31</sup> The Commission cautioned, however, that licensees may bear the burden of proving compliance with the educational use requirements in audits and other situations.<sup>32</sup> In those situations, “licensees must be ready and able to describe *and document* how they complied with [the educational-use] requirements.”<sup>33</sup> 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.”<sup>34</sup>

## 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.”<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup> At the time, many commenters asked the Commission to limit eligibility for ITFS licenses to local applicants.<sup>38</sup> The Commission recognized that “[l]ocally based educational entities have been convincingly demonstrated by the comment[er]s 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.”<sup>39</sup> 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.<sup>40</sup> 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

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66, Notice of Proposed Rulemaking, 33 FCC Rcd 4687, 4689, para. 4 (2018); *2004 EBS Order*, 19 FCC Rcd at 14234, para. 181.

<sup>30</sup> *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.

<sup>31</sup> *Two-Way Order*, 13 FCC Rcd at 19162, para. 94; *see also 2006 EBS Order*, 21 FCC Rcd at 5701, para. 227.

<sup>32</sup> *See Two-Way Order*, 13 FCC Rcd at 19154, 19162, paras. 81 n.188, 94.

<sup>33</sup> *Id.* at 19162, para. 94 (emphasis added).

<sup>34</sup> 47 CFR § 27.1201(a)(3) (2019).

<sup>35</sup> *See Educational TV Order*, 39 F.C.C. at 864; *see also id.* at 853-54, paras. 27-29.

<sup>36</sup> *See id.* at 854, para. 28.

<sup>37</sup> *See 1985 ITFS Report and Order*, 101 F.C.C.2d at 62, paras. 28-29.

<sup>38</sup> *Id.* at 54, para. 8.

<sup>39</sup> *Id.* at 56, para. 16.

<sup>40</sup> *Id.* at 56, para. 17.

that the applicant's programming would be incorporated into the institution's curriculum<sup>41</sup> and a requirement to establish a Local Program Committee.<sup>42</sup>

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.<sup>43</sup> 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."<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup>

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.<sup>47</sup> 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.<sup>48</sup> Instead, the Commission modified section 27.1201(a)(3) of the Commission's rules to better accommodate both technological and regulatory developments.<sup>49</sup> 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."<sup>50</sup> 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. The Conference describes itself as a "nonprofit corporation chartered [incorporated] by Congress in 1953 for purposes, as stated in the Congressional charter, 'being solely patriotic and educational.'"<sup>51</sup> Headquartered in Washington, D.C., the Conference asserts that it is dedicated to strengthening civic life in America through its three main activities: (1) holding an annual conference; (2) producing civic health indices for municipalities and states; and (3) engaging in educational activities,

<sup>41</sup> *Id.* at 60-62, paras. 25-27.

<sup>42</sup> *Id.* at 62, para. 28.

<sup>43</sup> *See id.* at 62, paras. 28-29.

<sup>44</sup> *See id.* at 110; 47 CFR § 74.932(a)(5) (1985); 47 CFR § 27.1201(a)(4) (2019).

<sup>45</sup> *See 1985 ITFS Report and Order*, 101 F.C.C.2d at 62, para. 29.

<sup>46</sup> *See id.* at 62, para. 28.

<sup>47</sup> *See 2004 EBS Order*, 19 FCC Rcd at 14236, para. 186.

<sup>48</sup> *See 2008 EBS Order*, 23 FCC Rcd at 6048-50, paras. 146-49.

<sup>49</sup> *Id.*

<sup>50</sup> 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").

<sup>51</sup> Response to Letter of Inquiry, from Nicolas Mele, Interim Chief Executive Officer, National Conference on Citizenship, to Marlene H. Dortch, Secretary, FCC, at 1 (Oct. 4, 2019) (NCOC LOI Response) (on file in EB-IHD-19-00029567). NCOC has no parent or affiliate organizations. *Id.* at 2.



including the development of curriculum around civics for middle schools, high schools, community colleges, and four-year colleges and universities.<sup>52</sup> The Conference states that its educational activities account for 40% of the organization's time.<sup>53</sup>

