

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

In the Matter of
Service Broadcasting Group, LLC
Licensee of Station KKDA-FM (Dallas, TX)
File Number: EB-08-IH-1377
NAL/Acct. No.: 200932080041
FRN #: 0006130611
Facility ID No. 59702

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: June 25, 2009

Released: June 25, 2009

By the Chief, Investigations and Hearings Division, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture ("NAL"), issued pursuant to Section 503(b) of the Communications Act of 1934, as amended (the "Act"), we find that Service Broadcasting Group, LLC ("Service" or the "Licensee"), licensee of Station KKDA-FM, Dallas, Texas (the "Station"), apparently willfully and repeatedly violated Section 73.1216 of the Commission's rules, by neglecting to announce the material terms of a contest and failing to conduct the contest substantially as announced. Based on a review of the facts and circumstances, we find the Licensee apparently liable for a forfeiture in the amount of \$4,000.

II. BACKGROUND

2. The Enforcement Bureau ("Bureau") received a complaint (the "Complaint") alleging that the Station conducted a call-in contest during the week of April 14, 2008, and that the Station failed to award the announced prize of VIP tickets to be "up close and personal with Nelly," a musical artist, at Nelly's Blackout Party at the Opus Lounge in Dallas, Texas. The complainant alleges that the Station's announcements led listeners to believe that they would win VIP tickets that would allow them to "meet and/or be around Nelly." According to the complaint, after the listeners waited in the VIP line for over half an hour, however, the winners learned that their tickets only covered general admission with no special access privileges.

3. The Bureau sent a letter of inquiry ("LOI") to Service on July 24, 2008 ("LOI"). On

1 See 47 U.S.C. § 503(b).

2 See 47 C.F.R. § 73.1216.

3 See Complaint to the Federal Communications Commission, dated April 19, 2008, at 1-2 ("Complaint").

4 See id. at 2.

5 See id.

6 See Letter from Kenneth M. Scheibel, Jr., Assistant Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to Service Broadcasting Group, LLC, dated July 24, 2008 ("LOI"). On March 23, 2009, the Bureau issued a second letter of inquiry seeking clarification on certain aspects of Service's response. See Letter from Kenneth M. Scheibel, Jr., Assistant Chief, Investigations and Hearings Division,

September 9, 2008, Service responded to the *LOI* (“*LOI Response*”).⁷ Therein, Service acknowledges that it promoted the contest, between April 14 and 18, 2008.⁸ According to Service, LD Unlimited leased the venue, Universal Motown Republic Music Group (“Universal Music”) provided the talent, and the Station promoted the event.⁹ Service represents that the Station awarded event passes that guaranteed the winners’ entry without having to wait in line and would qualify the winners to limousine transportation to the event for 10 people and an Applebottom prize pack.¹⁰ Service asserts that both its on-air announcements promoting the contest and its staff, in talking with winners when awarding the prize, described that the promised prize was limited to entry passes that would spare winners the necessity of waiting in line.¹¹ Service acknowledges, however, that “there were isolated unscripted remarks by Station DJs” that suggested that there would also be access to the VIP level, which would otherwise require payment.¹² Service argues, however, that while such VIP access was not guaranteed under the contest’s rules, it was nevertheless provided gratuitously by a Universal Music promoter for those contest winners who were present at the event.¹³ Service also represents that, in a survey of 11 contest winners, eight winners confirmed that they used the tickets to access the event and that they enjoyed themselves.¹⁴ Service admits, however, that three surveyed winners who attended the event using the Station’s passes were dissatisfied that those passes did not provide free VIP access.¹⁵

III. DISCUSSION

4. Under Section 503(b)(1) of 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 forfeiture penalty.¹⁶ 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.¹⁷ 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,¹⁸ and the Commission has so interpreted the term in the Section 503(b) context.¹⁹ The Commission may also

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Enforcement Bureau, Federal Communications Commission, to Service Broadcasting Group, LLC, dated March 23, 2009. Service responded to the second letter of inquiry on April 6, 2009, by supplementing its response to the *LOI*. See Response of Service Broadcasting Group, LLC, dated April 6, 2009 See also *infra*, note 7.

