

**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.").