15. The Conference holds 8 EBS licenses<sup>54</sup> and leases 95% of the capacity of those licenses and associated channels to Clearwire Spectrum Holdings III LLC (Clearwire) pursuant to a "long term *de facto* transfer lease agreement," dated January 20, 2015 and effective March 18, 2015.<sup>55</sup> Clearwire is a subsidiary of the Sprint Corporation.<sup>56</sup> The lease agreement reserves for the Conference's use the capacity required to be set aside for EBS licensees pursuant to FCC rules. The agreement also states that the Conference may use the reserved spectrum "for any purpose that furthers its educational mission, including but not limited to the satisfaction of its minimum educational use requirements for EBS channels."<sup>57</sup> The Conference represents that it satisfies its educational use requirement by providing schools with equipment and access to Sprint services, rather than using its reserved capacity to deploy its own facilities.<sup>58</sup>

16. While part of its mission is ostensibly educational in nature, the Conference does not claim to provide educational programming. Rather, the Conference asserts that it arranges for and provides "equipment and service on the Sprint wireless system" for each of its receive sites.<sup>59</sup> Specifically, the Conference states that it provides WIMAX devices and Internet service to its receive sites for a variety of educational uses, including: school related e-mail communications; school-related streaming and downloading of educational content to the classroom; lab observations and monitoring; educational reference and research; interconnection from remote locations; faculty class preparation and training; broadband assisted Internet activities; student standardized test preparation and performance improvement; data transmissions; uploading and downloading of educational content; grading, attendance, and other administrative functions; IT; technical and security system monitoring; IT

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<sup>52</sup> NCOC LOI Response at 2, 4.

<sup>53</sup> *Id.* at 4 ("The conference represents approximately 35% of the organization's times; the civic health indices approximately another 25%, and educational activities represent the remainder [(40%)].").

<sup>54</sup> NCOC was unable to provide copies of all the documentation required under section 27.1201(a)(3) (2019) of the Commission's rules for all of its receive sites. *Id.* at 6 ("NCOC notes, however, that it was not obligated under Commission rule or precedent to retain copies of its original applications or otherwise maintain evidence of eligibility over time."). NCOC maintains that it must have provided the required documentation at the time it submitted its original ITFS applications because, if it had failed to do so, "the Commission could not have acted upon NCOC's applications, much less granted them." *Id.* at 5.

<sup>55</sup> *Id.* at 18 ("NCOC is party to one lease titled 'Educational Broadband Service Long-Term *De Facto* Transfer Lease Agreement with Clearwire Spectrum Holdings III, LLC, a subsidiary of Sprint.');" *see also id.* at Appx. 2 (NCOC-FCC License and Lease Tracking Chart), Appx. 4 (Educational Broadband Service Long-Term *De Facto* Transfer Lease Agreement) (redacted).

<sup>56</sup> *See* Sprint Corp., Annual Report (Form 10-K) 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 Rcd 10578 (2019)

<sup>57</sup> NCOC LOI Response, Appx. 4 at 5-6.

<sup>58</sup> NCOC LOI Response at 21 ("NCOC has not actually deployed facilities on its own to use its reserve capacity. Instead, as noted, NCOC has provided equipment and Sprint system service to schools for their use in satisfying the minimum educational use requirements.").

<sup>59</sup> *Id.* at 19. NCOC asserts that, "at any point in time" since 2019, it has served 13 receive sites, including public and private schools, colleges, and universities. *Id.* at 4-5 (listing the names and addresses of 13 educational institutions).

troubleshooting and systems maintenance and administration; and similar activities that further the educational mission of the schools.<sup>60</sup>

17. According to the Conference, at some point between 2011 and October 2019, all of its receive sites “ceased using the Conference’s provided equipment and services.”<sup>61</sup> While the Conference asserts that it does not know the exact date on which this occurred, it “believes” it may have resulted from Sprint’s “transition from WiMAX to LTE which NCOC believes was completed in late 2015.”<sup>62</sup> The Conference states that, as of October 4, 2019, the date of its LOI Response, it had “recently re-instituted service [to its receive sites] or was in the process of doing so at [the] time.”<sup>63</sup> To date, NCOC has not provided any update on the status of such service.

