

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

In the Matter of)	EB-08-IH-5307
)	
Journal Broadcast Corporation)	NAL/Account No. 201032080021
)	FRN 0002710192
Licensee of Station KJOT(FM))	Facility ID No. 6329
Boise, Idaho)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 24, 2010

Released: March 24, 2010

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”),¹ we find that Journal Broadcast Corporation (“Journal” or the “Licensee”), licensee of Station KJOT(FM), Boise, Idaho (“J-105” or the “Station”), broadcast information about a contest without fully and accurately disclosing all material terms thereof in apparent willful and repeated violation of Section 73.1216 of the Commission’s rules.² Based upon our review of the record, we find Journal apparently liable for a forfeiture in the amount of \$4,000.

II. BACKGROUND

2. The Commission received a complaint on May 5, 2008 (the “Complaint”), alleging that the Station failed to conduct a contest in accordance with its advertised terms and the Commission’s rules.³ Specifically, the Complainant alleges that the Station did not advertise that it would award all prizes to a single individual.⁴ The Complainant also alleges that the Station “fixed” the results of the giveaway-event by awarding all prizes to a prior customer of one of the Station’s sponsors.⁵

3. Based on the allegations contained in the Complaint, the Enforcement Bureau sent a letter of inquiry to the Licensee.⁶ Journal responded, acknowledging that it had conducted the “J105 Treasure Valley Properties Ultimate Garage” contest (the “Contest”) and had awarded all advertised prizes to one

¹ See 47 U.S.C. § 503(b).

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

³ See Letter from Complainant to Federal Communications Commission (April 29, 2008). The Complainant did not authorize release of personal information so the Complainant’s name shall remain anonymous.

⁴ See *id.* at 2.

⁵ See *id.*

⁶ See Letter from Rebecca Hirselj, Assistant Chief, Investigations and Hearings Division, Enforcement Bureau, to Journal Broadcast Corporation (April 17, 2009) (“LOI”). Journal requests confidential treatment of one exhibit included with the LOI, pursuant to Section 0.459 of the Commission’s rules. Because the content of the exhibit is not specifically referenced in this Order, Journal’s request is moot.

grand-prize winner at the giveaway event held at Stor-Mor Sheds in Boise, Idaho, on the afternoon of April 26, 2008.⁷ The Licensee describes the Contest as designed to award “numerous prizes to a single winner so that the winner could own the Ultimate Garage,” and notes that promotional announcements for the Contest emphasized this winner-take-all aspect.⁸ As explained in the LOI Response, the “final giveaway,” or elimination process for selecting the winner (the “Drawing”), consisted of the following: each contestant pulled a numbered toy from a bucket; the number on the toy corresponded to a “qualifier bag” that the Station then distributed to each contestant.⁹ The Station next winnowed the contestants to ten by eliminating those whose bags did not contain certain specific items.¹⁰ Each of the ten finalists’ bags contained a key code.¹¹ The Contest winner was the finalist whose key code was uniquely capable of unlocking the door of a garage containing the prizes.¹² The Licensee asserts that the individual who won went “through a random process that was based on numbers” selected by that individual,¹³ and denies that the winner had a prior relationship with Stor-Mor Sheds, a co-sponsor of the Contest.¹⁴ The Licensee supports its denial with a sworn declaration from the winner.¹⁵

4. According to the Licensee, the Station aired recorded announcements promoting the Contest from March 31 to April 21, 2008.¹⁶ The Licensee provided transcripts of ten different recorded announcements, each in the same general format, citing various Contest sponsors and each mentioning prizes that will be awarded.¹⁷ For example, one announcement declares:

What’s in here?
Ooh, a sweet ride from Larry Miller Honda. Pimped out by Sun Busters and
Big-O Tires.
It’s the J-105 Treasure Valley Properties’ Ultimate Garage with Stor-Mor Sheds.
Opening soon.
From J-105. Everything that Rocks.¹⁸

5. Of the ten different recorded announcements the Licensee provided, only two mention that the prizes would be awarded to a single winner.¹⁹ One announcement states, *inter alia*, “[c]rammed

⁷ See Letter from Sally Buckman and John Bagwell, counsel for Journal Broadcasting Corporation, to Rebecca Hirselj, Assistant Chief, Investigations and Hearings Division, Enforcement Bureau (May 18, 2009) (“LOI Response”) at 1, 5, Ex. 3.

⁸ See *id.* at 1-2, 5, 7. The prizes included, *inter alia*, a Honda Civic, tires, garage cabinets, and tools.

