

2. While the Commission's rules permitted EBS licensees to rely on the provision of broadband or video service in fulfilling the 20-hour requirement,³ based on our investigation,⁴ we find that Voqal 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, Voqal 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, Voqal 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, Voqal reaped the rewards 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

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

⁴ In July 2019, Commissioner Brendan Carr sent a letter to Voqal requesting information regarding its compliance with these requirements for EBS licensees. Letter from Brendan Carr, Commissioner, Federal Communications Commission, to John Schwartz, President, Voqal USA. (July 2, 2019) (on file in EB-IHD-19-00029560) (Carr Letter). The Enforcement Bureau subsequently issued a Letter of Inquiry to Voqal, initiating an investigation into whether it violated the Commission's rules governing EBS licensing requirements. Letter of Inquiry from Jeffrey J. Gee, Chief, Investigations and Hearings Division, FCC Enforcement Bureau to John Schwartz, President, Voqal USA. (Aug. 6, 2019) (on file in EB-IHD-19-00029560) (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 *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*).

minimum of 5% of its spectrum capacity and provide 20 hours minimum of educational use per channel 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 *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[ied] 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 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 cautioned,

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

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.

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, 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.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[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.”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 para. 17.

⁴¹ *Id.* at 60-62, paras. 25-27.

⁴² *Id.* at 62, para. 28.

⁴³ See *id.* at paras. 28-29.

community where they apply.”⁴⁴ 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 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. Voqal USA is the trade name for Instructional Telecommunications Foundation, Inc., a Colorado nonprofit incorporated in 1983 (Voqal).⁵¹ Voqal’s efforts are supposed to be dedicated to educational purposes, including “providing educational and instructional television material” to accredited institutions and government entities for educational use.⁵² Voqal holds 11 EBS licenses,⁵³ and has entered into spectrum leasing agreements for each of them.⁵⁴ All the spectrum leasing agreements are

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 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 Attach. A, from Stephanie Weiner, Counsel to Voqal USA, to Kalun Lee, Deputy Chief, Investigations and Hearings Division, Enforcement, FCC, at 1, 9 (Nov. 20, 2019) (on file in EB-19-00029560) (Voqal Response). Currently, Voqal has three affiliate companies: EBS Support Services, LLC; Mobile Citizen, LLC; and Independent Spectrum, LLC. Voqal has a majority interest in Independent Spectrum, LLC and shares the same management. Independent Spectrum has four wholly owned subsidiaries that hold EBS licenses. *Id.* at 2. Voqal and its affiliates are headquartered at 825 Delaware Ave., Ste 500, Longmont, CO 80501. *Id.* at 2. John Schwartz is the Director and President of Voqal and the manager of Independent Spectrum, LLC and its subsidiaries. *Id.* at 2.

⁵² *Id.* at 9.

⁵³ *Id.* at 17 (“ITF holds 7 EBS licenses itself, and Independent Spectrum, LLC subsidiaries hold 4.”).

⁵⁴ *Id.* at 24.

with Sprint Corporation's subsidiary Clearwire Spectrum Holdings III, LLC (Clearwire).⁵⁵ Each lease agreement includes a provision that the lessee reserves a minimum channel capacity for educational use.⁵⁶

15. While its mission is ostensibly educational and public in nature, Voqal does not claim to provide educational or otherwise public programming.⁵⁷ Rather, Voqal asserts that it provides unlimited wireless broadband data service to its educational institution receive sites.⁵⁸ Specifically, Voqal states that it provides each of Voqal's receive sites with "unlimited LTE subscriptions and hotspots."⁵⁹ Voqal submits that these "[s]chools are given the discretion to determine how they use the hotspots to advance their educational missions."⁶⁰ Voqal's lease agreements are silent regarding the 20-hour requirement.⁶¹ Voqal states that its agent, Mobile Citizen, is one of the largest sources of Internet service to low-income individuals and does so via educational institutions and other nonprofit organizations.⁶² However, Voqal does not claim to undertake any effort directly in service of the 20-hour requirement.⁶³ When asked to describe its educational offering, Voqal didn't discuss *any* specific educational programming, but instead claimed, in something of a non sequitur, that its Internet service initiatives "dwarf[] the 20-hour minimum."⁶⁴