18. The Conference, by its own admission, also failed to maintain any active Local Program Committees.<sup>64</sup> The Conference initially created Local Program Committees for each of its original EBS licenses,<sup>65</sup> but argues that, due to regulatory changes, “the concept of a local program committee is no longer relevant.”<sup>66</sup>

### III. DISCUSSION

#### A. The National Conference on Citizenship Did Not Demonstrate Its Compliance with the Minimum Educational Use Requirement for EBS Licensees

19. Our Letter of Inquiry (LOI) requested information regarding the status of the Conference’s EBS licenses since 2009.<sup>67</sup> Nonetheless, the statute of limitations for this action is one year,<sup>68</sup> and accordingly we focus our review on the Conference’s EBS license compliance for the period from December 9, 2019 until April 27, 2020, when the educational use requirements were eliminated.<sup>69</sup>

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<sup>60</sup> *Id.* at 7-13.

<sup>61</sup> *Id.* at 7-13 (stating that “[a]t some point between 2011 and the present[,] . . . NCOC does not know the exact date,” the following eight educational institutions “ceased using NCOC’s provided equipment and services”: Hartford High School (Brownsville, VT), Trinity College (Hartford, CT), State University of New York, Albany, NY (SUNY-Albany), St. James Middle School (Binghamton, NY), St. Matthews Lutheran School (Buffalo, NY), Mater Christi School (Burlington, VT), First Lutheran School (Knoxville, TN), Dr. Fredie Thomas High School (Rochester, NY)).

<sup>62</sup> *Id.* at 8-12.

<sup>63</sup> *Id.* at 7, 15. Based on the record, it appears that one of the schools to which NCOC is proposing to provide wireless devices and broadband service is not an accredited educational institution. *See* Letter from Nicco Mele, Interim CEO, National Conference on Citizenship, to William Keenan, Director of Fund Development, Rochester School for the Deaf (Sept. 12, 2019) (attached as Appendix 22 to NCOC LOI Response) (showing the word “accredited” stricken from “accredited educational institution”).

<sup>64</sup> NCOC LOI Response at 17 (“The local program committees have not remained in existence and continued in operation. . . . NCOC does not currently have local program committees in the communities served by its EBS stations . . .”).

<sup>65</sup> *Id.* at 16.

<sup>66</sup> *Id.* at 17.

<sup>67</sup> *See* NCOC LOI.

<sup>68</sup> The applicable statute of limitations for these violations is one year. *See* 47 U.S.C. § 503(b)(6).

<sup>69</sup> Although the educational use requirements of section 27.1214(b)(1) of the Commission’s rules were eliminated effective April 27, 2020, the Conference and the Enforcement Bureau entered into a tolling agreement regarding the Enforcement Bureau’s investigation into the Conference’s EBS practices. *See* Tolling Agreement Executed between National Conference on Citizenship and Federal Communications Commission (executed Oct. 26, 2020) (on file in EB-IHD-19-00029567) (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.



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,<sup>70</sup> and (2) provided at least 20 hours per licensed channel per week of EBS educational use.<sup>71</sup> The Conference's lease refers to the reserved capacity required by FCC rules without specifically referencing the 5% reserved channel capacity required by the Commission's rules.<sup>72</sup>

20. Based on our review of the record, the terms of the Conference's lease agreement, and the information provided in this investigation, the Conference failed to establish that it met the 20-hour requirement for leased spectrum.<sup>73</sup> The Conference's apparent failure to comply with the Commission's 20-hour requirement is baldly clear. By the Conference's own admission, it did not provide service to any of its receive sites for at least the 12 months preceding the date of its response to our LOI.<sup>74</sup> Moreover, before receiving the LOI, the Conference had not communicated with any of its educational institutions since it first demonstrated that it met the substantial service requirements for each of its stations in 2011.<sup>75</sup> In fact, NCOC admitted that it only "became aware of the situation in connection with its investigation of the status of receive sites for the preparation of [its] response."<sup>76</sup> To date, the Conference has not provided any evidence demonstrating that it has reinstated service or that its receive sites are actually using the service for at least 20 hours per licensed channel per week. The Conference'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. Although the Commission has been loath to substitute its judgment for that of educational authorities concerning the use and instructional value of licensees' services, we do not face that difficulty here. The Conference has provided no evidence to show that either it or its spectrum lessees have actually served to support any educational uses at all, much less provided 20 hours per week per license of such content or equivalent services. The Commission relies on the "good faith efforts" of licensees to comply with its educational use requirements.<sup>77</sup> 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."<sup>78</sup> Without evidence or documentation of any use by the institutions in its licensed areas, the Conference was derelict in fulfilling its responsibility to comply with the Commission's 20-hour requirement. Furthermore, the Conference's response suggests that it apparently has no idea how or whether any of the educational institutions in its licensed service areas are using its offerings. There may be a case where a question arises about whether particular content or an equivalent substitute is sufficiently educational in nature, but this does not appear to be one of those cases.