⁹ See *id.* at 1, 7. The Licensee’s description of this process was unsupported by any citations.

¹⁰ See *id.*

¹¹ See *id.*

¹² See *id.* at 5, 7. The Licensee notes that the Honda was actually adjacent to the garage. See *id.* at 7, Ex. 8.

¹³ See *id.* at 9.

¹⁴ See *id.* at 1, 5.

¹⁵ See *id.* at Ex. 5 (declaration under penalty of perjury from the winner that he did not have any pre-existing relationship with Stor-Mor Sheds) (“Declaration”).

¹⁶ See *id.* at 2-4, Ex. 1.

¹⁷ See *id.* at Ex. 1.

¹⁸ *Id.* at 2. Other announcements mentioned other prizes such as a Honda Accord; a Traeger grill; a toolbox-shaped refrigerator; a Nintendo Wii; and a Stor-Mor Shed. See *id.*

¹⁹ See *id.* at Ex. 1, p. 1.

with cool stuff from Stor-Mor Sheds Listen for how to ‘win it all’ details.”²⁰ The other states: “Treasure Valley Properties’ Ultimate Garage . . . its contents could be yours.”²¹ The Licensee provided the times and dates the Station aired the recorded announcements at various intervals spanning 21 days, for a total of over 170 announcements.²² Of that total, 72 aired between the hours of 11:00 p.m. and 6:00 a.m.²³ The Station aired eight announcements on the first day it began advertising the Contest, but the Licensee cannot state which announcements aired on that – or any other – day because the Station’s records do not reflect which recorded announcement was broadcast at which time during the promotional period.²⁴

6. The Station also aired “live-read” announcements throughout April 2008.²⁵ The Licensee claims that the Station has no log of when the live-read announcements aired, but states that the Station’s practice was to air live-read announcements “prior to, or on the same date as, the recorded promotional announcements.”²⁶ According to the Licensee, these live-read announcements “included material terms” of the Contest.²⁷ Although the Station no longer has copies of every live-read announcement it aired, the Licensee avers that the following announcement is representative of all the live-read announcements the Station aired:

Opening soon, the J-105/Treasure Valley properties [sic] Ultimate Garage with Stor-Mor Sheds. Including cool stuff from Larry Miller Honda and Mountain Dew. Qualify with Pete & Joe in the Morning and Sparks in the Afternoon this week. You can also qualify at our sponsor locations. **Details at J-105 Dot.com.** To check out the contents of the U.G. [Ultimate Garage] head to Stor-Mor Sheds this weekend and the items will be on display.²⁸

The Licensee provided a copy of the information posted at J-105’s website and contends that this web-based information constitutes “the full Contest rules” (the “Rules”).²⁹ The Rules lay out various material terms, such as eligibility requirements, how to enter the Contest and the entry deadline, and the requirement that contestants had to be present at Stor-Mor Sheds’ Meridian location on April 26 for the “final giveaway.”³⁰ The Rules, however, do not contain a clear, consistent statement that there would be a single winner, instead variously referring to “winners,” “a winner,” “the winner,” and “each winner.”³¹ The Rules also do not list the prizes to be awarded, or their value.³² Most notably, the Rules make no

²⁰ *Id.*

²¹ *Id.*

²² *See id.* at 2-4.

²³ *See id.* at 3-4.

²⁴ *See id.* at 2-4. Three of the eight announcements aired before 6:00 a.m. and after 11:00 p.m. *See id.*

²⁵ *See id.* at 2, 4.

²⁶ *See id.* at 4.

²⁷ *See id.* at 2, 4, Ex. 2.

²⁸ *Id.* at Ex. 2 (emphasis added).

²⁹ *See id.* at 4, Ex. 3.

³⁰ *See id.* at Ex. 3, pp. 1-4.

³¹ *See id.* at Ex. 3, p. 3. Paragraph 3 of the Rules mentions “winners,” paragraph 6 mentions both “winners” and “winner,” and paragraphs 8 and 9 cite to a “winner.”

³² *See id.* at Ex. 3.

mention of how the Station planned to select the Contest winner, other than to note that finalists must “gather at 2:00pm [sic] at Stor Mor for the final giveaway.”³³

III. DISCUSSION

7. 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.³⁴ 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.³⁵ 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,³⁶ and the Commission has so interpreted the term in the Section 503(b) context.³⁷ The Commission may also assess a forfeiture for violations that are merely repeated, and not willful.³⁸ “Repeated” means that the act was committed or omitted more than once, or lasts more than one day.³⁹ 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.⁴⁰ 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.⁴¹ As described in greater detail below, we conclude under this procedure that Journal is apparently liable for a forfeiture for its apparent violation of Section 73.1216 of the Commission’s rules.