16. Voqal, by its own admission, also failed to maintain any active Local Program Committees.⁶⁵ In the case of eight of its eleven licenses, Voqal neither established nor maintained a Local Program Committee.⁶⁶ Voqal does not claim to have maintained a Local Program Committee in the three cases where it created committees at the time of license issuance.⁶⁷

III. DISCUSSION

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

17. Our LOI requested information regarding the status of Voqal's EBS licenses since 2009. Nonetheless, the statute of limitations for this action is one year,⁶⁸ and accordingly we focus our review on Voqal's EBS license compliance for the period from December 9, 2019 until April 27, 2020, when the

⁵⁵ *Id.* at 25. T-Mobile has since acquired Sprint in a merger that was approved by the Commission in 2019. *See Applications of T-Mobile US, Inc., and Sprint Corporation, et al., for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, Declaratory Ruling, and Order of Proposed Modification, 34 FCC Rcd 10578 (2019).

⁵⁶ *Id.* at 26.

⁵⁷ *Id.* at 9 (Voqal describes its educational mission and its activities in pursuit of that mission, such as provisioning internet service to schools, but does not describe any educational programming *per se*).

⁵⁸ *Id.* at 9, 16. {[REDACTED]}. *Id.* Material set off by double brackets {[]} is confidential and is redacted from the public version of this document.

⁵⁹ *Id.* at 16.

⁶⁰ *Id.* at 16.

⁶¹ 47 CFR § 27.1214(b)(1) (2019).

⁶² *Voqal Response* at 26.

⁶³ *Id.* at 26.

⁶⁴ *Id.*

⁶⁵ *Id.* at 22.

⁶⁶ *Id.*

⁶⁷ *Id.*

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

educational use requirements were eliminated.⁶⁹ Voqal'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,⁷⁰ and (2) provided at least 20 hours per licensed channel per week of EBS educational use.⁷¹

18. Based on our review of the record, the terms of Voqal's lease agreements and the information provided in this investigation, Voqal failed to provide sufficient documentation and information describing how it complied with and met the 20-hour requirement for leased spectrum.⁷² Voqal claims that it fulfills its 20-hour educational use requirement by providing low cost Internet service and Internet hotspots.⁷³ Voqal further asserts that it fulfills the educational use requirement because schools are given the discretion to advance their educational missions.⁷⁴ However, Voqal is not purchasing or providing anything that is definitively related to education.

19. Voqal's distribution of low-cost Internet service and Internet hotspots to its receive sites only guarantees that the receive sites have equipment capable of receiving service. It does not guarantee the use of the hardware or service by the educational institutions or whether any such use complies with the Commission's 20-hour requirement for EBS licensees that lease out their spectrum. Under Voqal'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 hardware (e.g., a portable hotspot or router). Under the Commission's rules, however, it is an educational institution's actual use of data services, not its mere ability to use them, that matters when determining whether an EBS licensee that leases its excess spectrum has satisfied the Commission's 20-hour requirement. Voqal'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.

20. Voqal's apparent failure to comply with the Commission's 20-hour requirement is baldly clear. Voqal has failed to demonstrate that the Internet hotspots it made available to the educational institutions were actually used to access the Internet or further their educational missions. Without evidence of educational use by the receive sites, Voqal was apparently derelict in fulfilling its responsibility to provide 20 hours per channel per week of educational usage.

21. 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 Voqal's conduct here because Voqal has provided no evidence to show that either it or its spectrum lessees have actually provided 20 hours per week per license of educational content to satisfy the Commission's rules. The Commission

⁶⁹ Although the educational use requirements of section 27.1214(b)(1) of the Commission's rules were eliminated effective April 27, 2020, Voqal and the Enforcement Bureau entered into a tolling agreement regarding the Enforcement Bureau's investigation into Voqal's EBS practices. *See* Tolling Agreement Executed between Voqal and Federal Communications Commission (executed Oct. 26, 2020) (on file in EB-IHD-19-00029560) (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.

⁷⁰ 47 CFR § 27.1203(b)-(c) (2019).