22. 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.<sup>79</sup> The Conference apparently failed to

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<sup>70</sup> 47 CFR §§ 27.1203(b)-(c) (2019).

<sup>71</sup> *Id.* § 27.1214(b)(1) (2019).

<sup>72</sup> *Id.*; NCOC LOI Response at 19, Appx. 4 at 5-6 (Part 5 "Capacity Requirements and Uses").

<sup>73</sup> 47 CFR § 27.1214(b)(1) (2019).

<sup>74</sup> NCOC LOI Response at 7-13.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 8-13.

<sup>77</sup> *Two-Way Order*, 13 FCC Rcd at 19162, para. 94; *see also 2006 EBS Order*, 21 FCC Rcd at 5701, para. 227.

<sup>78</sup> *Two-Way Order*, 13 FCC Rcd at 19162, para. 94 (emphasis added).

<sup>79</sup> 47 CFR § 27.1201(a)(3) (2019).

meet this requirement by failing to provide service to any educational institution receive site for at least one year, and possibly for several. It was incumbent upon the Conference, as the EBS licensee, to ensure that the hardware was being put towards an educational use that was equivalent to 20 hours of educational programming per channel per week. In its LOI Response, the Conference admits that “at some point between 2011 and the present, [though] NCOC does not know the exact date,” as many as eight receive sites “ceased using NCOC’s provided equipment and services.”<sup>80</sup> This demonstrates that the Conference apparently failed to follow-up with its receive sites to ensure that the hardware was being put towards any use, let alone an educational one. We find that the Conference has failed to demonstrate that it provided 20 hours per licensed channel per week of EBS educational use and therefore was in apparent violation of former section 27.1214(b)(1) of the Commission’s rules.<sup>81</sup>

### B. NCOC Failed to Maintain Local Program Committees

23. 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.<sup>82</sup> While the Commission created no “detailed regulatory requirements” concerning the composition of the committees, this did not permit them to dissolve.<sup>83</sup> 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.”<sup>84</sup> 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.”<sup>85</sup> 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.

24. According to the Conference, while it did establish Local Program Committees when it applied for each of its EBS licenses, it “does not currently have local programming committees in the communities served by its EBS stations.”<sup>86</sup> Specifically, the Conference argues that the Commission does not require that non-local EBS licensees maintain Local Program Committees if the licensee “does not select and provide broadcast-style video programming over any of its EBS stations.”<sup>87</sup> Throughout the years, there have been several modifications to the Commission’s EBS rules, including the transition from ITFS to EBS and the addition of broadband services.<sup>88</sup> Until recently, however, the Commission did not alter or eliminate the requirement for Local Program Committees.<sup>89</sup> Although modifications to the Commission’s EBS rules in 2008 included adjustments to other requirements for non-local licensees, the

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<sup>80</sup> NCOC LOI Response at 7-13.

<sup>81</sup> *Id.* § 27.1214(b)(1) (2019).

<sup>82</sup> *1985 ITFS Report and Order*, 101 F.C.C.2d at 62, para. 28.

<sup>83</sup> *Id.* at 62, para. 29.

<sup>84</sup> *Id.*

<sup>85</sup> 47 CFR § 27.1201(a)(4) (2019); 47 CFR § 74.932(a)(5), note 3 (1985).

<sup>86</sup> NCOC LOI Response at 17.