⁷ See Response of Service Broadcast Group, LLC, dated September 9, 2008 (“*LOI Response*”).

⁸ See *id.* at 1.

⁹ See *id.* at 3.

¹⁰ See *id.* at 1.

¹¹ See *id.* at 1-3.

¹² See *id.* at 3.

¹³ See *id.*

¹⁴ See *id.* at 4.

¹⁵ See *id.*

¹⁶ See 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1).

¹⁷ 47 U.S.C. § 312(f)(1).

¹⁸ See H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

¹⁹ See, e.g., *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

assess a forfeiture for violations that are merely repeated, and not willful.²⁰ “Repeated” means that the act was committed or omitted more than once, or lasts more than one day.²¹ In order to impose such a 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 penalty should be imposed.²² The Commission will then issue a forfeiture if it finds, by a preponderance of the evidence, that the person has willfully or repeatedly violated the Act or a Commission rule.²³ As described in greater detail below, we conclude under this procedure that Service is apparently liable for a forfeiture in the amount of \$4,000 for its apparent willful and repeated failure to comply with the Commission’s requirements concerning licensee-conducted contests.

5. We find that Service apparently violated the Commission’s contest rule. 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.”²⁴ Material terms under the rule “include those factors which define the operation of the contest and which affect participation therein,”²⁵ and generally include, among other things, “the extent, nature and value of prizes”²⁶

6. Licensees, as public trustees, have the affirmative obligation to prevent the broadcast of false, misleading or deceptive contest announcements,²⁷ and to conduct their contests substantially as announced.²⁸ A broadcast announcement concerning a contest is false, misleading, or deceptive “if the net impression of the announcement has a tendency to mislead the public.”²⁹ In enforcing this rule, the Enforcement Bureau has repeatedly held that licensees are responsible for broadcasting accurate statements as to the nature and value of contest prizes, and will be held accountable for any

²⁰ See, e.g., *Callais Cablevision, Inc., Grand Isle, Louisiana*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362, ¶ 10 (2001) (“*Callais Cablevision*”) (assessing a forfeiture for a cable television operator’s repeated signal leakage).

²¹ *Southern California Broadcasting Co.*, 6 FCC Rcd at 4388 ¶ 5; *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362 ¶ 9.

²² 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

²³ See, e.g., *SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591 ¶ 4 (2002) (forfeiture paid).

²⁴ 47 C.F.R. § 73.1216.

²⁵ *Id.* Note 1(b).

²⁶ *Id.*

²⁷ 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).

²⁸ 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”).

²⁹ *WMJX Inc.*, 85 FCC 2d at 269-70, n.82 (citing *Eastern Broadcasting Corp.*, Decision, 14 FCC 2d 228, 229 (1968)).

announcement that tends to mislead the public.³⁰

7. We reject Service's claims that its announcements and staff's interaction with contest winners clearly indicated that the passes would provide contest winners concert entry without having to wait in line.³¹ As discussed below, the record belies this claim. We find it compelling that the complainant cites station remarks suggesting that winners would be "up close and personal with Nelly."³² Access to the event alone would not necessarily and apparently did not afford such access to the star.³³ It is also significant that Service did not dispute that its staff made these remarks on the air.³⁴ Moreover, the record supports that the complainant's recollection of the station remarks was substantially accurate,³⁵ and that the announcers made other similar remarks that also suggested that the prize would allow VIP access, as discussed below.³⁶