⁷¹ 47 CFR § 27.1214(b)(1) (2019).

⁷² *Id.*; *see Two-Way Order*, 13 FCC Rcd at 19162, para.94.

⁷³ *Voqal Response* at 26.

⁷⁴ *Id.* at 16.

relies on the “good faith efforts” of licensees to comply with its educational use requirements.⁷⁵ 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.”⁷⁶ Without evidence or documentation of any use by the institutions in its licensed areas, Voqal was derelict in fulfilling its responsibility to comply with the Commission’s 20-hour requirement. Furthermore, although Voqal’s response explains that educational institutions may be using its Internet services, Voqal has provided no evidence of whether any actual educational content was transmitted in its licensed service areas. 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.

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.⁷⁷ Voqal’s mere distribution of hardware to its educational institution receive sites failed to meet this requirement. It was incumbent upon Voqal, as the EBS licensee, to ensure that the hardware was being put towards that 20-hour requirement. Voqal, however, has not demonstrated any follow-up with its receive sites to ensure that the broadband was being put towards any use, let alone an educational one. We find that Voqal has apparently 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.⁷⁸

B. Voqal 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.⁷⁹ While the Commission created no “detailed regulatory requirements” concerning the composition of the committees, this did not permit them to dissolve.⁸⁰ 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.”⁸¹ 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.”⁸² 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. Voqal admits that, “ITF and its affiliates do not have any LPC’s today. . . .”⁸³ Voqal’s apparent failure to comply with the Commission’s requirement for Local Program Committees means that the local communities that Voqal was supposed to serve via its 11 licenses lacked the mechanism for local input and feedback envisioned by the Commission’s rules. Indeed, were it the case that Voqal had maintained Local Program Committees, it is possible that Voqal would have also been more careful about

⁷⁵ *Two-Way Order*, 13 FCC Rcd at 19162, para.94; *see also 2006 EBS Order*, 21 FCC Rcd at 5701, para. 227.

⁷⁶ *Two-Way Order*, 13 FCC Rcd at 19162, para. 94 (emphasis added).

⁷⁷ 47 CFR § 27.1201(a)(3) (2019).

⁷⁸ *Id.* § 27.1214(b)(1) (2019).

⁷⁹ 1985 ITFS Report and Order, 101 F.C.C.2d at 62, para. 28.

⁸⁰ *Id.* at para. 29.

⁸¹ *Id.*

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

⁸³ Voqal Response at 22-23.

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.

25. Voqal is in apparent violation of the Local Program Committee rules by failing to maintain any Local Program Committees for any of its licenses. Voqal admits that while it did establish Local Program Committees for three of its licenses, it did not maintain them because “Section 27.1201(a)(4) does not require continued existence of an LPC” and because the Local Program Committee rule “was adopted in 1985, well before the advent of EBS wireless broadband Internet connectivity.”⁸⁴ These claims, however, are meritless. While the Commission has modified the EBS rules throughout the years,⁸⁵ the Commission did not alter or eliminate the requirement for Local Program Committees until recently.⁸⁶ Although modifications to the EBS rules in 2008 included adjustments to other requirements for non-local licensees, the Local Program Committee requirement remained intact.⁸⁷ 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, Voqal’s failure to maintain Local Program Committees constituted an apparent violation of former section 27.1201(a)(4) of the Commission’s rules.⁸⁸ The Local Program Committee requirement cannot be “willed away” by Voqal 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.

26. Finally, Voqal’s creation of Local Program Committees for three of its original applications did not absolve the Company 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 Voqal of the continued availability and quantity of services provided under the licenses—services which, as noted above, Voqal 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 Voqal 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

27. 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.⁸⁹ The Commission’s rules establish

⁸⁴ *Id.* at 23. Voqal asserts that it did not establish Local Program Committees for four of its licenses because they were granted prior to the adoption of section 27.1201(a)(4). Voqal further asserts that the licenses held by Independent Spectrum’s subsidiaries were acquired through assignment and as such “were not subject to the LPC requirement because Section 27.1201(a)(4) requires the creation of an LPC only upon issuance of a license, and not upon license transfer.” *Id.* at 22.