<sup>87</sup> *Id.*

<sup>88</sup> *See generally 2004 EBS Order; see also 2008 EBS Order*, 23 FCC Rcd 5992; *Amendment of Part 74 of the Commission’s Rules with Regard to the Instructional Television Fixed Service*, Report and Order, 10 FCC Rcd 2907 (1995).

<sup>89</sup> *See 2019 EBS Order*, 34 FCC Rcd at 5456, para. 25 (eliminating 47 CFR § 27.1201(a)(4), which required the “establishment of local program committee”).

Local Program Committee obligation remained intact.<sup>90</sup> The requirement cannot be “willed away” by the Conference 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. The Conference’s creation of Local Program Committees as part of its original applications did not absolve the Conference from its continuing obligation to maintain and convene such committees.

25. The Conference’s apparent failure to comply with the Commission’s requirement for Local Program Committees means that the local communities that the Conference was supposed to serve via its eight licenses lacked the mechanism for local input and feedback envisioned by the Commission’s rules.<sup>91</sup> Indeed, had the Conference even conducted an annual check-in with the Local Program Committees, it would have realized in a more timely manner that the local educational institutions had stopped using the equipment and services that the Conference provided. Instead, the Conference apparently came to learn of the suspension of use “at some point” over the course of nearly a decade only because the Commission initiated this investigation.<sup>92</sup>

26. While the use of the spectrum changed from ITFS to EBS, from video to broadband, and analog to digital, the Commission’s Local Program Committee requirement remained constant. Thus, the Conference’s failure to maintain Local Program Committees constituted an apparent violation of former section 27.1201(a)(4) of the Commission’s rules.<sup>93</sup>

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

27. Commission precedent holds that the rules in effect at the time of an apparent violation govern the conduct in question, even if the Commission’s rules are later revised.<sup>94</sup> The Commission’s rules establish agency policy until such time as they are rescinded or amended in a notice-and-comment rulemaking.<sup>95</sup> 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.<sup>96</sup> Under this new plan, incumbents retained their existing channels and service areas.<sup>97</sup> Additionally, all previous eligibility requirements, including the various educational use requirements and Local Program Committee obligations, ceased being effective April 27, 2020.<sup>98</sup> Until the new rules

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

<sup>91</sup> Cf. 1985 ITFS Report and Order, 101 F.C.C.2d at 62, para. 29 (“Each receive site . . . should have some representation so that its particular programming and scheduling needs will be considered.”).

<sup>92</sup> NCOC LOI Response at 7-13.

<sup>93</sup> 47 CFR § 27.1201(a)(4) (2019) (“Nonlocal 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.”).

<sup>94</sup> 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) (“[T]he Commission cannot simply ignore its published regulations and pretend they had never been promulgated. The Commission’s rules establish agency policy until such time as they are rescinded or amended in a notice and comment rulemaking.”); *Alarm Devices, Mfg. Co.*, Order to Show Cause, 49 F.C.C.2d 143, 145, para. 8 (1974).

<sup>95</sup> 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.”)).

<sup>96</sup> See generally 2019 EBS Order.

<sup>97</sup> *Id.* at 5459, para. 36.

<sup>98</sup> *Id.* at 5450-58, paras. 13-31; see also 2.5 GHz Fed. Reg. Notice, 84 Fed. Reg. at 57365.

established in the 2019 EBS Order took effect, however, the Commission's previous rules governed the actions of EBS licensees.<sup>99</sup>

28. 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.<sup>100</sup> As the Commission's rule changes were forward-looking in nature, a change to the Commission's rules does not relieve NCOC of its original obligations to have complied with the Commission's rules in effect before the rule change.<sup>101</sup>

#### D. Proposed Forfeiture

29. 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"<sup>102</sup> 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."<sup>103</sup> Here, section 503(b)(2)(D) of the Act authorizes us to assess a forfeiture against National Conference on Citizenship 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.<sup>104</sup> 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."<sup>105</sup> In addition, the Commission has established forfeiture guidelines; they establish base penalties for certain violations and identify criteria that we consider when determining the appropriate penalty in any given case.<sup>106</sup> Under these guidelines, we may adjust a forfeiture upward for violations that are egregious, intentional, or repeated, or that cause substantial harm or generate substantial economic gain for the violator.<sup>107</sup>

30. 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.<sup>108</sup>

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<sup>99</sup> 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* NCOC LOI Response at 17 (asserting that "[i]n 2004, the Commission converted the ITFS service from one-way video service to two-way wireless broadband service" and that "[i]n this setting, the concept of a local program committee is no longer relevant, and NCOC 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 . . . does not select and provide broadcast-style video programming to receive cites" (internal citations omitted)).