8. Contrary to Service's claims, its *LOI Response* suggests that the announcements were indeed deceptive. First, we note that several announcements indicate that the prize grants "VIP" access without defining that term.³⁷ Second, in the instances in which the term "VIP" was explained, Service's explanations were misleading. Some broadcast announcements indicated that "with VIP access you skip the line and are guaranteed entry"³⁸ and Service argues that only "isolated unscripted remarks from Station DJs" suggested VIP access was promised.³⁹ But we find that these "isolated" remarks occurred throughout Service's promotion of the contest. Specifically, several times, the deejays broadcast that "VIP" access would allow winners VIP access or the opportunity to be "up close and personal with Nelly."⁴⁰ Third, Service's own survey of contest winners suggests that Service's announcements were unclear about the type of access awarded to contest prize winners and that this resulted in some winners' dissatisfaction.⁴¹ The record thus demonstrates that Service did not accurately characterize to listeners a material term of its contest – the nature of the prize available. To the extent that Service blames its staff

³⁰ See, e.g., *Clear Channel Broadcasting Licenses, Inc.*, Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 6808, 6809 (Enf. Bur., Investigations & Hearings Div. 2006) (forfeiture paid); *Citicasters Co.*, Notice of Apparent Liability for Forfeiture, 15 FCC Rcd 16612, 16613-614 (Enf. Bur. 2000) (forfeiture paid); *Clear Channel Broadcasting Licenses, Inc.*, Notice of Apparent Liability for Forfeiture, 15 FCC Rcd 2734, 2735 (Enf. Bur. 2000) (forfeiture paid).

³¹ See *LOI Response* at 1-3.

³² See *Complaint* at 2.

³³ See *id.*; *LOI Response* at 4 ("[T]hree of the surveyed winners, while they attended the event using the Contest tickets, were displeased because they were not awarded free entry to the second floor VIP area").

³⁴ See *LOI* at 2 (providing Service the opportunity to point out any inaccuracies in the complaint in response to Inquiry 9).

³⁵ See *Complaint* at 2; Exhibit A at 16. See also *id.* at 17-18, 20, 22, 23-25 (stating same or similar remarks seven additional times).

³⁶ See *infra* ¶ 9.

³⁷ See *LOI Response* at Exhibit A at 3-5, 7-8, 10-11, 19.

³⁸ *Id.* at 2.

³⁹ See *id.* at 3 & Exhibit A at 14-15, 23 (noting deejays' remarks in the transcript of the contest promotions, including: (1) "[c]uz we got you access to the VIP level . . . [;]" (2) "you want to go hang out with Nelly in the VIP[;]" (3) "VIP room – you all up in there[;]" and (4) "you wanna ball in the VIP section"). See also *supra* note 35.

⁴⁰ See *supra* note 35.

⁴¹ See *LOI Response* at 4 (noting that "three of the surveyed winners, while they attended the event using the [c]ontest tickets, were displeased because they were not awarded free entry to the second floor VIP seating area").

for any discrepancies found in Station's announcements, we reiterate that the Commission has consistently held licensees responsible for the acts and omissions of their employees.⁴²

9. Service further asserts that it conducted the contest as announced by awarding the prize it promoted.⁴³ We disagree. Service concedes that its deejays promoted a prize awarding concert tickets, allowing winners to skip waiting in line, *and* providing access to the VIP floor free of charge.⁴⁴ In certain instances, Service, in fact, awarded the announced prize of access to the VIP level because "the Universal Music promoter . . . obtained free second floor access for present [c]ontest winners" even though "such access was not guaranteed under the [c]ontest rules."⁴⁵ Yet, Service's acknowledgment that at least three contest winners remained dissatisfied and did not gain free access to the VIP second floor demonstrates that Service failed to consistently award a prize understood by all to have been promised them.⁴⁶

10. Finally, Service contends that other factors demonstrate its compliance with the Commission's contest rules. Specifically, Service argues that it made clear the nature of the prize in off-air remarks.⁴⁷ To the extent that Service's staff provided these instructions in this manner, however, the Commission has found that licensees cannot avail themselves of non-broadcast announcements to satisfy the requirement that they accurately announce a contest's material terms.⁴⁸ The Commission's rules clearly state that "[t]he material terms should be disclosed periodically *by announcements broadcast on the station* conducting the contest."⁴⁹ The rules state that while disclosure by non-broadcast means (such

