

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

In the Matter of)	
)	File No. EB-05-IH-0150
CBS RADIO INC. OF PHILADELPHIA)	FRN: 0003741998
)	NAL/Acct. No. 200732080008
Licensee of Station WIP(AM),)	Facility ID No. 28626
Philadelphia, Pennsylvania)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 2, 2007

Released: March 2, 2007

By the Chief, Investigations and Hearings Division:

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture* (“NAL”), we find CBS Radio Inc. of Philadelphia (“CBS” or “Licensee”),¹ Licensee of Station WIP(AM), Philadelphia, Pennsylvania (the “Station”), apparently liable for a monetary forfeiture in the amount of \$4,000 for its apparent violation of Section 73.1216 of the Commission’s rules.² That rule requires a broadcast licensee to “fully and accurately disclose the material terms of a contest . . . and conduct the contest substantially as announced or advertised.”³ As discussed below, we find that CBS failed to announce the material terms of a contest, and neglected to conduct the contest in accordance with its material terms, in apparent violation of the Commission’s rule.

II. BACKGROUND

2. The FCC received a complaint from Mr. Arnie Chapman (the “Complainant”), dated January 18, 2005 (the “Complaint”), alleging that the Station failed to conduct a competitive eating contest entitled “Wing Off” (the “Contest”), in accordance with the Contest’s advertised material terms.⁴ The Complaint alleges that, on December 1, 2004, the Complainant won the Contest, which offered winners a chance to compete in a popular competitive eating competition, “Wing Bowl 13.”⁵ The Complaint alleges that the Station revoked the prize awarded to the Complainant due to Contest conditions that the Station neither announced nor advertised.⁶

¹ Infinity Broadcasting Corporation of Philadelphia was the licensee at the time that this investigation began, January 18, 2005.

² See 47 C.F.R. § 73.1216.

³ *Id.*

⁴ See Letter from Mr. Arnie Chapman to the Federal Communications Commission, dated January 18, 2005 (“Complaint”). The Complaint alleges that the Contest solicited ideas and actual performance of competitive eating stunts from participants.

⁵ See *id.* at 1-4.

⁶ See *id.* at 1-3.

3. In response to the Complaint, the Bureau sent a letter of inquiry to CBS, dated June 28, 2005 (the “LOI”).⁷ CBS responded by letter dated August 1, 2005 (the “LOI Response”).⁸ The Complainant did not file a reply.⁹

4. In its LOI Response, CBS admits that the Complainant qualified to win the Contest prize, an opportunity to compete in the Wing Bowl 13,¹⁰ but that the Station disqualified him after determining that he belonged to a competitive eating association, the Association of Independent Competitive Eaters (“AICE”).¹¹ CBS states that AICE is a rival of another competitive eating association historically associated with Wing Bowl 13, the Independent Federation of Competitive Eating (“IFOCE”).¹² CBS contends that the Complainant should have known that members of associations in rivalry with IFOCE could not compete in the Contest because the Station previously disqualified a participant from Wing Bowl 12 for the same reason.¹³ Moreover, CBS asserts that the published Contest rules provide the Station discretion to disqualify a contestant based on “subjective criteria.”¹⁴ Finally, CBS states that the Contest rules specify that the Contest is open to Station listeners, and that Mr. Chapman does not reside within reach of the Station’s broadcast so he could not be a listener.¹⁵

III. DISCUSSION

5. Under Section 503(b)(1) of the Communications Act of 1934, as amended (the “Act”), any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a monetary forfeiture penalty. In order to impose such a forfeiture penalty, the Commission must issue a notice of apparent liability, the notice must be received, and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should

⁷ See Letter from William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, to Infinity Broadcasting Corporation of Philadelphia, dated June 28, 2005 (“LOI”).

⁸ See Letter from Steven A. Lerman, Dennis P. Corbett, and Phillip A. Bonomo, Attorneys for Infinity Broadcasting Corporation of Philadelphia, to David J. Brown, Esq., Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated August 1, 2005 (the “LOI Response”).

⁹ See LOI at 5 (providing the Complainant with the opportunity to reply to the Licensee’s response).

¹⁰ See LOI Response at 4 (“Chapman . . . qualified through an eating stunt performed at the WIP studios.”).

¹¹ See *id.*

¹² See *id.* at 2 – 5.

¹³ See *id.* at 4 – 5 (“[Chapman’s] participation was incompatible with the IFOCE’s participation. Chapman had at least constructive or presumptive knowledge of this from the facts surrounding Gentleman Joe’s disqualification from Wing Bowl 12 and from the realities of the competitive eating world . . . In Wing Bowl 12, WIP established that with IFOCE eaters included as Wing Bowl competitors, professional eaters allied with national organizations that are active IFOCE rivals would not be welcome as competitors.”).

