

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

In the Matter of)
The Northern Arizona University Foundation, Inc.) File No.: EB-IHD-19-00029571
) NAL/Acct. No: 202132080009
) FRN: 0005024237
)

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 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;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 \$5,485,000 against The Northern Arizona University Foundation, Inc. (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

1 47 CFR § 27.1214(b)(1) (2019).

2 47 CFR § 27.1201(a)(4) (2019).

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

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.

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.⁵ 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.”⁶ 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.⁷ 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.⁸

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),⁹ 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

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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 Cheryl Heitz, Chief Financial Officer, The Northern University Foundation, Inc. (July 16, 2019) (on file in EB-IHD-19-00029571) (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 Cheryl Heitz, Chief Financial Officer, The Northern University Foundation, Inc. (Aug. 6, 2019) (on file in EB-IHD-19-00029571) (LOI).

⁵ See *Amendment of Parts 2 and 4 of the Commission Rules and Regulations to Establish a New Class of Educational Television Service for the Transmission of Instructional and Cultural Material to Multiple Receiving Locations on Channels in the 1990-2110 MC/S or 2500-2690 MC/S Frequency Band et al.*, Report and Order, 39 F.C.C. 846, 852-53, para. 25 (1963) (*Educational TV Order*), recons. denied, 39 F.C.C. 873 (1964).

⁶ See *Educational TV Order*, 39 F.C.C. at 852-53, para. 25.

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, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14165 (2004) (*2004 EBS Order*).

⁸ 47 CFR § 27.1203(b) (2019).

⁹ 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*).

per week (the 20-hour requirement).¹⁰ 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 1963¹¹ until repeal of the requirement effective April 27, 2020,¹² 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,¹³ 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.¹⁴ 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.¹⁵ 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.¹⁶

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.¹⁷ The Commission similarly no longer limited permitted services to "in-classroom instruction."¹⁸ 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.¹⁹ Thus, the Commission continued to require channels to be used to "further the educational mission of accredited schools offering

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

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

¹² See Federal Communications Commission, *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*).

¹³ See generally *Educational TV Order*.

¹⁴ 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).

¹⁵ See *id.*

¹⁶ See *id.*

¹⁷ *2004 EBS Order*, 19 FCC Rcd at 14222, para. 151.

¹⁸ *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*).

¹⁹ *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.

formal educational courses to enrolled students.”²⁰ The Commission repeatedly reaffirmed the applicability of the educational use requirement as a means of “safeguarding the primary educational purpose” of the spectrum.²¹

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

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.”²⁷ This 20-hour requirement is “appl[ie]d spectrally over the licensee’s whole actual service area.”²⁸ 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.²⁹

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.³⁰ Instead, the Commission stated that it would rely on the “good-faith efforts” of licensees to ensure compliance with the educational use requirements.³¹ The Commission

²⁰ 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]”).

²¹ *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.

²² *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*). *See also 2006 EBS Order*, 21 FCC Rcd at 5612, para. 4; *2004 EBS Order*, 19 FCC Rcd at 14169, para. 6.

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

²⁴ *See id.* at 14223, para. 152; *see also id.* at 14234, para. 181.

²⁵ *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).

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

²⁷ 47 CFR § 27.1214(b)(1) (2019).

²⁸ *Id.*

²⁹ *See, e.g., id.* § 27.1214(b)(2) (2019); *2019 EBS Order*, 34 FCC Rcd at 5448, para. 7; *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands et al.*, WT Docket No. 03-66, Notice of Proposed Rulemaking, 33 FCC Rcd 4687, 4689, para. 4 (2018); *2004 EBS Order*, 19 FCC Rcd at 14234, para. 181.

³⁰ *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.