⁴² See *Rama Communications, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 18209, 18211 ¶ 7 (Enf. Bur. 2008) (citing *Padre Serra Communications, Inc.*, Letter, 14 FCC Rcd 9709, 9714 (Mass Media Bur. 1999) and *Gaffney Broadcasting, Inc.*, Memorandum Opinion and Order, 23 FCC 2d 912 (1970)) ("where lapses in compliance occur, neither the negligent acts nor omissions of station employees or agents, nor the subsequent remedial actions undertaken by the licensee, excuse or nullify the licensee's rule violation"); *Gaffney Broadcasting, Inc.*, 23 FCC 2d at 913 ("licensees are responsible for the selection and presentation of program material over their stations, including . . . acts or omissions of their employees"); *supra* note 30.

⁴³ See *LOI Response* at 3-4 & Exhibit G (noting that although "the Universal Music promoter . . . obtained free second floor access for present [c]ontest winners[.]" in response to a post-contest survey, "three of the surveyed winners, while they attended the event using the [c]ontest tickets, were displeased because they were not awarded free entry to the second floor VIP seating area").

⁴⁴ See *id.* at 3 (noting that isolated unscripted deejay remarks suggested that "VIP access" would provide access to the VIP level, although majority of over-the-air announcements and individual instructions from deejays to winners noted that "VIP access" meant skipping the line and gaining entry).

⁴⁵ *Id.* See also *id.* & Exhibit G, Memo from Olden Hatcher, S.W. Regional Promotion and Marketing Director, Universal Motown Republic Music Group, to Hymen Childs, Manager, Service Broadcasting Group, LLC (undated).

⁴⁶ See *supra* note 43. Further, we do not find mitigating the fact that Service's survey indicated that the majority of contest winners were satisfied with their prize. These facts, even if true, do not excuse Service's apparent rule violation. See, e.g., *NM Licensing LLC*, Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 7916, 7920 (Enf. Bur. Investigations & Hearings Div. 2006) (rejecting claims that station's ultimate awarding of prize and compensation for three excluded winners mitigated the licensee's liability for a contest rule violation).

⁴⁷ See *LOI Response* at 1-2 & Exhibits B-C.

⁴⁸ Although non-broadcast disclosures (such as making contest rules available at the stations) can supplement broadcast announcements, they cannot act as a substitute for broadcast announcements. See *AK Media Group, Inc.*, 15 FCC Rcd 7541, 7543 (Enf. Bur. 2000) (finding contest rule violation for failure to broadcast a contest's material term and holding that posting rules at the station and on website do not suffice to satisfy rule); *Clear Channel Broadcasting Licenses Inc.*, 15 FCC Rcd 2734, 2735 (Enf. Bur. 2000) (finding contest rule violation for failure to broadcast a contest's material term and holding that posting rules at the station's website does not suffice to satisfy rule).

⁴⁹ 47 C.F.R. § 73.1216 n.2 (emphasis added).

as on a website) can be considered in determining whether adequate disclosure has been made, any non-broadcast disclosures must be “[i]n addition to the required broadcast announcements . . .” and cannot substitute for them.⁵⁰ Accordingly, we find that any such off air instructions, even if made, do not excuse Service from liability.

