

**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)	

FORFEITURE ORDER

Adopted: July 10, 2008

Released: July 10, 2008

By the Chief, Investigations and Hearings Division:

I. INTRODUCTION

1. In this *Forfeiture Order* (“*Order*”), we issue a monetary forfeiture in the amount of \$4,000 against CBS Radio Inc. of Philadelphia (“CBS”),¹ licensee of Station WIP(AM), Philadelphia, Pennsylvania (the “Station”), for its willful violation of Section 73.1216 of the Commission’s Rules.² As discussed below, CBS failed to announce the material terms of a contest and neglected to conduct the contest in accordance with its material terms, in violation of the Commission’s Rules.

II. BACKGROUND

2. On March 2, 2007, the Investigations and Hearings Division (the “Division”) released a *Notice of Apparent Liability for Forfeiture* (“*NAL*”).³ The Division found in the *NAL* 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 contest rule, 47 C.F.R. § 73.1216.⁴ Specifically, the Division found that CBS apparently violated the rule by disqualifying a contest winner and revoking his prize due to an unannounced term.⁵ The contest required contestants to propose and perform a competitive eating stunt, and awarded winners a chance to compete in a popular competitive

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 See *CBS Radio Inc. of Philadelphia*, Notice of Apparent Liability, 22 FCC Rcd 4223 (Enf. Bur., Investigations & Hearings Div. 2007) (“*NAL*”).

⁴ See *id.* at 4225-4226. 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.” 47 C.F.R. § 47.1216.

⁵ See *NAL*, 22 FCC Rcd at 4225-4226.

eating competition called “Wing Bowl 13.”⁶ CBS initially awarded the prize to the complainant, but later disqualified him when it discovered that he belonged to a competitive eating association, the Association of Independent Competitive Eaters (“AICE”). AICE is a rival of the Independent Federation of Competitive Eating (“IFOCE”), which is another competitive eating association historically associated with Wing Bowl 13.⁷ CBS offered two justifications for its conduct: (1) that the complainant was on constructive notice due to CBS’s prior exclusion of a competitor in a previous contest, Wing Bowl 12, on the same basis; and (2) that the complainant did not meet the contest’s requirements because he did not reside within the Station’s listening area.⁸ The Division rejected these arguments and, based on CBS’s violation of Section 73.1216, proposed a forfeiture in the amount of \$4,000.⁹

3. On April 2, 2007, CBS filed a response to the *NAL* (“*NAL Response*”).¹⁰ In its *NAL Response*, CBS argues that the forfeiture should be cancelled because the disqualification of the complainant from the contest was an exercise of the Station’s discretionary rights under the Station’s rules for the contest.¹¹ Further, CBS contends that it substantially complied with the rule and that its conduct was, at most, a “technical” violation for which a forfeiture should not be issued because there was no deception to the public.¹² CBS also argues that the Commission should impose a burden on the complainant to show that he listened to the Station even though his address is outside the Station’s listener area contours.¹³

III. DISCUSSION

4. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Communications Act,¹⁴ Section 1.80 of the Commission’s Rules,¹⁵ and the Commission’s forfeiture guidelines set forth in its *Forfeiture Policy Statement*.¹⁶ In assessing forfeitures, Section 503(b) of the Act requires that we take 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 other matters as justice may require.¹⁷ As discussed further below, we have examined CBS’s

⁶ See *id.* at 4224.

⁷ See *id.*

⁸ See *id.* at 4225-4226.

⁹ See *id.*

¹⁰ See Response to Notice of Apparent Liability for Forfeiture from Brian M. Madden, Dennis P. Corbett, and Philip A. Bonomo, Attorneys, Leventhal Senter & Lerman PLLC, to Hillary S. DeNigro, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated April 2, 2007 (“*NAL Response*”).

¹¹ See *NAL Response* at 2.

¹² See *id.* at 3. In support of its contention, CBS cites *Lincoln Dellar*, Memorandum Opinion and Order, 8 FCC Rcd 2582, 2586 (MMB 1993). See *infra* paragraph 6.

¹³ See *id.* at 2-3.

¹⁴ See 47 U.S.C. § 503(b).

¹⁵ See 47 C.F.R. § 1.80.

¹⁶ 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 (1997), *recons. denied*, 15 FCC Rcd 303 (1999) (“*Forfeiture Policy Statement*”).

