

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

In the Matter of)
)
CBS Radio Holdings, Inc.) File No.: EB-11-IH-1374
) NAL/Acct. No.: 201232080027
Licensee of Station WBAV-FM, Gastonia, North) FRN: 0009225392
Carolina) Facility ID No.: 6587
)

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: August 21, 2012

Released: August 21, 2012

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

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture (NAL), we find that CBS Radio Holdings, Inc. (CBS), licensee of commercial radio station WBAV-FM, Gastonia, North Carolina (Station), apparently willfully and repeatedly violated Section 73.1216 of the Commission's rules by failing to conduct a contest substantially as announced or advertised.1 Based upon our review of the facts, we find CBS apparently liable for a monetary forfeiture in the amount of ten thousand dollars (\$10,000).

II. BACKGROUND

2. The Commission received a complaint on September 13, 2011, alleging that CBS failed to conduct its "Carolina Cuties" contest (Contest) in accordance with its announced or advertised terms and the Commission's rules.2 Specifically, the complainant alleges that CBS conducted a Contest over the Station in which the Station invited each participant to submit a picture of his or her baby to be posted to and voted on by the public through the Station's website, in order to compete for a grand prize.3 The complainant alleges that the Station sent an e-mail to the complainant, and posted information on the Station's website, that was false and misleading regarding the Contest's final voting deadline.4 The complainant alleges that confusion resulting from this incorrect information deterred public participation through voting and unfairly compromised her child's chances of winning.5

3. The Enforcement Bureau (Bureau) issued a letter of inquiry to CBS regarding the complainant's allegations.6 CBS filed a response on April 26, 2012.7 In its response, CBS acknowledges

1 47 C.F.R. § 73.1216.

2 See Complaint from Yolanda Harris to Federal Communications Commission, Form 2000A, No. 11-C00331766-1, at 1 (Sept. 13, 2011) (on file in EB-11-IH-1374) (Complaint).

3 See id.

4 See id.

5 See id.

6 See Letter from Anjali K. Singh, Assistant Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to CBS Radio Holdings, Inc. (Mar. 13, 2012) (on file in EB-11-IH-1374).

that Station staff twice posted erroneous information on the Station's website, and that it sent e-mails to the Contest's ten finalists containing incorrect dates for the voting deadline and the announcement of the Contest winner,⁸ but denies the allegation that it did not conduct the Contest substantially as announced or advertised.⁹

4. According to CBS, the Station broadcast announcements stating that Contest voting would conclude on September 5, 2011, and that the Station would announce winners on September 6, 2011.¹⁰ CBS acknowledges, however, that certain of the key dates that the Station subsequently supplied to the public and to the Contest's finalists were inconsistent with the key dates provided in the broadcast announcements. CBS states that Station staff first posted such inconsistent information on the Station's website on August 28, 2011. Specifically, the website posting indicated that the Station would announce the Contest's grand prize winner on September 4, 2011 (thus indicating that voting would conclude as of that date).¹¹ Similarly, on August 28–29, 2011, Station staff sent e-mail messages to the Contest finalists, stating that the Station would announce the grand prize winner on September 4, 2011 (again indicating that voting would conclude on that date).¹² Later, on September 5, 2011, Station staff again updated the Station's website, this time asserting that the Contest concluded on September 4, 2011, and that the Station would announce the grand prize winner on September 6, 2011.¹³ Notwithstanding these acknowledgements, CBS maintains that the conduct at issue was inadvertent and the result of its staff's failure to consult with more knowledgeable colleagues or supervisory personnel.¹⁴ CBS also claims that these errors were harmless in that they did not favor or disfavor any of the finalists because CBS actually allowed voting to continue until September 5, 2011, and that the Station broadcast announcements to that effect throughout the time the Station conducted the Contest.¹⁵

III. DISCUSSION

5. Under Section 503(b)(1) of the Communications Act of 1934, as amended (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

(Continued from previous page) _____

⁷ See Letter from Peter M. Gould, Counsel to CBS Radio Holdings, Inc., to Gary A. Oshinsky, Attorney Advisor, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission (Apr. 26, 2012) (on file in EB-11-IH-1374) (CBS April 26 Letter).

⁸ See *id.* at 3–4.

⁹ See *id.* at 4.

¹⁰ See *id.* at 3.

¹¹ See *id.* at 4.

¹² See *id.* at 4, Attach. 6 (including various e-mails between Station staff and Contest finalists).

¹³ See *id.* at 4.

¹⁴ See *id.*

¹⁵ See *id.* at 4–5.