<sup>100</sup> 47 CFR §§ 27.1201(a)(4), 27.1214(b)(1) (2019).

<sup>101</sup> *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.").

<sup>102</sup> 47 U.S.C. § 503(b)(1)(A).

<sup>103</sup> *Id.* § 503(b)(1)(B).

<sup>104</sup> 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).

<sup>105</sup> *Id.* § 503(b)(2)(D); 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*, CI Docket No. 95-6, Report and Order, 12 FCC Rcd 17087, 17100-01, para. 27 (1997) (*Forfeiture Policy Statement*), *recon. denied*, 15 FCC Rcd 303 (1999).

<sup>106</sup> 47 CFR § 1.80(b)(9), Note to paragraph (b)(9).

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

<sup>108</sup> See 47 CFR § 1.80, note to para. (b)(9); *Forfeiture Policy Statement*, 12 FCC Rcd at 17101, para. 27.

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.<sup>109</sup> Accordingly, we impose a forfeiture of \$8,000 for each week that the Conference 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 rules sunset on April 27, 2020, we impose a forfeiture of \$8,000 multiplied by the 19 weeks that the apparent violation occurred (\$152,000). We then multiply this by each of the Conference's eight EBS licenses, resulting in a base forfeiture of \$1,216,000 for the Conference's apparent failure to comply with the Commission's 20-hour requirement.

31. 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).<sup>110</sup> 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 the Conference holds eight EBS licenses, none of 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 Conference apparently failed to maintain a Local Program Committee, resulting in a base forfeiture amount of \$56,000 for failure to comply with the Commission's Local Program Committee requirement.

32. Based on the facts and record in this case, we have determined that the Conference 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 each of its eight EBS licenses; and (2) failing to maintain its Local Program Committee obligations in the service area of its eight EBS licenses. In total, the Conference's apparent violations would incur a cumulative base forfeiture of \$1,272,000.

33. 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.<sup>111</sup> We believe that an upward adjustment is warranted in this instance. Although we are assessing the

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<sup>109</sup> 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)).

<sup>110</sup> 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 "[t]he interaction between the station and the community would foster responsive programming").

<sup>111</sup> 47 U.S.C. § 503(b)(2)(E).



Commission's forfeitures for the Conference's conduct during a 19-week period, its violations apparently occurred over several years. Moreover, the extent and gravity of the violations are significant. When the Conference applied for and received its EBS licenses, the Conference also accepted the responsibility of ensuring that the Commission's educational goals for EBS would be faithfully met through their licenses. The Conference, however, has failed to demonstrate compliance with its responsibilities in two respects. First, it has been unable to demonstrate that each of its licensed EBS facilities met the Commission's threshold requirement of 20 hours of educational use per channel per week. Indeed, the Conference's heedless conduct is starkly exemplified by it not knowing that for perhaps as long as eight years its education receive sites had stopped using the equipment and services the Conference was purportedly providing for educational purposes. Second, while it purported to serve educational institutions, the Conference proceeded without any guidance or support from a Local Program Committee, a deficiency that deprived these institutions and the communities it serves of an important means of determining how the Conference's licensed spectrum could serve the localities' educational needs. Commission licensees are expected to understand and comply with the requirements and obligations associated with the licenses they are granted. In this instance, compliance with our requirements is important as these requirements go to the fundamental purpose of the EBS licenses. The Conference's apparent violations warrant a substantial penalty as they represent extensive and significant long-term violations of our rules.