¹⁷ See 47 U.S.C. § 503(b)(2)(E).

response to the *NAL* pursuant to the aforementioned statutory factors, our rules, and the *Forfeiture Policy Statement*, and find no basis for cancellation or reduction of the forfeiture.

5. CBS acknowledges that it disqualified the complainant because he was a member of another competitive eating organization (*i.e.*, AICE),¹⁸ yet its contest rules do not state that contestants who are members of other competitive eating organizations are ineligible; nor do its rules state that the Station would have the authority to disqualify a winner later found to be a member of another competitive eating organization. In its *NAL Response*, CBS argues that the complainant's disqualification was an exercise of the Station's discretionary rights under its rules, which provided the Station broad discretion as to how to conduct the contest and modify the rules.¹⁹ We find this argument unpersuasive. The Commission's contest rule generally does not permit a licensee to modify the material terms of a contest – in this case, eligibility requirements -- after the contest has been conducted.²⁰ We affirm the *NAL*'s conclusion that CBS failed to conduct the contest “substantially” as announced in violation of our rules.

6. CBS further argues that its conduct was merely a technical violation that did not result in deception of the public and, therefore, should not result in forfeiture action, consistent with the result in another contest case, *Lincoln Dellar*.²¹ We disagree. CBS's reliance on *Lincoln Dellar* is unavailing because the facts and circumstances in *Lincoln Dellar* are completely different from the facts in the instant case. In *Lincoln Dellar*, the licensee allegedly cancelled a contest, for which it aired teasers telling listeners that prizes worth thousands of dollars would be awarded, before its scheduled start date but conducted the contest one month later.²² The Mass Media Bureau determined that, although cancellation of a contest is technically a violation of the contest rule, the record did not actually support finding a rule violation because the facts and circumstances did not effectively result in any deception of the public, since the teasers never stated a firm date for the contest and the contest was actually conducted. Here, the licensee changed the material terms of its contest and disqualified a contestant after-the-fact which, in effect, resulted in deceiving the public. Furthermore, it did so despite being on notice itself from a prior competitive eating contest it conducted (when the Station ended up disqualifying a contestant because of prior membership to another competitive eating organization) that its rules were unclear as to whether members from competitive eating associations besides IFOCE could

¹⁸ See *NAL Response* at 2 (“Here, WIP exercised that flexibility in a very limited manner, by disqualifying a single Wing Bowl 13 contestant on the basis of his incompatible AICE membership.”)

¹⁹ See *id.* at 1-2.

²⁰ See *Clear Channel Broadcasting Licenses, Inc.*, Notice of Apparent Liability, 21 FCC Rcd 4072, 4075 (EB 2006) (finding a violation of the contest rules and rejecting licensee's contentions that the contest rules provided it the ability to alter the outcome of a contest if it was affected by human error because “[s]uch a reading of the rules would provide the licensee with virtually unlimited discretion to change the Contest rules”). The Commission's contest rules only mention “discretion” in terms of the time and manner of disclosure of the material terms of the contest, but even limit that discretion. See 47 C.F.R. § 73.1216 Note 2 (“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.”) (emphasis added). See also *CBS, Inc.*, Letter, 9 FCC Rcd 705 (MMB 1994) (finding violation of contest rules due to the licensee's failure to disclose a contest's material terms in a reasonable number of announcements during the hours in which a contest was conducted).

²¹ See *Lincoln Dellar*, 8 FCC Rcd at 2586.

²² See *Lincoln Dellar*, 8 FCC Rcd at 2585.

compete.²³ In addition, CBS failed to broadcast or announce its requirement that contestants may not be members of any eating associations other than IFOCE. Thus, based on the factual circumstances of this case, the manner in which the Station conducted the contest could, and did, lead to deception of the public, thereby justifying the forfeiture imposed, unlike in *Lincoln Dellar*.

7. CBS also requests reconsideration of the *NAL* on the ground that the complainant's residency is outside of the Station's listener area and, therefore, is a contest condition supporting disqualification of the complainant.²⁴ In support, CBS cites to *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005* ("Omnibus Indecency Order").²⁵ There, the Commission dismissed certain indecency complaints, finding that "there is nothing in the record . . . to tie the complaints to the . . . local viewing area" of the station.²⁶ CBS asserts that a similar burden should be imposed on the complainant in this case – *i.e.*, that he should be required to demonstrate that he was a Station listener. CBS's reliance on the *Omnibus Indecency Order* is misplaced and reflects a misunderstanding of the Commission's indecency enforcement policy. The indecency policy statement referenced was intended to clarify that the Commission's indecency enforcement policy does not require the complainant to submit a statement that it viewed the material alleged to be indecent.²⁷ The Commission determined that indecency complaints lacking such a statement would not be rendered procedurally defective if the complaint otherwise shows that the complainant is a viewer in the market served by the station alleged to have violated the Commission's indecency rule. That policy simply has no relevance to the proper application and enforcement of the Commission's contest rule, and CBS has not provided any precedent to support its suggestion for a narrow application of the rule.