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

¹⁷ 47 U.S.C. § 312(f)(1).

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 and/or repeatedly violated the Act or a Commission rule.²³ As described in more detail below, we conclude under this procedure that CBS is apparently liable for a monetary forfeiture for its apparent willful and repeated violation of Section 73.1216.²⁴

A. CBS Failed to Conduct the Contest Substantially As Announced or Advertised

6. Under Section 73.1216 of the Commission’s rules, a broadcast 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.”²⁵ Material terms, among other things, include the time and means of selection of winners.²⁶ Section 73.1216 further provides that “[n]o contest description shall be false, misleading or deceptive with respect to any material term.”²⁷

7. We find that CBS failed to conduct the Contest substantially as announced or advertised.²⁸ According to the record, CBS conducted the Contest over the Internet by requiring contestants to upload pictures of their children on the Station’s website and by requiring the participating public to use the Station’s website to vote to determine the grand prize winner.²⁹ On the same website, however, during the course of the Contest, CBS staff misinformed the voting public and the Contest’s finalists about the dates when voting would conclude and when the grand prize winner would be

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, para. 5 (1991).

²⁰ See, e.g., *Callais Cablevision, Inc., Grand Isle, Louisiana*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362, para. 10 (2001) (*Callais Cablevision, Inc.*) (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, para. 5; *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362, para. 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, para. 4 (2002) (forfeiture paid).

²⁴ 47 C.F.R. § 73.1216.

²⁵ *Id.*

²⁶ *Id.*, Notes 1(b), 2.

²⁷ 47 C.F.R. § 73.1216.

²⁸ See *id.*

²⁹ See, e.g., CBS April 26 Letter at Attachs. 1–2 (containing descriptions of the Contest’s material terms, which required online participation from contestants, such as through announcements like “Log on to V1019.com and upload your Carolina Cuties photo” and “. . . log on to V1019.com and vote for your favorite cutie . . .”).

announced.³⁰ On August 28, 2011, and again on September 5, 2011, CBS staff posted incorrect information indicating that voting would and did conclude on September 4, 2011.³¹ Visiting the website to cast a vote was an essential part of the conduct of the Contest. The public, therefore, necessarily viewed this misinformation and may have reasonably believed that voting concluded on September 4 rather than September 5, 2011, as described in the broadcast announcement. Such misinformation may have caused participant confusion and led some members of the public to cease voting before the Contest actually ended. Indeed, based on the Complaint, at least one Contest finalist saw the incorrect information—both on the website and in e-mails sent by Station staff—and expressed confusion about the information.³² Thus, CBS’s conduct in communicating with the public and contestants clearly departed from what the broadcast announcements stated would occur in terms of the dates of the voting deadline and the announcement of the grand prize winner.

8. Therefore, although CBS’s on air announcements technically covered the Contest’s material terms, CBS failed to conduct the Contest substantially in accordance with those announcements, in violation of the rule. The Station’s website and e-mail announcements conflicted with its broadcast announcements, thus confusing and misleading the public with respect to how the contest would be conducted. We have repeatedly held that any non-broadcast means used by a Station to announce contest rules can only supplement, but not replace, the obligation to broadcast a Contest’s material terms.³³ In this case, the non-broadcast communications were a fundamental part of the Station’s conduct of the contest. Far from supplementing the broadcast announcements, the Station’s contradictory announcements undermined the conduct of the Contest.

**B. Employee Error, Inadvertence, and Alleged Lack of Harm
Do Not Excuse the Violation**

9. CBS’s attempts to mitigate or exculpate the Station’s multiple errors by blaming its staff and its staff’s inadvertent actions do not persuade us.³⁴ Rather, we find that these excuses underscore the Station’s failure to adequately supervise the conduct of the Contest, which is noteworthy given CBS’s

³⁰ See *id.* at 3–4, Attach. 6.

³¹ See *id.* at 4.

³² See *id.* at 4, Attach. 6; Complaint at 1.