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

cautioned, however, that licensees may bear the burden of proving compliance with the educational use requirements in audits and other situations.³² In those situations, “licensees must be ready and able to describe *and document* how they complied with [the educational-use] requirements.”³³ 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.”³⁴

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.”³⁵ 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.³⁶ 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.³⁷ At the time, many commenters asked the Commission to limit eligibility for ITFS licenses to local applicants.³⁸ The Commission recognized that “[l]ocally based educational entities have been convincingly demonstrated by the comment[e]rs to be the best authorities for evaluating their educational needs and the needs of others they propose to serve in their communities, for designing courses to suit those needs, and for scheduling courses during the school year.”³⁹ 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.⁴⁰ 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 curriculum⁴¹ and a requirement to establish a Local Program Committee.⁴²

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.⁴³ 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

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

³³ *Id.* at 19162, para. 94 (emphasis added).

³⁴ 47 CFR § 27.1201(a)(3) (2019).

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

³⁶ See *id.* at 854, para. 28.

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

³⁸ *Id.* at 54, para. 8.

³⁹ *Id.* at 56, para. 16.

⁴⁰ *Id.* at 56, para. 17.

⁴¹ *Id.* at 60-62, paras. 25-27.

⁴² *Id.* at 62, para. 28.

⁴³ See *id.* at 62, paras. 28-29.

community where they apply.⁷⁴⁴ 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.⁴⁵ 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.⁴⁶

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.⁴⁷ 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.⁴⁸ Instead, the Commission modified section 27.1201(a)(3) of the Commission's rules to better accommodate both technological and regulatory developments.⁴⁹ 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."⁵⁰ 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 Foundation is an Arizona nonprofit corporation incorporated in 1959.⁵¹ Operating exclusively for the benefit of Northern Arizona University (University), the Foundation "receives gifts and bequests, administers and invests securities and property, and disburses payments to and on behalf of the University for the advancement of its educational mission."⁵² The Foundation asserts that, by means of its EBS licenses, it "likewise supports the educational mission of the schools it serves in each of its [Geographic Service Areas]."⁵³

15. The Foundation holds 35 EBS licenses in communities across the United States.⁵⁴ The Foundation has entered into spectrum leasing agreements for all of its licenses.⁵⁵ All the spectrum leasing

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

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

⁴⁶ See *id.* at 62, para. 28.

⁴⁷ See *2004 EBS Order*, 19 FCC Rcd at 14236, para. 186.

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

⁴⁹ *Id.*

⁵⁰ 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").

⁵¹ Response to Letter of Inquiry, from Rickey N. McCurry, J.D., Executive Director, The Northern Arizona University Foundation, Inc., to Marlene S. Dortch, Secretary, FCC at A-1 (Oct. 4, 2019) (on file in EB-IHD-19-00029571) (Foundation Response). The Foundation has two subsidiaries, Northern Arizona Real Estate Holdings, LLC and NAU Ventures, LLC. *Id.* The Foundation notes that the University is not a corporate parent or a corporate affiliate of the Foundation, explaining that "each entity is governed by its own independent board." *Id.*

⁵² *Id.* at A-1, A-5.

⁵³ *Id.* at A-5.

⁵⁴ At the time it submitted its LOI response, the Foundation had 33 EBS licenses. *Id.*, Exh. A. Shortly thereafter, the Foundation acquired two additional EBS licenses. See FCC Universal Licensing System, *Educational Broadband Service License - WNC314 - The Northern Arizona University Foundation, Inc.*,

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agreements are with Sprint Corporation subsidiaries and affiliates.⁵⁶ Each lease agreement includes covenants reserving for the Foundation's use, "at a minimum, the capacity required for EBS licensees leasing spectrum."⁵⁷ The lease agreements require the Foundation to use this reserved spectrum to satisfy its minimum educational use requirements.⁵⁸