8. 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.”⁴² Material terms under the rule “include those factors which define the operation of the contest and which affect participation therein,”⁴³ 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

³³ See *id.* at Ex. 3, p. 1. According to Webster’s Dictionary, “giveaway” merely means, *inter alia*, “something given away free,” or “a radio or television program on which prizes are given away.” See Webster’s New Collegiate Dictionary 482 (1979). The term does not explicate the Station’s method for awarding the prizes.

³⁴ See 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1).

³⁵ 47 U.S.C. § 312(f)(1).

³⁶ See H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

³⁷ See, e.g., *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

³⁸ 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).

³⁹ *Southern California Broadcasting Co.*, 6 FCC Rcd at 4388, ¶ 5; *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362, ¶ 9.

⁴⁰ See 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

⁴¹ See, e.g., *SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591 ¶ 4 (2002).

⁴² 47 C.F.R. § 73.1216.

⁴³ *Id.*, Note 1(b).

extent, nature and value of prizes; [and] time and means of selection of winners;”⁴⁴ Although licensees have discretion in determining the time and manner of disclosing a contest’s material terms, and need not enumerate the terms each time it airs an announcement promoting a contest, “the obligation to disclose the material terms arises at the time the audience is first told how to enter or participate [in the contest] and continues thereafter.”⁴⁵ Finally, disclosure of material terms must be by announcements broadcast on the station; non-broadcast disclosures of material terms can be made to supplement, but not substitute for, broadcast announcements.⁴⁶

9. In this case, Journal failed to fully and accurately disclose all material terms of the Contest. The Station’s live-read announcement mentions sponsors and provides general qualification information, and refers listeners to the Station’s website for additional details, but makes no mention of the winner-take-all term. The Station’s several recorded promotions, which vary in content, mention certain prizes and/or sponsors and encourage the public to “listen to win” or “enter to win.”⁴⁷ Only a minority – two out of ten – of the recorded announcements provided, however, mention that all prizes would be awarded to a single winner, and Journal has no record of when or how often the Station aired those specific announcements. Journal cannot affirmatively state that any of the recorded announcements mentioning the single-winner term actually aired, let alone confirm that the winner-take-all announcements aired when the Station first announced the Contest and periodically thereafter.⁴⁸ Although the Commission’s Contest Rule permits licensees discretion in the time and manner of broadcasting a contest’s material terms, such discretion is not absolute: licensees must broadcast those terms at the time the audience is first told how to enter a contest and periodically thereafter.⁴⁹ In this case, Journal’s inability to affirmatively establish that it in fact broadcast announcements disclosing the single-winner aspect, both when the Station first told the audience how to enter the Contest and periodically thereafter, does not adequately rebut the Complainant’s allegation regarding the accuracy of the announcements.⁵⁰ Furthermore, the Station’s apparent failure to broadcast accurate announcements that fully disclosed the single-winner aspect of the Contest was replicated in its web-based Rules, which referenced both “the winner” and “winners,” and misleadingly created ambiguity as to whether there would be one, or multiple, winners.⁵¹

⁴⁴ *Id.*

⁴⁵ *Id.*, Note 2.

⁴⁶ *See id.* (“material terms should be disclosed periodically by announcements broadcast on the station conducting the contest”) (emphasis added). Posting contest rules on a station’s website does not satisfy Section 73.1216’s requirement that a licensee broadcast the material terms of a contest it conducts. *See, e.g., AK Media Group*, Notice of Apparent Liability for Forfeiture, 15 FCC Rcd 7541, 7543, ¶ 7 (Enf. Bur. 2000) (forfeiture paid); *Service Broadcasting Group, LLC*, Notice of Apparent Liability for Forfeiture, 24 FCC Rcd 8494, 8498 (Investigations & Hearings Div., Enf. Bur. 2009) (forfeiture paid) (“*Service Broadcasting*”).

⁴⁷ *See* LOI Response at 2-4, Ex. 1.