³³ See, e.g., *AK Media Group, Inc.*, Notice of Apparent Liability for Forfeiture, 15 FCC Rcd 7541, 7543, para. 7 (Enf. Bur. 2000) (holding that while non-broadcast disclosures can supplement broadcast announcements, they cannot act as a substitute for broadcast announcements). We have, however, commented on the sufficiency of Internet materials that licensees purport to use as a substitute for, or as a supplement to, broadcast announcements of material terms that can be both “misleading and deceptive” and result in “participant confusion,” preventing listeners from meaningful participation in a contest. See *AMFM Broadcasting Licenses, LLC*, Notice of Apparent Liability for Forfeiture, 24 FCC Rcd 1529, 1532, para. 9 (Enf. Bur. 2009) (finding broadcast announcements and website rules were insufficient to inform the public of the contest’s material terms); see also *Journal Broadcast Corporation*, Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 2797, 2799, para. 6 (Enf. Bur. 2010) (same); *Clear Channel Communications, Inc.*, Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 343, 345–46, paras. 6–7 (Enf. Bur. 2012) (finding contest rules that are posted only on the station’s website were insufficient to meet the contest rule’s requirements concerning broadcast of material terms; and also finding the substance of the online rules to be deficient in communicating material terms to the public); *infra* note 41 (regarding misleading or deceptive matter under Section 73.1216).

³⁴ See CBS April 26 Letter at 4–5.

past violations of the Contest rule.³⁵ For example, CBS stresses that Station staff acted without consulting supervisors regarding the incorrect website postings and e-mails.³⁶ It is well-established that a licensee is responsible for its employee's actions.³⁷ Consequently, this argument does not preclude us from finding a violation nor mitigate the conduct here, but instead acknowledges that the Station management failed to exercise effective oversight of the Contest. CBS also attempts to justify the Station's violation by arguing that its staff's errors were inadvertent.³⁸ Here, too, the inadvertence argument merely emphasizes the lack of supervision and does not prevent the violation from being willful,³⁹ nor prevent us from finding CBS liable for the violation.

10. CBS also suggests that its staff's errors in conducting the Contest did not favor or disfavor any one contestant over another, and that the lack of harm requires that we determine that its conduct conforms to Commission standards.⁴⁰ The Commission has held, however, that "proof of actual injury to the public" is not a necessary component when determining a violation of Section 73.1216.⁴¹ Moreover, contrary to CBS's assertions, the Station caused *actual* as well as potential harm to the public. As discussed above, at least one contestant (i.e., the complainant), alleged that her child's participation in the contest was harmed as a direct result of the conflict between the terms as broadcast and the terms as posted on the Station's website, as well as included in e-mails it sent directly to the contestants.⁴² Additionally, the public, which used the website to vote on pictures entered as part of the Contest, would certainly have encountered the erroneous website postings. Thus, although a finding of harm is not required to assess a forfeiture in this case, we find that CBS's conduct misled both the public and at least one contestant with respect to a key element of the operation of the Contest.

C. Forfeiture Amount

11. Based on the evidence before us, and in view of the applicable law and Commission precedent, we find that CBS apparently willfully and repeatedly violated Section 73.1216 of the Commission's rules. The Commission's *Forfeiture Policy Statement* and Section 1.80 of the

³⁵ See *CBS Radio Inc. of Philadelphia*, Order, 24 FCC Rcd 12047, 12051, para. 14 (Enf. Bur. 2009) (containing CBS's admission of liability for violating the contest rule in the underlying investigation); *CBS, Inc.*, Letter, 9 FCC Rcd 705 (Mass Media Bur. 1994) (imposing a \$5,000 forfeiture for failure to disclose the material terms of a contest in a reasonable number of announcements).

³⁶ See CBS April 26 Letter at 3–4.

³⁷ See, e.g., *Nationwide Communications Inc.*, Notice of Apparent Liability for Forfeiture, 9 FCC Rcd 175 (Mass Med. Bur. 1994) (licensee held liable for a contest violation despite staff's error in violative conduct); *Triad Broadcasting Company, Inc.*, Memorandum Opinion and Order, 96 F.C.C.2d 1235, 1242, para. 16 (1984) (holding that "[a] licensee will not be excused for violation because he may have been deceived by an employee since licensees are responsible for acts of their employees").

³⁸ See CBS April 26 Letter at 4–5.

³⁹ See *PJB Communications of Virginia, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 2088, 2089, para. 5 (1992) ("The fact that a licensee's violation occurred through inadvertence does not prevent it from being willful."); see also *Corr Wireless Communications LLC*, Notice of Apparent Liability for Forfeiture, 24 FCC Rcd 5419, 5421, para. 7 (Enf. Bur. 2009) ("[T]he Commission has long held that a downward adjustment of a forfeiture is not justified where violators claim their actions or omissions were due to inadvertent errors.").

⁴⁰ See CBS April 26 Letter at 5.

⁴¹ See *WMJX, Inc.*, Decision, 85 FCC 2d 251, 269, para. 31 (1981) (stating that "a tendency to mislead the public" is enough for a contest description to constitute false, misleading or deceptive matter under Section 73.1216).