16. While its mission is ostensibly educational in nature, the Foundation does not claim to provide educational programming. Rather, the Foundation asserts that it provides each of its receive sites with "Internet access devices and service on essentially a 24/7 basis."⁵⁹ Specifically, the Foundation explains that it "has partnered with Sprint to provide the Receive Sites with devices capable of accessing the Internet via Sprint's wireless broadband service as well as the service itself, at no cost to the Receive Sites."⁶⁰ The Foundation also claims that the receive sites "agreed to use the devices and service to further their educational mission" by (1) providing sick students with free access to school resources over the Internet, (2) monitoring school facilities with connected video cameras, and (3) assisting faculty with sharing academic research and related materials.⁶¹ The Foundation notes, however, that it did not provide service to some receive sites for more than a year.⁶²

17. The Foundation, by its own admission, also failed to maintain any active Local Program Committees.⁶³ The Foundation created Local Program Committees for each of its original EBS licenses,⁶⁴

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<https://wireless2.fcc.gov/UlsApp/UlsSearch/license.jsp?licKey=2586625> (last visited Jan. 4, 2021); FCC Universal Licensing System, *Educational Broadband Service License – WNC751 - The Northern Arizona University Foundation, Inc.*, <https://wireless2.fcc.gov/UlsApp/UlsSearch/license.jsp?licKey=2588517> (last visited Jan. 4, 2021).

⁵⁵ Foundation Response, Exh. B; FCC Universal Licensing System, *Lease Details for WNC751 - L000001205 - Fixed Wireless Holdings, LLC*, <https://wireless2.fcc.gov/UlsApp/UlsSearch/leaseMain.jsp?parentKey=2588517&licKey=2840372> (last visited Jan. 4, 2021) (WNC751 Lease Details); FCC Universal Licensing System, *Lease Details for WNC314 - L000040737 - TDI Acquisition Sub, LLC*, <https://wireless2.fcc.gov/UlsApp/UlsSearch/leaseMain.jsp?parentKey=2586625&licKey=4253317> (last visited Jan. 4, 2021) (WNC314 Lease Details).

⁵⁶ Foundation Response, Exh. B; WNC751 Lease Details; WNC314 Lease Details. Specifically, the Foundation has entered into 16 leases with Clearwire Spectrum Holdings III, LLC, 6 leases with NSAC, LLC, 4 leases with Nextel Spectrum Acquisition Corp. (subsidiary of Sprint Nextel), 3 leases with Clearwire Spectrum Holdings LLC, 3 leases with Fixed Wireless Holdings, LLC, 2 leases with Sprint Nextel (now Sprint Communications, Inc.), and 1 lease with TDI Acquisition Sub, LLC. Sprint Corporation owns all of these lessees. *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 Jan. 4, 2021). 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, 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).

⁵⁷ Foundation Response at A-14.

⁵⁸ *See, e.g.*, Educational Broadband Service Long-Term De Facto Transfer Lease Agreement, by and between The Northern Arizona University Foundation, Inc. and Clearwire Spectrum Holdings III LLC (Sept. 4, 2013) (redacted version on file in EB-IHD-19-00029571) (lease agreement for stations WHR453 and WHR460).

⁵⁹ Foundation Response at A-15.

⁶⁰ *Id.* at A-10.

⁶¹ *Id.*

⁶² *Id.* at A-9. Specifically, for its two licenses in Burlington, Vermont (WLX608 and WNC404), the Foundation indicated that it has not serviced a receive site since acquiring the licenses on November 5, 2018. *Id.*

⁶³ *Id.* at A-13.

but argues that such committees have not served a purpose for EBS licensees after the Commission changed its rules—first in 1998 “to allow EBS licensees to construct digital two-way systems capable of providing high-speed, high-capacity broadband service,” and later in 2004 to allow EBS licensees to deliver data transmission.⁶⁵ Accordingly, the Foundation admits that it has not made use of Local Program Committees for the past ten years since it has relied on “data/Internet transmission” for each of its EBS licenses.⁶⁶