⁴⁸ Moreover, of the 170 times the Station aired the recorded announcements, a significant number (72) aired after 11:00 p.m. or before 6:00 a.m., hours well outside the time of the Drawing. To the extent the Station may have aired the single-winner announcements during the overnight hours, such disclosure might nevertheless fail to satisfy the Commission’s Contest Rule. *See, e.g., CBS, Inc.*, Licensee of WBBF(FM), *Letter Notice of Apparent Liability for Forfeiture*, 9 FCC Rcd 705 (MMB 1994) (in a contest operated between the hours of 6:00 p.m. and midnight, licensee admitted that its disclosure of all material terms between the hours of midnight and 5:00 a.m. “failed to ‘reasonably disclose’ conditions” of its contest).

⁴⁹ *See* 47 C.F.R. § 73.1216.

⁵⁰ *See CBS, Inc.*, *supra* note 48.

⁵¹ The Licensee provided declarations of four Station personnel who attended the Drawing. *See* LOI Response at Ex. 8. All declarants aver that they “did not hear” and were “not aware of any statement” that listeners attending the

10. Further, neither the live-read nor the recorded promotional announcements mention the Drawing or disclose how the winner would be selected.⁵² This deficiency is exacerbated by the same omission in the Station's web-based Rules which, other than a single mention that contestants had to "gather at 2:00pm [sic] at Stor Mor for the final giveaway," are silent as to the method the Station would use to select a winner.⁵³ The Commission's Contest Rule clearly states that a licensee "shall fully and accurately disclose the material terms" of a contest it conducts, to include "the means of selection of winners."⁵⁴ Here, Journal failed to disclose how the Station would select a winner. Had it done so, the Station would have informed the public that the elaborate elimination process resulted in all prizes being awarded to a single winner. We therefore find that Journal violated Section 73.1216 of the Commission's rules by failing to fully and accurately disclose the material terms of the Contest.

11. Despite Journal's failure to fully and adequately disclose all material terms of the Contest, there is insufficient evidence to conclude that the Station pre-determined the winner of the Contest. The nature of the Drawing and the weight of the evidence – particularly the winner's declaration – support our conclusion that the Station awarded the prizes to a random winner, not to someone with a prior relationship to a Station sponsor.⁵⁵

12. Based upon the record 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 73.1216.⁵⁶ 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,⁵⁷ 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.⁵⁸ Applying the 503(b) factors to the facts and circumstances presented here, we find that a proposed forfeiture in the amount of \$4,000 is appropriate in this case.

Drawing believed the Station would award prizes to multiple contestants. This information is not dispositive as to whether Journal complied with Section 73.1216. The mere fact that Station personnel lacked awareness of listener ignorance regarding prize distribution does not negate the fact that some listeners – such as the Complainant, who was at the Drawing – were ignorant of the winner-take-all aspect. Nor does it affirmatively establish that Journal complied with Section 73.1216's requirement that licensees broadcast all material terms of a contest at the time the public is first advised of how to enter a contest and periodically thereafter.

⁵² See *id.* at Ex. 2.

⁵³ See *id.* at 2, 4, Ex. 2, Ex. 3.

⁵⁴ See 47 C.F.R. § 73.1216.

⁵⁵ See LOI Response at 1, 5-7, and Declaration.

⁵⁶ 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).

⁵⁷ See 47 U.S.C. § 503(b)(2)(E); 47 C.F.R. § 1.80(c)(4).

⁵⁸ See *id.*

IV. ORDERING CLAUSES

13. **ACCORDINGLY, IT IS ORDERED**, pursuant to Section 503(b) of the Act,⁵⁹ and Sections 0.111, 0.311, and 1.80(f)(4) of the Commission's rules,⁶⁰ that Journal Broadcast Corporation, licensee of Station KJOT(FM), Boise, Idaho, 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.⁶¹

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 NAL, Journal Broadcast Corporation **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.⁶² Journal Broadcast Corporation will also send electronic notification on the date said payment is made to Hillary.DeNigro@fcc.gov, Kenneth.Scheibel@fcc.gov, and Dana.Leavitt@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, Kenneth.Scheibel@fcc.gov, and Dana.Leavitt@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.

⁵⁹ See 47 U.S.C. § 503(b).

⁶⁰ See 47 C.F.R. §§ 0.111, 0.311 and 1.80(f)(4).

⁶¹ See 47 C.F.R. § 73.1216.

⁶² See 47 C.F.R. § 1.1914.

18. **ACCORDINGLY, 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**.⁶³

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 Journal Broadcast Corporation, 3355 S. Valley View Boulevard, Las Vegas, Nevada 89102 and to its counsel, John W. Bagwell, 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

⁶³ For the purposes of the forfeiture proceeding initiated by this *NAL*, Journal Broadcast Corporation shall be the only party to this proceeding.