¹⁴ Specifically, CBS cites: (1) provisions of the rules allowing Station personnel the right to determine a proposed qualifying eating stunt as worthy of attempt “based on subjective criteria;” (2) a requirement that participants sign a release before participating in any portion of the Contest, agreeing to fully abide by the decisions of the Station Morning Show hosts and/or others designated by them; (3) a rule provision stating that “[d]ecisions of station management with respect to the contest are final;” and (4) a rule provision specifying that “[f]ailure to comply with the contest rules may result in a contestant’s disqualification, at the sole discretion of WIP . . .” See *id.* at 4 n.6.

¹⁵ See *id.* at 5.

be imposed. The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has violated the Act or a Commission rule. As we set forth in greater detail below, we conclude under this standard that CBS is apparently liable for a forfeiture for its apparent willful violation of Section 73.1216 of the Commission's rules.

6. Section 73.1216 of the Commission's rules provides that “[a] licensee that broadcasts or advertises information about a contest it conducts shall fully and accurately disclose the material terms of the contest, and shall conduct the contest substantially as announced or advertised. No contest description shall be false, misleading or deceptive with respect to any material term.”¹⁶ The Notes to the section make clear that eligibility restrictions are generally considered to be material terms of the contest¹⁷ Further, the Notes state that “the obligation to disclose the material terms arises at the time the audience is first told how to enter or participate and continues thereafter.”¹⁸

7. Licensees, as public trustees, have the affirmative obligation to prevent the broadcast of false, misleading or deceptive contests announcements,¹⁹ and to conduct their contests substantially as announced.²⁰ The Commission has noted in this regard that “[t]he standards are high, for while contests are particularly susceptible to abuse, abuses can be prevented by diligent licensee attention to the planning and conduct of contests.”²¹ By its own admission, CBS disqualified the Complainant from the Contest due to his participation in AICE. The Contest rules do not specify or permit such disqualification and the contestant was informed of this eligibility requirement only after the Contest was concluded. CBS argues that the Complainant should have known about the disqualification of participants who were members of IFOCE’s rival organizations based on the Station’s similar disqualification of a potential Wing Bowl 12

¹⁶ 47 C.F.R. § 73.1216.

¹⁷ Note 1 (b) to Section 73.1216 states:

Material terms include those factors which define the operation of the contest and which affect participation therein. Although the material terms may vary widely depending upon the exact nature of the contest, they will generally include: how to enter or participate; *eligibility restrictions*; entry deadline dates; whether prizes can be won; when prizes can be won; the extent, nature and value of prizes; basis for valuation of prizes; time and means of selection of winners; and/or tie-breaking procedures.

Id., Note 1(b) (emphasis added).

¹⁸ *Id.*, Note 2.

¹⁹ See *WMJX, Inc.*, Decision, 85 FCC 2d 251, 269 (1981) (holding that proof of actual deception is not necessary to find violations of contest rules, and that the licensee, as a public trustee, has an affirmative obligation to prevent the broadcast of false, misleading or deceptive contest announcements); *Amendment of Part 73 of the Commission’s Rules Relating to Licensee-Conducted Contests*, Report and Order, 60 FCC 2d 1072 (1976).

²⁰ See *Headliner Radio, Inc.*, Memorandum Opinion and Order, 8 FCC Rcd. 2962 (Mass Media Bur. 1993) (finding that the airing of a misleading advertisement concerning a licensee’s contest violated the Commission contest rules because the contest was not then conducted “substantially as announced or advertised”); *Lincoln Dellar*, Memorandum Opinion and Order, 8 FCC Rcd. 2582, 2585 (Mass Media Bur. 1993) (finding that the cancellation of a pre-announced contest violated the pertinent Commission rules because the contest was not then conducted “substantially as announced”).

²¹ *Honeyradio, Inc.*, Memorandum Opinion and Order, 69 FCC 2d 833 (1978), quoting *Licensee-Conducted Contests*, Proposed Rulemaking, 40 Fed. Reg. 26692 (1975) (holding licensee responsible for mistakes made during its conduct of a contest, and affirming forfeiture and denying petition for reconsideration of a letter of admonishment for violation of the Commission’s rules).

competitor. This argument has no basis in Commission rules requiring material terms, like eligibility requirements, to be disclosed prior to the contest. Further, CBS's position undercuts its own position. That the Station previously disqualified a contestant from Wing Bowl 12 for similar reasons suggests that the eligibility requirements were not self-evident to contestants and put CBS on notice to include information about this material term in the rules for the Contest preceding Wing Bowl 13. The argument also fails because the Licensee cannot defend against allegations that it committed a rule violation by stating that it has undertaken similar conduct in the past that did not result in a complaint to the Commission.