⁴² See Complaint at 1; *supra* note 40.

Commission's rules specify a base forfeiture amount of four thousand dollars (\$4,000) for each violation of Section 73.1216.⁴³ 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,⁴⁴ 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.⁴⁵ We believe that the base amount is inadequate in this case due to the repeated nature of the violation here and the licensee's previous violations of the same rule.⁴⁶ It appears that the forfeiture amounts assessed against CBS stations previously have not had a sufficient deterrent effect. Thus, where, as here, a case presents a violation comparable to past violations, it appears necessary to upwardly adjust the base forfeiture amount to strengthen the deterrent effect.⁴⁷ In this context, we also must take into account that CBS is a large company with substantial revenues.⁴⁸

12. After considering all the foregoing factors, and given the particular facts of this case, we find that CBS is apparently liable for a forfeiture in the amount of ten thousand dollars (\$10,000). In view of today's action, and in light of CBS's prior history of non-compliance, we caution that the imposition of still higher forfeitures may result in the future if such misconduct persists.

IV. ORDERING CLAUSES

13. **ACCORDINGLY, IT IS ORDERED**, pursuant to Section 503(b) of the Act,⁴⁹ and Sections 0.111, 0.204, 0.311, and 1.80 of the Commission's rules,⁵⁰ that CBS Radio Holdings, Inc. is hereby **NOTIFIED** of its **APPARENT LIABILITY FOR FORFEITURE** in the amount of ten thousand dollars (\$10,000) for apparently willfully and repeatedly violating Section 73.1216 of the Commission's rules.

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, CBS Radio Holdings, 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, wire transfer, or credit card, and must include the NAL/Account number and FRN referenced above. CBS Radio

⁴³ 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).

⁴⁴ See 47 U.S.C. § 503(b)(2)(E); 47 C.F.R. § 1.80(b)(4).

⁴⁵ See *id.*

⁴⁶ See *supra* note 35.

⁴⁷ See, e.g., *Acme Television Licenses of Ohio, LLC*, 25 FCC Rcd 6145, 6148, para. 11 (2010) (increased forfeiture amount justified by "numerous violations" such that "[it] appears that the forfeiture amounts assessed previously have not had a sufficient deterrent effect").

⁴⁸ In 2011, CBS Corporation, the licensee's parent company, and its consolidated subsidiaries had revenues of over \$14.245 billion. See United States Securities and Exchange Commission Form 10-K, Annual Report, CBS Corporation (2011) at II-3 (<http://sec.gov/Archives/edgar/data/813828/000104746912001373/a2207377z10-k.htm>).

⁴⁹ See 47 U.S.C. § 503(b).

⁵⁰ See 47 C.F.R. §§ 0.111, 0.204, 0.311, and 1.80.

Holdings, Inc. shall send electronic notification of payment to Jeffrey.Gee@fcc.gov, Anjali.Singh@fcc.gov, and Gary.Oshinsky@fcc.gov, on the date said payment is made. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.⁵¹ When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters “FORF” in block number 24A (payment type code). Below are additional instructions you should follow based on the form of payment you select:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

16. Any request for full payment under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.⁵² If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

17. The response, if any, must be mailed to Theresa Z. Cavanaugh, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, SW, Room 4-C330, Washington, D.C. 20554, and **SHALL INCLUDE** the NAL/Acct. number referenced above. In addition, to the extent practicable, a copy of the response, if any, should also be transmitted via e-mail to Terry.Cavanaugh@fcc.gov, Jeffrey.Gee@fcc.gov, Anjali.Singh@fcc.gov, and Gary.Oshinsky@fcc.gov.

18. 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.

⁵¹ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

⁵² See 47 C.F.R. § 1.1914.

19. **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**.⁵³

20. **IT IS FURTHER ORDERED** that a copy of this NAL shall be sent by First Class Mail and by Certified Mail, Return Receipt Requested, to Anne Lucey, Senior Vice President for Regulatory Policy, CBS Corporation, 601 Pennsylvania Avenue, NW, Suite 540, Washington, DC 20004; and to Peter M. Gould, Esquire, Lerman Senter PLLC, 2000 K Street, NW, Suite 600, Washington DC 20006.

FEDERAL COMMUNICATIONS COMMISSION

Theresa Z. Cavanaugh
Chief, Investigations and Hearings Division
Enforcement Bureau

⁵³ For purposes of the forfeiture proceeding initiated by this NAL, CBS Radio Holdings, Inc. shall be the only party to this proceeding.