III. DISCUSSION

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

18. Our LOI requested information regarding the status of the Foundation’s EBS licenses since 2009. Nonetheless, the statute of limitations for this action is one year,⁶⁷ and accordingly we focus our review on the Foundation’s EBS license compliance for the period from December 9, 2019 until April 27, 2020, when the educational use requirements were eliminated.⁶⁸ 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,⁶⁹ and (2) provided at least 20 hours per licensed channel per week of EBS educational use.⁷⁰

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 met the 20-hour requirement for leased spectrum.⁷¹ The record indicates that after the Foundation demonstrated that it had met the substantial service requirements for each of its stations in 2011, it did not communicate further with its educational institutions regarding their use.⁷² Accordingly, the Foundation has been unable to demonstrate whether its educational institutions actually used their provided equipment, if the equipment was used to further an educational mission, or if the equipment was used for at least 20 hours per week per channel for educational purposes.

20. Moreover, the Foundation is unable to provide any evidence that it purchased any equipment or provided any service that actually supported educational use by the receive sites. Through its lease agreements with Sprint and its affiliates, the Foundation is entitled to “an Account Credit for the

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⁶⁴ *Id.* at A-12 (asserting that its limited documentation “indicates that local program committees were planned, and the letters evidence the willingness of the schools to provide representatives for same.”).

⁶⁵ *Id.*

⁶⁶ *Id.* at A-13.

⁶⁷ The applicable statute of limitations for these violations is one year. *See* 47 U.S.C. § 503(b)(6).

⁶⁸ 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 The Northern Arizona University Foundation, Inc. and Federal Communications Commission (executed Oct. 26, 2020) (on file in EB-IHD-19-00029571 (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 26, 2020.

⁶⁹ 47 CFR § 27.1203(b)-(c) (2019).

⁷⁰ *Id.* § 27.1214(b)(1) (2019).

⁷¹ *Id.*; *see also Two-Way Order*, 13 FCC Rcd at 19162, para. 94.

⁷² *See generally* Foundation Response.

purchase of wireless broadband products and services provided by Sprint.”⁷³ The Foundation has used the credit to provide the receive sites with “Internet access devices,” such as portable hotspots and netbooks.⁷⁴ The Foundation asserts that it also provides access to data services over the Sprint network to the receive sites located in its licensed areas “on essentially a 24/7 basis.”⁷⁵ But the Foundation’s distribution of hardware only guarantees that the receive sites have equipment capable of receiving the Foundation’s data service. It does not guarantee the use of the hardware or service by the educational institutions and does not show that any such use complies with the Commission’s 20-hour requirement for EBS licensees that lease out their spectrum.

21. Under the Foundation’s plan, the access to broadband or data services did not occur unless and until an accredited institution or its enrolled students, faculty or staff took actions to successfully connect to and use the Internet connectivity using the Sprint-provided connection devices (e.g., a portable hotspot or netbook). Under the Commission’s rules, however, it is an educational institution’s actual use of data services, not its mere ability to use them, that matters when determining whether an EBS licensee that leases its excess spectrum has satisfied the Commission’s 20-hour requirement. The Foundation used its Sprint credits to purchase hardware that it then passed on to the educational institutions with insufficient follow-up to either ensure that the equipment was used in furtherance of the site’s educational mission or determine whether any educational value was derived from the provided hardware. The Foundation’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.

22. The Foundation cannot describe or provide information regarding the state of its operations and educational use at the institutions within its license areas during the period under review, other than the fact that it relied on Sprint to provide service to its receive sites and on Sprint’s assurance that “all Receive Sites have been served.”⁷⁶ This apparently misplaced reliance reflects the Foundation’s disconnect from its own receive sites.⁷⁷ The Commission relies on the “good faith efforts” of licensees to comply with its educational use requirements.⁷⁸ But licensees bear the burden of proving compliance with the educational use—and “must be ready and able to describe *and document* how they complied with [the educational-use] requirements.”⁷⁹ Without evidence or documentation of any use by the institutions in its licensed areas, the Foundation was derelict in fulfilling its responsibility to comply with the Commission’s 20-hour requirement. The Foundation has failed to demonstrate that the schools and other institutions actually used the Sprint-provided equipment to access the Internet or further their educational missions. This further highlights the Foundation’s failure to meet the Commission’s 20-hour requirement at any of the educational institutions located within its 35 EBS license areas.

