

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

In the Matter of	)	
	)	
<b>Access 1 New Jersey License Company, LLC</b>	)	FRN: 0009510595
	)	NAL/Acct. No. 200732080015
Licensee of Station WTKU-FM,	)	Facility ID No. 3139
Ocean City, New Jersey	)	File No. EB-05-IH-1081

**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 Access 1 New Jersey License Company, LLC (“Access 1”), licensee of Station WTKU-FM, Ocean City, New Jersey (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.<sup>1</sup> 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.”<sup>2</sup> As discussed below, we find that Access 1 substantially altered material terms of a contest, in apparent violation of the Commission’s rule.

**II. BACKGROUND**

2. The Commission received a complaint from Sean Mack (the “Complainant”) alleging that Access 1 made a significant change to the rules governing the Station’s advertised contest entitled the “Treasure Vault” contest (the “Contest”).<sup>3</sup> According to the Complainant, on September 22, 2005, at around 7:30 p.m., the Station conducted a contest in which it announced that a monetary prize of \$275 would be awarded to the person who was the eighth caller, and could guess a “4 digit code.”<sup>4</sup> According to the Complaint, the Complainant called the Station utilizing multiple telephone lines. He reached the Station on one line first and was informed he was the seventh caller in line. He was asked to identify himself and told to call back. When Station personnel picked up the Complainant’s second telephone line next, making him the eighth caller in line, he was informed by Station personnel, that he was still considered only the seventh caller, and he was denied an opportunity to participate in the contest. Shortly thereafter, the Complainant’s mother, Elaine Mack, called the Station and confirmed that Mr. Mack had been eliminated from the Contest due to his use of multiple phone lines, and further, that there were no contest rules

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<sup>1</sup> 47 C.F.R. § 73.1216.

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

<sup>3</sup> See Email from Sean Mack to the Federal Communications Commission, dated September 23, 2005 (“Complaint”).

<sup>4</sup> *Id.*

prohibiting the use of multiple phone lines by callers.<sup>5</sup>

3. Based on the allegations contained in the Complaint, the Investigations and Hearings Division of the Enforcement Bureau sent a letter of inquiry to Access 1 on August 14, 2006.<sup>6</sup> Access 1 responded by letter dated September 18, 2006, and included a CD and a written transcript of the broadcasts it aired giving the material rules for the Contest.<sup>7</sup> In its response Access 1 states, that it broadcast the contest rules in 2002 and 2003, but has no record of broadcasting them in September of 2005.<sup>8</sup> Access 1 further states, that on-air personalities broadcast the Contest “terms and rules as part of the announcements for the Contest.”<sup>9</sup> According to Access 1, the Contest was conducted by “air personality” Joe Ricci, on September 22, 2005, at 7:30 p.m., and involved the chance to win \$275.<sup>10</sup> Mr. Ricci informed listeners that the eighth caller to the Station would have an opportunity to solve a four digit code and win the cash prize. The Complainant, Sean Mack, called the Station utilizing multiple phone lines which allowed him to occupy two lines simultaneously. When Mr. Ricci received Mr. Mack’s first call, he informed him he was the “seventh caller” and to “please try again.” Upon picking up the next telephone line in cue and hearing Mr. Mack’s voice again, he advised him “that he was still the seventh caller.” Shortly thereafter, Mr. Ricci received a call from Elaine Mack and explained that the use of multiple phone lines constituted only one call.<sup>11</sup> Mrs. Mack was eventually routed to the general manager of the Station, John Ford, who informed her that the use of multiple phone lines during a contest was, “not consistent with the intent of the contest.”<sup>12</sup>

5. Access 1 admits that the official contest rules in effect during the Contest contain no restrictions on the use of multiple phone lines by contest participants.<sup>13</sup> After receipt of the Complaint in this case, Mr. Ford, determined that “WTKU-FM needed to do a better job of informing listeners of our contest rules.”<sup>14</sup> On October 6, 2005, he revised the contest rules for the Station, and directed that they be broadcast on a more frequent basis. The revised rules specifically prohibit the use of multiple phone lines during the conduct of on-air contests.<sup>15</sup>

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<sup>5</sup> *Id.*

<sup>6</sup> See Letter from Benigno Bartolome, Esq., Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission to Access 1, dated August 14, 2006.

<sup>7</sup> See Letter from James Winston, Esq., counsel for Access 1, to Benigno Bartolome, Esq., Deputy Chief, Investigations & Hearings Division, Enforcement Bureau, dated September 18, 2006 (“Response”).

<sup>8</sup> *Id.* at 6.

<sup>9</sup> *Id.* Access states that the Contest rules are posted in the lobby of the Station. *Id.* at 6.