⁸⁵ *See, e.g., 2004 EBS Order.*

⁸⁶ *See 2019 EBS Order*, 34 FCC Rcd at 5456, para. 25.

⁸⁷ *See 2008 EBS Order*, 23 FCC Rcd at 6048-50, paras. 146-49.

⁸⁸ 47 CFR § 27.1201(a)(4) (2019).

⁸⁹ *See, e.g., Alarm Devices, Mfg. Co.*, Order to Show Cause, 49 F.C.C.2d 143, 145, para. 8 (1974); *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*).

agency policy until such time as they are rescinded or amended in a notice-and-comment rulemaking.⁹⁰ 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.⁹¹ Under this new plan, incumbents retained their existing channels and service areas.⁹² Additionally, all previous eligibility requirements, including the various educational use requirements and Local Program Committee obligations, ceased being effective on April 27, 2020.⁹³ Until the new rules established in the *2019 EBS Order* took effect, however, the Commission's previous rules governed the actions of EBS licensees.⁹⁴

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.⁹⁵ As the Commission's rule changes were forward-looking in nature, a change to the Commission's rules does not relieve Voqal of its original obligations to have complied with the rules in effect before the rule change.⁹⁶

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 or any license, permit, certificate or other instrument or authorization issued by the Commission"⁹⁷ as well as or 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."⁹⁸ Here, section 503(b)(2)(D) of the Act authorizes us to assess a forfeiture against Voqal 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.⁹⁹ 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."¹⁰⁰

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.¹⁰¹

⁹⁰ *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.")).

⁹¹ *See 2019 EBS Order*, 34 FCC Rcd 5446.

⁹² *Id.* at 5459, para. 36.

⁹³ *Id.* at 5450-58, paras. 13-31; *see also 2.5 GHz Fed. Reg. Notice*, 84 Fed. Reg. at 57365.

⁹⁴ *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).

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

⁹⁶ *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.").

⁹⁷ 47 U.S.C. § 503(b)(1)(A).

⁹⁸ *Id.* § 503(b)(1)(B).

⁹⁹ *See* 47 U.S.C. § 503(b)(2)(D); 47 CFR § 1.80(b)(2). *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).

¹⁰⁰ *Id.* § 503(b)(2)(E); *see also* 47 CFR § 1.80(b)(9); *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 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).

¹⁰¹ *See* 47 CFR § 1.80, note to para. (b)(9).

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.¹⁰² Accordingly, we impose a base forfeiture of \$8,000 for each week that Voqal 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 base forfeiture of \$8,000 multiplied by the 19 weeks that the violation occurred (\$152,000). We then multiply this by each of Voqal's 11 EBS licenses in apparent violation, resulting in a base forfeiture amount of \$1,672,000 for the Company's 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)(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).¹⁰³ 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 Voqal holds 11 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 Voqal failed to maintain a Local Program Committee, resulting in a base forfeiture amount of \$77,000 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 Voqal 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 their 11 EBS licenses; and (2) failing to maintain their Local Program Committee obligations in the service area of its 11 EBS licenses. In total, Voqal's apparent violations incurs a cumulative base forfeiture of \$1,749,000.

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.¹⁰⁴

¹⁰² 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)).

¹⁰³ See 47 CFR § 1.80(b)(8), note to para. (b)(8) (2017); see also *id.* § 73.1125(a) (2017). The main studio rule, which was eliminated in 2017, required the licensee of a broadcast station to maintain a main studio in order "to serve the needs and interests of the residents of the station's community of license." *Amendment of Sections 73.1125 and 73.1130 of the Commission's Rules, the Main Studio and Program Origination Rules for Radio and Television Broadcast Stations*, MM Docket No. 86-406, Memorandum Opinion and Order, 3 FCC Rcd 5024, 5026, para. 23 (1988) (*1988 Main Studio Order*); see also *Elimination of Main Studio Rule*, MB Docket No. 17-106, Report and Order, 32 FCC Rcd 8158, 8160-61, paras. 6-7 (2017). Among other things, the Commission required each broadcast station to "maintain a meaningful management and staff presence" at the main studio to "help expose stations to community activities, help them identify community needs and interests and thereby meet their community service requirements." *1988 Main Studio Order*, 3 FCC Rcd at 5026, para. 24; see also *Amendment of Sections 73.1125 and 73.1130 of the Commission's Rules, the Main Studio and Program Origination Rules for Radio and Television Broadcast Stations*, MM Docket No. 86-406, Report and Order, 2 FCC Rcd 3215, 3218, para. 29 (1987) (stating that "th[e] interaction between the station and the community would foster responsive programming").