8. Notwithstanding the foregoing, even if we were to apply the burden suggested by CBS to the instant case, the record evidence supports a finding that the complainant would have met that burden. The complainant in this case actively engaged the Station during the contest by visiting the Station to perform the stunt which qualified him to win.²⁸ CBS's rules for the contest at issue here – as written and announced – did not preclude the complainant's participation, and CBS has not provided evidence or arguments to counter that conclusion. CBS's decision to disqualify the contest winner (here, the

²³ CBS disqualified a contestant from both Wing Bowl 13 and the prior contest it cites as precedent for doing so, Wing Bowl 12. See *NAL Response* at 3. CBS asserts that "[t]he adversarial relationship of IFOCE and AICE, as described in the Letter Inquiry Response, and the history of the Wing Bowl itself, including the disqualification of an AICE member during the prior year's Wing Bowl competition, provided constructive knowledge to the Complainant that his participation in Wing Bowl 13 is not allowed." The rules, however, do not allow for a contest's material terms to be advertised through "constructive notice." The rules require 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 requires that those "material terms should be disclosed periodically by announcements broadcast on the station conducting the contest . . ." See 47 C.F.R. § 73.1216 & Note 2 (emphasis added).

²⁴ See *NAL Response* at 3-4.

²⁵ 21 FCC Rcd 13299, 13329 (2006). See *NAL Response* at 4.

²⁶ See *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Order, 21 FCC Rcd 13299, 13329 (2006).

²⁷ See *In the Matter of Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue,"* Forfeiture Order, 23 FCC Rcd 3147, 3156 (2008).

²⁸ 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, at 4 (noting that the complainant "qualified through an eating stunt performed at the WIP studios").

complainant) resulted in the substantial modification of a material term of its contest rules, in violation of Section 73.1216.

9. We therefore find that the proposed forfeiture of \$4,000 is appropriate in the instant case.²⁹ We have examined the *Response to the NAL* pursuant to the statutory factors above, and in conjunction with the *Forfeiture Policy Statement*. As a result of our review, we conclude that the CBS willfully violated Section 73.1216 of the Commission's Rules.

IV. ORDERING CLAUSES

10. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act³⁰ and Sections 0.111, 0.311, and 1.80(f)(4) of the Commission's Rules,³¹ CBS Radio Inc. of Philadelphia **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of four thousand dollars (\$4,000) for willful violation of Section 73.1216 of the Commission's Rules.³²

11. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within 30 days of the release of this *Forfeiture Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.³³ 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/Account Number and FRN Number referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code). Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures. CBS Radio Inc. of Philadelphia will also send electronic notification on the date said payment is made to Hillary.DeNigro@fcc.gov, Ben.Bartolome@fcc.gov, and Anjali.Singh@fcc.gov.

²⁹ See *supra* note 20; *NM Licensing, Inc.*, Notice of Apparent Liability, 21 FCC Rcd 7916 (Enf. Bur., Investigations & Hearings Div. 2006) (imposing \$4,000 forfeiture for failure to conduct the contest as advertised or announced); *New Northwest Broadcasters, L.L.C.*, Notice of Apparent Liability, 19 FCC Rcd 9352 (Enf. Bur. 2004) (same).

³⁰ See 47 U.S.C. § 503(b).

³¹ See 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).

³² See 47 C.F.R. § 73.1216.

³³ See 47 U.S.C. § 504(a).

12. **IT IS FURTHER ORDERED** that a copy of this *Forfeiture Order* shall be sent by First Class Mail and Certified Mail Return Receipt Requested to CBS Radio Inc. of Philadelphia, 2175 K Street, N.W., Suite 350, Washington, DC 20037, and to its counsel, Brian M. Madden, Dennis P. Corbett, and Philip A. Bonomo, Leventhal Senter & Lerman PLLC, 2000 K Street, N.W., Suite 600, Washington, DC 20006.

FEDERAL COMMUNICATIONS COMMISSION

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