<sup>10</sup> *Id.* at 1.

<sup>11</sup> *Id.* at 3.

<sup>12</sup> *Id.* at 7, Declaration of John Ford, General Manager of Station WTKU-FM.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 5.

<sup>15</sup> *Id.* at 7, Exhibit 11.

### III. DISCUSSION

6. 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.<sup>16</sup> 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 be imposed.<sup>17</sup> 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.<sup>18</sup> As set forth in greater detail below, we conclude under this standard that Access 1 is apparently liable for a forfeiture for its apparent willful violation of section 73.1216 of the Commission's rules.

7. Section 73.1216 of the Commission's rules provides:

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.

Note 2 to the rule states:

In general, the time and manner of disclosure of the material terms of a contest are within the licensee's discretion. However, the obligation to disclose the material terms arises at the time the audience is first told how to enter or participate and continues thereafter. The material terms should be disclosed periodically by announcements broadcast on the station conducting the contest, but need not be enumerated each time an announcement promoting the contest is broadcast. Disclosure of material terms in a reasonable number of announcements is sufficient. In addition to

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<sup>16</sup> 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1); *see also* 47 U.S.C. § 503(b)(1)(D) (forfeitures for violation of 14 U.S.C. § 1464). Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law. 47 U.S.C. § 312(f)(1). The legislative history to section 312(f)(1) of the Act clarifies that this definition of willful applies to both sections 312 and 503(b) of the Act, H.R. Rep. No. 97-765, 97<sup>th</sup> Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the term in the section 503(b) context. *See, e.g., Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991) ("*Southern California Broadcasting Co.*"). The Commission may also assess a forfeiture for violations that are merely repeated, and not willful. *See, e.g., Callais Cablevision, Inc.*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359 (2001) (issuing a Notice of Apparent Liability for, *inter alia*, a cable television operator's repeated signal leakage). "Repeated" merely means that the act was committed or omitted more than once, or lasts more than one day. *Southern California Broadcasting Co.*, 6 FCC Rcd at 4388, ¶ 5; *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362, ¶9.

<sup>17</sup> 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

<sup>18</sup> *See, e.g., SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591, ¶ 4 (2002) (forfeiture paid).

the required broadcast announcements, disclosure of the material terms may be made in a non-broadcast manner.<sup>19</sup>

8. In this case, it appears that Access 1 violated section 73.1216 of the Commission's rules by altering a material term of the contest and failing to conduct the Contest substantially as advertised.<sup>20</sup> Indeed, Access 1 does not dispute that the rules, as established for contest participants, contained no restrictions on the use of multiple phone lines.<sup>21</sup> Accordingly, any announcements of the rules made by the Station, would fail to notify potential participants that use of multiple phone lines could result in disqualification. The Commission has stated previously that, for the purposes of the rule, "a term is considered material if it defines operation of, or affects participation in a contest."<sup>22</sup> In this case, Station management changed the rules governing the operation of the contest by restricting the method by which a potential participant could be chosen. This change substantially altered the material terms of the Contest. The fact that Station personnel may have made, in their view, a "reasonable interpretation" of the "intent" of the rules, as Access 1 argues,<sup>23</sup> does not alter the fact that the manner in which a contestant was chosen to participate in the contest was changed without notice, during the contest.<sup>24</sup> Indeed, Access 1 concedes that after receipt of the Complaint, it revised its rules to specifically eliminate the use of multiple phone lines for contest participants and took steps to make certain that the rules were better disseminated to its listening audience.<sup>25</sup> Similarly, Access 1's contention that the change was not intended to exclude the Complainant specifically, or that the Station did not award the advertised prize to anyone else,<sup>26</sup> does not mitigate its liability. The Commission has stated previously that a showing of harm is not necessary to

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<sup>19</sup> *ABC, INC.*, Notice of Apparent Liability for Forfeiture, 18 FCC Rcd 25,647 (Enf. Bur. 2003).

<sup>20</sup> 47 C.F.R. § 73.1216.

<sup>21</sup> *Response* at 7.

<sup>22</sup> *Application for Review of Staff Ruling Concerning Complaint of Violation of Section 73.1216 of the Commission's Rules*, Memorandum Opinion and Order, 2 FCC Rcd 5638 (1987).

<sup>23</sup> *Response* at 7.