¹⁰⁴ 47 U.S.C. § 503(b)(2)(E).

Based on the totality of the facts in the record, we have determined to not adjust this amount upwards or downwards. Accordingly, we find Voqal apparently liable for a forfeiture of \$1,749,000.¹⁰⁵

IV. ORDERING CLAUSES

34. Accordingly, **IT IS ORDERED** that, pursuant to section 503(b) of the Act, and 1.80 of the Commission's rules,¹⁰⁶ Instructional Telecommunications Foundation, Inc. d/b/a Voqal USA, is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A FORFEITURE** in the amount of one million, seven hundred and forty nine thousand dollars (\$1,749,000) for apparently willfully and repeatedly violating former sections 27.1201(a)(4) and 27.1214(b)(1) of the Commission's rules.¹⁰⁷

35. **IT IS FURTHER ORDERED** that, pursuant to section 1.80 of the Commission's rules,¹⁰⁸ within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture, Instructional Telecommunications Foundation, Inc. d/b/a Voqal USA **SHALL PAY** the full amount of their proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture consistent with paragraph 38 below.

36. Instructional Telecommunications Foundation, Inc. d/b/a Voqal USA, shall send electronic notification of payment to Pam Slipakoff, Enforcement Bureau, Federal Communications Commission, at Pam.Slipakoff@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),¹⁰⁹ 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:¹¹⁰

- 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).¹¹¹ 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

¹⁰⁵ We note that any entity that is a "Small Business Concern" as defined in the Small Business Act (Pub. L. 85-536, as amended) may avail itself of rights set forth in that Act, including rights set forth in 15 U.S.C. § 657, "Oversight of Regulatory Enforcement," in addition to other rights set forth herein.

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

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

¹⁰⁸ *Id.* § 1.80.

¹⁰⁹ Payments made using the Commission's Fee Filer system do not require the submission of an FCC Form 159.

¹¹⁰ 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.

¹¹¹ Instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

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.

37. 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. 20554.¹¹² 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.

38. 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.¹¹³ 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 Pam Slipakoff at Pam.Slipakoff@fcc.gov.

39. 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.¹¹⁴ 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.¹¹⁵

40. **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 Stephanie Weiner, Counsel to Voqal USA, Harris, Wiltshire, & Grannis, LLP, 1919 M Street, NW, Eighth Floor, Washington, D.C. 20036, and John Schwartz, Director and President, Instructional

¹¹² See 47 CFR § 1.1914.

¹¹³ *Id.* §§ 1.16, 1.80(f)(3).

¹¹⁴ 47 U.S.C. § 503(b)(2)(E).

¹¹⁵ 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).

Telecommunications Foundation, Inc. d/b/a Voqal USA, 825 Delaware Ave., Ste 500, Longmont, CO 80501.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

**STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL
DISSENTING**

Re: *In the Matter of Instructional Telecommunications Foundation, Inc. d/b/a Voqal USA*, Notice of Apparent Liability for Forfeiture, EB-IHD-19-00029560

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 Instructional Telecommunications Foundation, Inc. d/b/a Voqal USA*, Notice of Apparent Liability for Forfeiture, EB-IHD-19-00029560

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

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

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

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

The proposed forfeiture calculations are also fundamentally flawed. First, the NALs are based on the period from December 9, 2019 through April 27, 2020, the effective date of the Commission's

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

² *Id.*

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

⁴ 47 CFR § 27.1201(a)(4) (2019).

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

elimination of the rules in question. But the NALs are based on Letters of Inquiry that covered the licensees' conduct only until August 26, 2019. Thus, we appear to have no evidence about the period subject to forfeiture penalty.

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

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

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

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