11. Based upon the evidence before us, we find that the Station apparently willfully and repeatedly violated Section 73.1216 of the Commission’s rules. The Commission’s *Forfeiture Policy Statement* sets a base forfeiture amount of \$4,000 for violation of Section 73.1216.⁵¹ In assessing the monetary forfeiture amount, we must take into account the statutory factors set forth in Section 503(b)(2)(E) of the Act and Section 1.80 of the Commission’s rules, which include the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of culpability, any history or prior offenses, ability to pay, and other such matters as justice may require.⁵² Taking this standard into account, and based upon the facts and circumstances presented here, we find that a forfeiture in the amount of \$4,000 is appropriate as to Service’s contest violation.⁵³

IV. ORDERING CLAUSES

12. **ACCORDINGLY, IT IS ORDERED**, pursuant to Section 503(b) of the Act,⁵⁴ and Sections 0.111, 0.311, and 1.80(f)(4) of the Commission’s rules,⁵⁵ that Service Broadcasting Group, LLC, is hereby **NOTIFIED** of its **APPARENT LIABILITY FOR FORFEITURE** in the amount of \$4,000 for apparently willfully and repeatedly violating Section 73.1216 of the Commission’s rules.⁵⁶

13. **IT IS FURTHER ORDERED**, pursuant to Section 1.80 of the Commission’s rules, that within thirty (30) days of the release of this *NAL*, Service Broadcasting Group, LLC, **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

14. 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,

⁵⁰ *Id.*

⁵¹ See *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), *recons. denied*, 15 FCC Rcd 303 (1999) (“*Forfeiture Policy Statement*”).

⁵² See 47 U.S.C. § 503(b)(2)(E); 47 C.F.R. § 1.80(b)(4).

⁵³ See *Entercom Wichita License, LLC*, Forfeiture Order, DA 09-183 (Enf. Bur., Investigations & Hearings Div. rel. Feb. 5, 2009), *response pending* (assessing \$4,000 forfeiture for failure to announce a contest’s material term and for neglecting to conduct contest as announced); *Citicasters Co.*, Notice of Apparent Liability for Forfeiture, 15 FCC Rcd 16612, 16613-614 (Enf. Bur. 2000) (assessing \$4,000 forfeiture for failure to announce a contest’s material term) (forfeiture paid); *Capstar TX Limited Partnership*, Notice of Apparent Liability for Forfeiture, 20 FCC Rcd 10636, 10641 (Enf. Bur., Investigations & Hearings Div. 2005) (assessing \$4,000 forfeiture for failure to announce a contest’s material term and for neglecting to conduct the contest as announced) (forfeiture paid).

⁵⁴ See 47 U.S.C. § 503(b).

⁵⁵ See 47 C.F.R. §§ 0.111, 0.311 and 1.80(f)(4).

⁵⁶ See 47 C.F.R. § 73.1216.

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. Service Broadcasting Group, LLC, will also send electronic notification on the date said payment is made to Hillary.DeNigro@fcc.gov, Kenneth.Scheibel@fcc.gov, and Anjali.Singh@fcc.gov.

15. The response, if any, must be mailed to Hillary S. DeNigro, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, SW, Room 4-C330, Washington, D.C. 20554, and must include the NAL/Account Number referenced above. In addition, to the extent practicable, a copy of the response, if any, should also be transmitted via e-mail to Hillary.DeNigro@fcc.gov, Kenneth.Scheibel@fcc.gov, and Anjali.Singh@fcc.gov.

16. 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.

17. Accordingly, **IT IS ORDERED**, that the Complaint in this proceeding **IS GRANTED**, and the Complaint proceeding **IS HEREBY TERMINATED**.⁵⁷

18. **IT IS FURTHER ORDERED** that copies of this *NAL* shall be sent, by First Class Mail and Certified Mail - Return Receipt Requested, to Service Broadcasting Group, LLC, 621 Northwest Sixth Street, Grand Prairie, Texas 59703, and to its counsel, Marissa Repp, Esq., Hogan & Hartson LLP, Columbia Square, 555 Thirteenth Street, NW, Washington, D.C. 20004, and by First Class mail to the Complainant.

FEDERAL COMMUNICATIONS COMMISSION

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

⁵⁷ Consistent with Section 503(b) of the Act and consistent Commission practice, for the purposes of the forfeiture proceeding initiated by this *NAL*, Service Broadcasting Group, LLC, shall be the only party to this proceeding.