

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

In the Matter of)	
)	
Greater Boston Radio, Inc.)	EB-08-IH-5305
)	Facility ID No. 25052
Licensee of Station WMJX(FM))	NAL/Account No. 200932080039
Boston, Massachusetts)	FRN 0005069802

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: April 8, 2009

Released: April 8, 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”), and Section 1.80 of the Commission’s rules,¹ we find that Greater Boston Radio, Inc. (“Greater Boston” or the “Licensee”), licensee of Station WMJX(FM), Boston, Massachusetts (“Station WMJX” or the “Station”), broadcast information about a contest without fully and accurately disclosing all material terms thereof, and failed to conduct the contest substantially as announced or advertised, in apparent willful violation of Section 73.1216 of the Commission’s rules.² Based upon our review of the record, we find that Greater Boston is apparently liable for a forfeiture in the amount of \$4,000.

II. BACKGROUND

2. The Commission received a complaint on May 2, 2008 (the “Complaint”), alleging that the Station failed to conduct its “Win a Car” contest in accordance with the contest’s advertised terms and the Commission’s rules.³ Specifically, the Complainant states that contest promotions broadcast by the Station stated that the winner would win one of three new cars.⁴ The Complainant was a preliminary winner who received a cash prize and an automobile ignition key that he initially believed represented a chance to win the contest’s grand prize, his choice of one of three cars. After qualifying for a chance to win the grand prize, the Complainant learned that the prize was not the winner’s choice of three available cars but, instead, a two-year lease of the selected car. Additionally, after qualifying, he was informed that the grand prize award was conditioned upon the winner further qualifying for credit with the car dealer supplying the leased car.⁵

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

² See 47 C.F.R. § 73.1216 (the “Contest Rule”).

³ See Complaint to Federal Communication Commission filed May 2, 2008 (“Complaint”) (copy on file).

⁴ See *id.* at 1.

⁵ See *id.*

3. By Letter of Inquiry (“LOI”), dated February 11, 2009, the Enforcement Bureau directed Greater Boston to provide information about the alleged contest.⁶ On March 20, 2009, Greater Boston filed its response (“LOI Response”).⁷ In its LOI Response, the Licensee states that the contest was entitled the “Cool, Hot or Green” contest (the “Contest”) and that it “offered listeners a chance to win a two-year lease on the winner’s choice of one of three automobiles – a ‘cool’ Mercedes Benz C Series Sedan, a ‘hot’ Audi TT Convertible, or a ‘green’ environmentally-friendly Toyota Prius.”⁸ Listeners called into the Station in order to win a gas card worth \$106 (representing the Station’s position on the FM dial – 106.7 MHz) and a chance to win the grand prize, a two-year lease of the listener’s chosen automobile.⁹

4. In its LOI Response, Greater Boston acknowledges that “while the Contest, as described on air, made plain that the grand prize winner would be able to choose from three different cars, only the complete rules of the Contest, made available via the Station’s website . . . spelled out that what was being awarded was a two-year lease of the car chosen, and not title to a car, and that the winner would have to be qualified for credit by Prime Motor Group,” the contest co-sponsor.¹⁰ Moreover, the Licensee admits that “the Station’s on-air announcements did not directly refer listeners to the Station’s web site for complete Contest rules.”¹¹

5. Notwithstanding the foregoing, Greater Boston contends that none of the Contest contestants were harmed, inconvenienced or “suffered any reliance damages based on any misunderstanding of the rules.”¹² In its LOI Response, Greater Boston offers assurances that it has taken “remedial measures to ensure that every material term is fully disclosed in announcements for future contests”¹³ and submits documents addressed to its staff concerning the Commission’s Contest Rule requirements.¹⁴ Based upon these conditions and its remedial actions, Greater Boston argues that “it is appropriate for the Bureau to limit its actions to an admonishment of the Station for the misunderstanding concerning the grand prize that arose from announcements broadcast to promote the ‘Cool, Hot or Green’ Contest”¹⁵

⁶ See Letter from Rebecca Hirselj, Assistant Chief, Investigations and Hearings Division, Enforcement Bureau, to Greater Boston Radio, Inc., dated February 11, 2009 (the “LOI”).

⁷ See Letter from David S. Keir, Esq., Lerman Senter PLLC, to Judy Lancaster, Investigations and Hearings Division, Enforcement Bureau, dated March 20, 2009 (“LOI Response”).

⁸ See LOI Response at 2.

⁹ See *id.* at 2, 4. A check in the amount of \$106 was substituted for each advertised gas card because the Station was unable to procure gas cards in the amount of \$106. See LOI Response at 4.

¹⁰ See *id.* at 3.