34. In short, an upward adjustment is warranted in this instance because of the extended period of time over which the violations apparently occurred, the extent and gravity of the apparent violations, as well as the casual nonchalance with which the Conference approached regulatory obligations. Indeed, but for having to respond to the Commission's LOI, NCOC might not have discovered that it was not engaged in fulfilling the educational dimension of the EBS program. The Conference made inquiries of its receive sites only when confronted with the Commission's LOI. Had the Conference been in communication with its receive sites and kept some record of how the equipment provided by the Conference was being used, perhaps the Conference might have been able to describe and document its compliance with our rules. Instead, the Conference asks the Commission to accept bald claims of compliance. Given the totality of the circumstances here, and consistent with the *Forfeiture Policy Statement*, we propose an upward adjustment of 25%, for a total forfeiture of \$1,590,000 for the Conference's apparent rule violations.<sup>112</sup>

#### 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,<sup>113</sup> National Conference on Citizenship is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A FORFEITURE** in the amount of one million, five hundred and ninety thousand dollars (\$1,590,000) for apparently willfully and repeatedly violating former sections 27.1201(a)(4) and 27.1214(b)(1) of the Commission's rules.<sup>114</sup>

36. **IT IS FURTHER ORDERED** that, pursuant to section 1.80 of the Commission's rules,<sup>115</sup> within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture, National Conference on Citizenship **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. National Conference on Citizenship shall send electronic notification of payment to Kathryn Hinton, Enforcement Bureau, Federal Communications Commission, at

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<sup>112</sup> 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.

<sup>113</sup> 47 U.S.C. § 503(b); 47 CFR § 1.80.

<sup>114</sup> 47 CFR §§ 27.1201(a)(4), 27.1214(b)(1) (2019).

<sup>115</sup> *Id.* § 1.80.



[Kathryn.Hinton@fcc.gov](mailto:Kathryn.Hinton@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),<sup>116</sup> 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:<sup>117</sup>

- 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](mailto: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).<sup>118</sup> 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.<sup>119</sup> 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](mailto: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 rules.<sup>120</sup> 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

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<sup>116</sup> Payments made using the Commission's Fee Filer system do not require the submission of an FCC Form 159.

<sup>117</sup> 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](mailto:ARINQUIRIES@fcc.gov).

<sup>118</sup> Instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

<sup>119</sup> See 47 CFR § 1.1914.

<sup>120</sup> *Id.* §§ 1.16, 1.80(f)(3).

caption. The written statement shall also be e-mailed to Jeffrey J. Gee at [Jeffrey.Gee@fcc.gov](mailto:Jeffrey.Gee@fcc.gov) and to Kathryn Hinton at [Kathryn.Hinton@fcc.gov](mailto:Kathryn.Hinton@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.<sup>121</sup> 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.<sup>122</sup>

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 Nicholas Mele, Chief Executive Officer, National Conference on Citizenship, 1920 L Street NW, Suite 450, Washington, D.C. 20036, and Todd D. Gray, Counsel for National Conference on Citizenship, Gray, Miller, Persh LLP, 2233 Wisconsin Avenue NW, Suite 226, Washington, D.C. 20007.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>121</sup> 47 U.S.C. § 503(b)(2)(E).

<sup>122</sup> See, e.g., *Ocean Adrian Hinson, Surry County, North Carolina*, Forfeiture Order, 34 FCC Rcd 7619, 7621, para. 9 & n.21 (2019); *Vearyl 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).

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**STATEMENT OF  
COMMISSIONER JESSICA ROSENWORCEL  
DISSENTING**

Re: *In the Matter of National Conference on Citizenship*, Notice of Apparent Liability for Forfeiture, File No. EB-IHD-19-00029567.

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 National Conference on Citizenship*, Notice of Apparent Liability for Forfeiture, File No. EB-IHD-19-00029567.

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."<sup>1</sup> Notice is fair when it allows regulated parties to identify, with "ascertainable certainty," the standards with which the agency expects them to conform.<sup>2</sup>

The EBS licensees lacked such fair notice of the majority's interpretation of the now-eliminated educational use<sup>3</sup> and Local Programming Committee rules.<sup>4</sup> When it authorized wireless broadband service for the EBS program, the Commission rejected requests from the EBS community to clarify its educational use rules<sup>5</sup>; 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

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

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

<sup>3</sup> 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").

<sup>4</sup> 47 CFR § 27.1201(a)(4) (2019).

<sup>5</sup> 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.<sup>6</sup> 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.

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<sup>6</sup> 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.").