⁷³ *Id.* at A-15.

⁷⁴ *Id.* at A-10, A-15.

⁷⁵ *Id.*

⁷⁶ *Id.* at A-9.

⁷⁷ Furthermore, by the Foundation’s own admission, two of the its EBS stations violated the 20-hour requirement because they experienced non-use by educational institutions since November 2018 even as the Foundation continued to lease out the spectrum. *Id.* at A-9, Exh. B. As of October 4, 2019, the Foundation had not found an educational partner (i.e., receive site) for its Burlington, VT licenses (WLX608 and WNC404). Notwithstanding this failure, the Foundation entered into arrangements to lease the Burlington spectrum effective November 29, 2018. *Id.*, Exh. B. To date, the Foundation has not confirmed whether it has found one or more educational partners for its Burlington licenses and, if it has, whether it is satisfying the 20-hour requirement with respect to those licenses.

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

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

23. The Commission’s reluctance to substitute its judgment for that of educational authorities concerning what content or use is regarded as educational does not excuse the Foundation’s conduct here because the Foundation has not pointed us to *any* educational content in this case nor has it otherwise established that the content or use of the relevant EBS licenses satisfy 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. In other words, the Foundation can neither describe nor document actual compliance with the educational-use requirement—and its failure in this regard appears to confirm the Foundation’s failure to engage in good-faith efforts to ensure compliance with the 20-hour requirement. 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.

24. The Commission’s rules contemplated that broadband and data services would be used to further the receive site’s educational mission and would be provided to enrolled students, faculty, and staff in a manner and in a setting conducive to educational uses.⁸⁰ 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 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 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.⁸¹

B. The Foundation Failed to Maintain Local Program Committees

25. Beginning 25 years ago, the Commission’s rules required non-local ITFS applicants to establish a Local Program Committee in each community they proposed to serve.⁸² While the Commission created no “detailed regulatory requirements” concerning the composition of the committees, this did not permit them to dissolve.⁸³ 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.”⁸⁴ 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.”⁸⁵ The Commission relied upon this statement in the future tense, indicating an ongoing and continuing state of affairs, in approving these licenses. Moreover, the rule’s reference to “scheduling” similarly indicates that the Commission intended for the Local Program Committee to provide ongoing assistance throughout the license term.

26. The Foundation admits that it “has not made use of the local program committees referenced in 27.1201(a)(4)” for the past ten years and does not offer evidence that Local Program Committees existed during the period under review in this investigation.⁸⁶ 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 serve via its 35 licenses lacked the mechanism for local input and feedback envisioned by the Commission’s rules. Indeed, were it the case that the Foundation

⁸⁰ 47 CFR § 27.1201(a)(3) (2019).

⁸¹ *Id.* § 27.1214(b)(1) (2019).

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

⁸³ *Id.* at 62, para. 29.

⁸⁴ *Id.*

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

⁸⁶ Foundation Response at A-13.

had maintained Local Program Committees, it is possible that it would have also been more careful about its responsibility to confirm that the programming substitute was actually provided to the educational and public institutions, instead of simply being offered without any follow-up.

27. The Foundation's claim that "local program committees no longer serve[] a purpose for EBS Licenses" is meritless.⁸⁷ While the Commission has modified the EBS rules throughout the years,⁸⁸ the Commission did not alter or eliminate the requirement for Local Program Committees until recently.⁸⁹ Although modifications to the EBS rules in 2008 included adjustments to other requirements for non-local licensees, the Local Program Committee requirement remained intact.⁹⁰ The 2008 rule revisions demonstrated that the Commission was aware of the changed circumstances for the ITFS/EBS band since 1985, and nonetheless chose to retain the Local Program Committee requirement. Thus, 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.⁹¹ 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.