¹¹ See *id.* at 2. The Station’s announcements consistently described the grand prize in the “Cool, Hot or Green” contest as “A *Cool* Mercedes Benz...A *Hot* Audi TT Convertible...or a [*Green*] Toyota Prius Hybrid ... from Prime Auto Group...No fine print gimmicks...on line at Driveprime.com!” See *id.* at 2 & Exhibit 2.

¹² See *id.* at 6, 7.

¹³ See *id.* at 7.

¹⁴ See *id.* at Exhibits 3 (a 2004 Memorandum to its General Managers and Program and Promotion Directors concerning contests and lotteries, referred to in the LOI Response as a copy of its corporate policy regarding contests), 8 (containing a March 19, 2009 “Important Advisory” regarding “Required Announcements Concerning Station-Sponsored Contests” addressed to “All Greater Media Programming and Promotions Personnel” and a copy of Exhibit 3).

¹⁵ See *id.* at 7.

III. DISCUSSION

6. 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 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 Greater Boston is apparently liable for a forfeiture for its apparent violation of Section 73.1216 of the Commission’s rules.

7. Section 73.1216, the Commission’s Contest Rule, 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.”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, instructions on “how to enter or participate; eligibility restrictions; . . . whether prizes can be won; when prizes can be won; . . . the extent, nature and value of prizes; time and means of selection of winners; . . .”²⁶ Additionally, “the obligation to disclose the material terms arises at the time the audience is first told how to enter or participate and continues thereafter.”²⁷

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).

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*”) (issuing a Notice of Apparent Liability for, *inter alia*, 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 See 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 *Id.*, Note 2.

8. Licensees, as public trustees, have the affirmative obligation to prevent the broadcast of false, misleading or deceptive contest announcements,²⁸ and to conduct their contests substantially as announced.²⁹ 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.”³⁰ 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 announcement that tends to mislead the public.³¹

9. In this case, Greater Boston promoted its Contest over the air with misleading information that did not fully disclose to the listening audience the Contest’s material terms.³² The promotions did not include, *inter alia*, an accurate description of the Contest’s grand prize; the value of the grand prize; the eligibility requirements of the contestants; or how to access the complete contest rules.³³

10. Although Greater Boston tacitly admits that it violated the Contest Rule, it nevertheless argues that it should receive only an admonishment for “the misunderstanding concerning the grand prize.”³⁴ In support of its position, Greater Boston references “remedial measures” it has taken to ensure future compliance with the Contest Rule and cites a 1990 Mass Media Bureau, Enforcement Division decision imposing an admonishment on KIRO, Inc. for Contest Rule violations.³⁵ Although the remedial action taken by Greater Boston is commendable, it is well settled that subsequent remedial actions do not excuse or nullify a licensee’s violation of a Commission rule.³⁶ Further, the violations in the precedent

²⁸ 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).

²⁹ 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”).

³⁰ *WMJX Inc.*, 85 FCC 2d at 269-270, n.82 (citing *Eastern Broadcasting Corp. (Station WCVS(AM))*, Decision, 14 FCC 2d 228, 229 (1968)).

³¹ See, e.g., *Clear Channel Broadcasting Licenses, Inc. (Station WRUM(FM))*, Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 6808, 6809 (Enf. Bur., Investigations & Hearings Div. 2006) (forfeiture paid); *Citicasters Co. (Station KITT(FM))*, Notice of Apparent Liability for Forfeiture, 15 FCC Rcd 16612, 16613-614 (Enf. Bur. 2000) (forfeiture paid); *Clear Channel Broadcasting Licenses, Inc. (Station KPRR(FM))*, Notice of Apparent Liability for Forfeiture, 15 FCC Rcd 2734, 2735 (Enf. Bur. 2000) (forfeiture paid).

³² See LOI Response at 2 & Exhibit 2.

³³ See *id* at Exhibit 4 (“Contest Rules, as Posted on WMJX(FM) Website”).

³⁴ See *id.* at 7.

³⁵ See *id.* (citing *KIRO, Inc.*, 5 FCC Rcd 7105 (MMB, Enf. Div. 1990) (“*KIRO*”).

³⁶ See *Entercom Wichita License, LLC*, Forfeiture Order, DA 09-183, at ¶ 7 & note 17 (Enf. Bur., Investigations and Hearings Div. Feb. 5, 2009) (“*Entercom Wichita*”) (finding that subsequent remedial actions undertaken by a licensee cannot excuse or nullify a licensee’s rule violation); *Capstar TX Limited Partnership*, Notice of Apparent Liability, 20 FCC Rcd 10636, 10640 (Enf. Bur., Investigations & Hearings Division 2005) (same); *Padre Serra Communications, Inc.*, Letter Decision, 14 FCC Rcd 9709, 9714 (Mass Media Bur. 1999) (citing *Gaffney Broadcasting, Inc.*, Memorandum Opinion and Order, 23 FCC 2d 912, 913 (1970); *Eleven Ten Broadcasting Corp.*, Notice of Apparent Liability, 33 FCC 2d 706 (1962)).

that Greater Boston cites are minor compared to the instant case and, therefore, justify a different result.