<sup>24</sup> *See NM Licensing LLC*, Notice of Apparent Liability for Forfeiture, 2006 WL 2044708 (EB 2006) (forfeiture for violating contest rules imposed due to unannounced rule change preventing contestant's participation in contest), *Clear Channel Broadcasting Licenses, Inc.*, Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 4072, (EB 2006) (forfeiture imposed for unannounced contest rule change which excluded contestant's multiple entries), *Nationwide Communications Inc.*, Notice of Apparent Liability for Forfeiture, 9 FCC Rcd 175 (Mass Media Bur. 1994) (forfeiture for violating contest rules imposed, notwithstanding licensee's contention that its failure to conduct a contest substantially as announced was due to "inadvertence"), *forfeiture reduced*, *Nationwide Communications Inc.*, Memorandum Opinion and Order, 9 FCC Rcd 2054 (Mass Media Bur. 1994) (licensee's history of compliance with Commission rules warranted forfeiture reduction, whereas licensee's general good faith efforts, "awarding the contest prize as announced, and receiving no benefit from its error" did not).

<sup>25</sup> *Response* at 7.

<sup>26</sup> *Response* at 5-6.

establish a violation.<sup>27</sup> In this case, however, the Complainant was harmed by being denied the chance to win the contest prize.

9. Licensees, as public trustees, have the affirmative obligation to prevent the broadcast of false, misleading or deceptive contest announcements,<sup>28</sup> and to conduct their contests substantially as announced.<sup>29</sup> 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.”<sup>30</sup> Access 1 has failed to meet these standards.

10. Based upon the evidence before us, we find that Access 1 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.<sup>31</sup> 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,<sup>32</sup> 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. Specifically, we conclude that the violation occurred due to inadequate planning and control, and not due to a deliberate attempt to deceive or to favor a particular contestant or class of contestants.

## V. ORDERING CLAUSES

11. ACCORDINGLY, IT IS ORDERED, pursuant to section 503(b) of the Communications Act of 1934, as amended,<sup>33</sup> and sections 0.111, 0.311, and 1.80 of the Commission’s rules,<sup>34</sup> that Access 1 New Jersey License Company, LLC, is hereby NOTIFIED of its APPARENT LIABILITY FOR

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<sup>27</sup> See *WMJX*, 48 RR 2d 1339, ¶ 37.

<sup>28</sup> *WMJX, Inc.*, Decision, 48 RR 2d 1339, 1355 (1981); *Rules Relating to Licensee-Conducted Contests*, Report and Order, 60 FCC 2d 1072 (1976).

<sup>29</sup> *Headliner Radio, Inc.*, Memorandum Opinion and Order, 8 FCC Rcd 2962 (Mass Media Bur. 1993); *Lincoln Dellar*, Memorandum Opinion and Order, 8 FCC Rcd 2582, 2585 (Mass Media Bur. 1993) (where the cancellation of a pre-announced contest violated the pertinent Commission rule because the contest was not then conducted “substantially as announced”).

<sup>30</sup> *Honeyradio, Inc.*, Memorandum Opinion and Order, 19 FCC 2d 833 (1978), quoting *Notice of 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 contest rules).

<sup>31</sup> *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).

<sup>32</sup> 47 U.S.C. § 503(b)(2)(D).

<sup>33</sup> 47 U.S.C. § 503(b).

<sup>34</sup> 47 C.F.R. §§ 0.111, 0.311 and 1.80.

FORFEITURE in the amount of \$4,000 for willfully and repeatedly violating section 73.1216 of the Commission's rules.

12. 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, Access 1 New Jersey License Company, LLC SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

13. Payment of the forfeiture must be made by mailing check or similar instrument, payable to the order of the Federal Communications Commission. The payment MUST INCLUDE the FCC Registration Number ("FRN") and the NAL/Account Number specified in the caption of this NAL. Payment by check or money order may be mailed to the Forfeiture Collection Section, Finance Branch, 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 Bank, and account number 9116229.

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

15. 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.

16. Requests for payment of the full amount of this NAL under an installment plan should be sent to: Deputy Chief Financial Officer, Federal Communications Commission, Room 1-A637, 445 12th Street, S.W., Washington, D.C. 20554.<sup>35</sup>

17. IT IS FURTHER ORDERED that the complaint filed by Sean Mack IS GRANTED to the extent indicated herein and IS OTHERWISE DENIED, and the complaint proceeding IS HEREBY TERMINATED.<sup>36</sup>

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<sup>35</sup> See 47 C.F.R. § 1.1914.

<sup>36</sup> For purposes of the forfeiture proceeding initiated by this NAL, Access 1 New Jersey License Company, LLC, shall be the only party to this proceeding.

18. IT IS FURTHER ORDERED that a copy of this Notice shall be sent, by Certified Mail/Return Receipt Requested, to Access 1 New Jersey License Company, LLC, 505 Eighth Avenue, Ninth Floor, New York, New York, 10018, and to its counsel, James Winston, Esq., 1155 Connecticut Ave., N.W., Sixth Floor, Washington, DC 20036.

FEDERAL COMMUNICATIONS COMMISSION

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