28. 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 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

29. Commission precedent holds that the rules in effect at the time of an apparent violation govern the conduct in question, even if the rules are later revised.⁹² The Commission's rules establish agency policy until such time as they are rescinded or amended in a notice-and-comment rulemaking.⁹³ The agency undertook a significant restructuring of the EBS band in 2019, including a new band plan, updated performance requirements, and a new geographic area licensing system for future licensees.⁹⁴

⁸⁷ *Id.* at A-12, A-13.

⁸⁸ *See, e.g., 2004 EBS Order.*

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

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

⁹¹ 47 CFR § 27.1201(a)(4) (2019).

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

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

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

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

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

D. Proposed Forfeiture

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

32. In determining a proposed forfeiture amount, the Commission starts with the base forfeiture amount for the apparent violation, as set forth in the Commission's forfeiture guidelines.¹⁰⁴ While section 1.80(b)(9) does not establish a specific base forfeiture amount for a violation of the Commission's EBS educational use requirement, we find that the base forfeiture amount of \$8,000 for a violation of the children's television commercialization or programming requirements is most analogous to the Commission's EBS educational use requirement since they govern the amount of children's programming to be provided within a prescribed time span.¹⁰⁵ Accordingly, we impose a base forfeiture

⁹⁵ *Id.* at 5459, para. 36.

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

⁹⁷ 2.5 GHz Fed. Reg. Notice, 84 Fed. Reg. at 57360. The new EBS rules became effective on April 27, 2020. *See* 2019 EBS Order, 34 FCC Rcd at 5489, para. 117 (deferring the effective date until six months from the date of the Order's publication in the Federal Register). *See contra* Foundation Response at A-12 (asserting that due to changes in EBS rules in 1998 and 2004, Local Program Committees no longer served a purpose for EBS licenses).

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

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

¹⁰⁰ 47 U.S.C. § 503(b)(1)(A).

¹⁰¹ *Id.* § 503(b)(1)(B).

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

¹⁰³ 47 U.S.C. § 503(b)(2)(E); *see also* 47 CFR § 1.80(b)(9); *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17100-01, para. 27 (1997) (*Forfeiture Policy Statement*), *recons. denied*, 15 FCC Rcd 303 (1999).

¹⁰⁴ *See* 47 CFR § 1.80, note to para. (b)(9); *Forfeiture Policy Statement*, 12 FCC Rcd at 17101, para. 27.

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.

33. The number of weeks that the violation occurred at each of the Foundation's EBS licenses varies depending on the date the Foundation entered into an EBS spectrum leasing arrangement for a particular license. For 34 of the Foundation's EBS licenses, we use December 9, 2019 as the Commission's starting point until the Commission's rules sunset on April 27, 2020, and impose a base forfeiture of \$8,000 multiplied by the 19 weeks that the violation occurred (\$152,000).¹⁰⁶ We then multiply this number by each of those 34 licenses, resulting in a base forfeiture amount of \$5,168,000 for those licenses. With respect to EBS license WNC314, we use February 21, 2020 as the Commission's starting point,¹⁰⁷ and impose a base forfeiture of \$8,000 multiplied by the nine weeks that the apparent violation occurred (\$72,000). Therefore, we assess a total base forfeiture amount of \$5,240,000 for the Foundation's apparent failure to comply with the Commission's 20-hour requirement.

34. As to the failure to maintain a Local Program Committee, section 1.80(b)(8) does not establish a specific base forfeiture amount for a violation of that requirement. Again, in the absence of a specified base forfeiture, we select a base forfeiture for an analogous violation. We find that the violation is most analogous to a violation of the former main studio rule and will use that amount (\$7,000).¹⁰⁸ 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 Foundation holds 35 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 Foundation apparently failed to maintain a Local Program Committee, resulting in a base forfeiture amount of \$245,000 for failure to comply with the Commission's Local Program Committee requirement.