8. CBS points to the Complainant's address as an additional basis to exclude him, because purportedly he is not a Station "listener."²² The Station's correspondence with the Complainant, however, alludes to the incompatibility of his AICE membership with the IFOCE's historical association with the Wing Bowl as the reason for his disqualification, and does not mention the Complainant's listener or residential status.²³ Accordingly, this after-the-fact justification does not appear to be the reason for exclusion.²⁴ Furthermore, the Complainant's address alone in this situation does not support the conclusion that he did not listen to the Contest.

9. Based upon the evidence before us, we find that CBS apparently willfully violated Section 73.1216 of the Commission's rules. The Commission's *Forfeiture Policy Statement* sets a base forfeiture amount of \$4,000 for failure to conduct a station contest substantially as announced.²⁵ In assessing the monetary forfeiture amount, we must take into account the statutory factors set forth in Section 503(b)(2)(D) of the Act,²⁶ which include 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 other such matters as justice may require. After considering the record, the factors contained in Section 503(b)(2)(D) of the Act, 47 U.S.C. § 503(b)(2)(D), and the *Forfeiture Policy Statement*, we believe that a \$4,000 forfeiture is appropriate in this case.²⁷

IV. ORDERING CLAUSES

10. ACCORDINGLY, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended,²⁸ and Sections 0.111, 0.311, and 1.80 of the Commission's rules,²⁹ that CBS

²² See LOI Response at 5.

²³ See Complaint at 8.

²⁴ See LOI Response at 5 ("In Wing Bowl 12, WIP established that with IFOCE eaters included as Wing Bowl competitors, professional eaters allied with national organizations that are active IFOCE rivals would not be welcome as competitors. This policy is particularly reasonable as applied to individuals who, like Chapman, cannot be deemed a WIP listener.").

²⁵ See *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, 17113 (1997), *recon. denied* 15 FCC Rcd. 303 (1999) ("Forfeiture Policy Statement"); 47 C.F.R. § 1.80(b).

²⁶ See 47 U.S.C. § 503(b)(2)(D).

²⁷ See authorities cited, *supra*, note 25; *NM Licensing, Inc.*, Notice of Apparent Liability, 21 FCC Rcd. 7916 (EB 2006) (imposing \$4,000 for apparent failure to conduct the contest as advertised or announced); *New Northwest Broadcasters, L.L.C.*, Notice of Apparent Liability, 19 FCC Rcd. 9352 (EB 2004) (same).

²⁸ See 47 U.S.C. § 503(b).

Radio Inc. of Philadelphia, is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of \$3,000 for willfully and repeatedly violating Section 73.1216 of the Commission's rules.

11. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission's rules, that within thirty (30) days of the release of this Notice, CBS Radio Inc. of Philadelphia, SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

12. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL Acct. No. and FRN No. referenced in the caption. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 358340, Pittsburgh, PA 15251-8340. Payment by overnight mail may be sent to Mellon Bank /LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, PA 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Pittsburgh, and account number FCC/ACV 9116229.

13. The response, if any, must be mailed to Hillary S. DeNigro, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 3-B433, Washington, D.C. 20554 and MUST INCLUDE the NAL/Acct. No. referenced above.

14. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

15. Requests for payment of the full amount of this NOTICE OF APPARENT LIABILITY FOR FORFEITURE under an installment plan should be sent to the Deputy Chief Financial Officer, Room 1-A637, 445 12th Street, S.W., Washington, D.C. 20554.³⁰

16. IT IS FURTHER ORDERED that the complaint filed by Darlene Harris IS GRANTED to the extent indicated herein and IS OTHERWISE DENIED, and the complaint proceeding IS HEREBY TERMINATED.³¹

17. IT IS FURTHER ORDERED that a copy of this Notice shall be sent, by Certified Mail/Return Receipt Requested, to CBS Radio Inc. of Philadelphia, 2175 K Street, N.W., Suite 350, Washington, D.C., 20037, and to its counsel, Steven A. Lerman, Dennis P. Corbett, and Philip A. Bonomo, Leventhal Senter & Lerman PLLC, 2000 K Street, N.W., Suite 600, Washington, D.C., 20006-1809.

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²⁹ See 47 C.F.R. §§ 0.111, 0.311 and 1.80.

³⁰ See 47 C.F.R. § 1.1914.

³¹ For purposes of the forfeiture proceeding initiated by this NAL, CBS Radio Inc. of Philadelphia shall be the only party to this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Hillary S. DeNigro
Chief, Investigations and Hearings Division
Enforcement Bureau