11. In *KIRO*, the complainant did not understand that the station's contest term stating "enter as often as you like" contemplated participation in various segments of the contest but did not permit duplicate entries for the same segment.³⁷ The station made clarifying announcements about this contest term during the course of the contest. The Mass Media Bureau determined that the term as originally announced could have been reasonably misunderstood to permit duplicate entries and was material to the contest. The Mass Media Bureau then determined that the overall circumstances of the case, including the edited announcements and the station's offer to compensate the complainant for wasted participation expense, warranted an admonition.³⁸ The circumstances of the violations in the instant case, however, are more serious and justify a forfeiture. In the instant case, Greater Boston failed to disclose at all several material terms of the contest, as discussed above.³⁹ The Station did not provide an accurate description of the Contest's grand prize; the value of the grand prize; the eligibility requirements of the contestants; or how to access the complete contest rules. Finally, the decision in this case is consistent with more recent decisions where a forfeiture was imposed for violation of the Commission's contest rule.⁴⁰

12. Based upon the evidence before us, we find that the Licensee apparently willfully violated Section 73.1216 of the Commission's rules. The Commission's Forfeiture Policy Statement specifies a base forfeiture amount of \$4,000 for violation of Section 73.1216.⁴¹ 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,⁴² 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.⁴³ 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 in this case.

IV. ORDERING CLAUSES

13. **ACCORDINGLY, IT IS ORDERED**, pursuant to Section 503(b) of the Act,⁴⁴ and Sections 0.111, 0.311, and 1.80(f)(4) of the Commission's rules,⁴⁵ that Greater Boston Radio, Inc., licensee of Station WMJX(FM), Boston, Massachusetts, is hereby **NOTIFIED** of its **APPARENT LIABILITY FOR FORFEITURE** in the amount of \$4,000 for apparently willfully and repeatedly

³⁷ *KIRO*, 5 FCC Rcd at 7105.

³⁸ *See id.*

³⁹ *See* paragraph 9, *supra*.

⁴⁰ *E.g.*, *CBS Radio East Inc.*, Notice of Apparent Liability, DA 09-189 (Enf. Bur., Investigations & Hearings Div. rel. Feb. 5, 2009) (finding licensee apparently liable for a \$6,000 forfeiture for failing to disclose all material terms of a contest), *response to NAL pending.*; *Clear Channel Broadcasting Licenses, Inc.*, Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 4072 (Enf. Bur. Investigations & Hearings Div. 2006) (imposing a \$4,000 forfeiture despite licensee's prompt remedial action) (forfeiture paid).

⁴¹ *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), *recons. denied*, 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*"); 47 C.F.R. § 1.80(b).

⁴² *See* 47 U.S.C. § 503(b)(2)(E); 47 C.F.R. § 1.80(c)(4).

⁴³ *See id.*

⁴⁴ *See* 47 U.S.C. § 503(b).

⁴⁵ *See* 47 C.F.R. §§ 0.111, 0.311 and 1.80(f)(4).

violating Section 73.1216 of the Commission's rules.⁴⁶

14. **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, Greater Boston Radio, Inc. **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

15. 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[s] 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.⁴⁷ Greater Boston Radio, Inc. will also send electronic notification on the date said payment is made to Hillary.DeNigro@fcc.gov, Rebecca.Hirselj@fcc.gov, and Judy Lancaster@fcc.gov.

16. 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 4-C330, Washington D.C. 20554 and **SHALL INCLUDE** the NAL/Acct. No. referenced above. The Licensee shall also, to the extent practicable, transmit a copy of the response via e-mail to Hillary.DeNigro@fcc.gov, Rebecca.Hirslef@fcc.gov, and Judy.Lancaster@fcc.gov.

17. 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.

18. **IT IS FURTHER ORDERED** that the complaint in this proceeding **IS GRANTED** to the extent indicated herein and **IS OTHERWISE DENIED**, and the complaint proceeding **IS HEREBY TERMINATED**.⁴⁸

⁴⁶ See 47 C.F.R. § 73.1216.

⁴⁷ See 47 C.F.R. § 1.1914.

⁴⁸ For the purposes of the forfeiture proceeding initiated by this NAL, Greater Boston shall be the only party to this proceeding.

19. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture shall be sent, by Certified Mail/Return Receipt Requested, to Greater Boston Radio, Inc., 35 Braintree Hill Office Park, Suite 300, Braintree, Massachusetts 02184-8703, and to its counsel, David S. Keir, Esq., at Lerman Senter PLLC, 2000 K Street, NW, Suite 600, Washington, DC 20006-1809.

FEDERAL COMMUNICATIONS COMMISSION

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