35. 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 34 EBS licenses and a nine-week period at one EBS license; and (2) failing to maintain its Local Program Committee obligations in the service area of its 35 EBS licenses. In total, the Foundation's apparent violations incurs a cumulative base forfeiture of \$5,485,000.

(Continued from previous page) _____

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

¹⁰⁶ The Foundation entered into EBS spectrum leases for 34 of its EBS licenses prior to December 9, 2019. See Foundation Response, Exh. B.

¹⁰⁷ The Commission approved the Foundation's lease for WNC314 on February 21, 2020. See WNC314 Lease Details.

¹⁰⁸ 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").

36. 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.¹⁰⁹ 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 \$5,485,000.¹¹⁰

IV. ORDERING CLAUSES

37. Accordingly, **IT IS ORDERED** that, pursuant to section 503(b) of the Act, and 1.80 of the Commission's rules,¹¹¹ The Northern Arizona University Foundation, Inc., is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A FORFEITURE** in the amount of five million, four hundred eighty five thousand dollars (\$5,485,000) for apparently willfully and repeatedly violating former sections 27.1201(a)(4) and 27.1214(b)(1) of the Commission's rules.¹¹²

38. **IT IS FURTHER ORDERED** that, pursuant to section 1.80 of the Commission's rules,¹¹³ 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 41 below.

39. The Northern Arizona University Foundation, Inc., shall send electronic notification of payment to Kathryn Hinton, Enforcement Bureau, Federal Communications Commission, at 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),¹¹⁴ 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:¹¹⁵

- 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).¹¹⁶ 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

¹⁰⁹ 47 U.S.C. § 503(b)(2)(E).

¹¹⁰ 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.

¹¹¹ *Id.* § 503(b); 47 CFR § 1.80.

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

¹¹³ *Id.* § 1.80.

¹¹⁴ Payments made using the Commission's Fee Filer system do not require the submission of an FCC Form 159.

¹¹⁵ 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.

¹¹⁶ Instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

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.

40. 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. 20554.¹¹⁷ 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.

41. 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.¹¹⁸ The written statement must be mailed to Jeffrey J. Gee, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 45 L Street NE, Washington, D.C. 20554, and must include the NAL account number referenced in the caption. The written statement shall also be e-mailed to Jeffrey J. Gee at Jeffrey.Gee@fcc.gov and to Kathryn Hinton at Kathryn.Hinton@fcc.gov.

42. 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.¹¹⁹ 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.¹²⁰

43. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture and Order shall be sent by first class mail and certified mail, return receipt requested, to Rickey N. McCurry, Executive Director, The Northern Arizona University Foundation, Inc., P.O. Box 4094,

¹¹⁷ See 47 CFR § 1.1914.

¹¹⁸ *Id.* §§ 1.16, 1.80(f)(3).

¹¹⁹ 47 U.S.C. § 503(b)(2)(E).

¹²⁰ 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).

Flagstaff, AZ 86011, and to F. Reid Avett, Counsel for The Northern Arizona University Foundation, Inc., Womble Bond Dickinson LLP, 1200 Nineteenth Street NW, Suite 500, Washington, D.C. 20036.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

**STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL
DISSENTING**

Re: *In the Matter of The Northern Arizona University Foundation, Inc.*, Notice of Apparent Liability for Forfeiture, EB-IHD-19-00029571

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 The Northern Arizona University Foundation, Inc.*, Notice of Apparent Liability for Forfeiture, EB-IHD-19-00029571

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

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

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

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

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

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

² *Id.*

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

⁴ 47 CFR § 27.1201(a)(4) (2019).

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

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

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

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

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

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