

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

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

FORFEITURE ORDER

Adopted: March 8, 2013

Released: March 8, 2013

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

I. INTRODUCTION

1. In this Forfeiture Order, we assess a monetary forfeiture in the amount of four thousand dollars (\$4,000) against Journal Broadcast Corporation (Journal), licensee of Station KJOT(FM), Boise, Idaho (Station), for willfully and repeatedly violating Section 73.1216 of the Commission’s rules by broadcasting information about a contest without fully and accurately disclosing all of its material terms.¹

II. BACKGROUND

2. As discussed in more detail in the *Notice of Apparent Liability for Forfeiture (NAL)* issued in this case,² the Commission received a complaint (Complaint) on May 5, 2008, alleging that the Station failed to conduct the “complete garage makeover” contest in accordance with its advertised terms and the Commission’s rules.³ Specifically, the complainant alleged that the Station did not advertise that it would award all contest prizes to a single individual.⁴ The complainant also criticized the selection

¹ 47 C.F.R. § 73.1216.

² See *Journal Broadcast Corporation*, Notice of Apparent Liability for Forfeiture, 25 FCC Red 2797 (Enf. Bur. 2010) (*NAL*).

³ See Letter from complainant to Federal Communications Commission (April 29, 2008) (on file in EB-08-IH-5307) (Complaint). The complainant did not authorize release of personal information so the complainant’s name shall remain anonymous.

⁴ See Complaint at 2.

process and claimed that the contest was “fixed.”⁵

3. On April 17, 2009, the Enforcement Bureau (Bureau) sent a letter of inquiry (LOI) to Journal regarding the contest.⁶ In its response, Journal acknowledged that it conducted the “Ultimate Garage” contest (Contest) in April 2008.⁷ Journal stated that it promoted the Contest using “live-read” and recorded broadcast announcements.⁸ Journal noted that, as a “standard practice,” it would refer to the Station’s website in its live-read announcements.⁹ Journal represented that the Station’s website contained the official Contest rules.¹⁰ The website rules referred to single and multiple prize “winners.”¹¹

4. In view of the evidence in this case, including Journal’s admissions, the Bureau issued the *NAL* that proposed a forfeiture of four thousand dollar (\$4,000).¹² The *NAL* found that “Journal failed to fully and accurately disclose all material terms” of the Contest, and, in particular, its single-winner nature and how the winner would be selected.¹³ The *NAL* also noted that Journal failed to fully disclose the prizes being awarded or their values.¹⁴ In its response, Journal requests that the proposed forfeiture be cancelled or reduced to an admonishment.¹⁵ Journal claims that the name of the Contest

⁵ *Id.* The *NAL* found that there was insufficient evidence to conclude that the Station pre-determined the winner. *NAL*, 25 FCC Rcd at 2802, para. 11.

⁶ See Letter from Rebecca Hirselj, Assistant Chief, Investigations and Hearings Division, FCC Enforcement Bureau, to Journal Broadcasting Corporation (April 17, 2009) (on file in EB-08-IH-5307).

⁷ See Letter from Sally Buckman and John Bagwell, counsel for Journal Broadcast Corporation, to Dana Leavitt, Investigations and Hearings Division, FCC Enforcement Bureau, at 1 (May 18, 2009) (on file in EB-08-IH-5307) (LOI Response).

⁸ *Id.* at 2, 4.

⁹ See *id.* at 4 (“it is the Station’s standard practice for live-read announcements to include a statement that listeners can visit the Station’s website where full contest rules are available” and “[the] live-read announcements... included referrals to the station’s website where listeners could obtain the full Contest rules”); see also *id.* at Ex. 2 (transcript of representative live-read announcement).

¹⁰ See *id.*; see also *id.* at Ex. 3 (screenshot of website rules stating, at the top of the rules section, “Official Rules KJOT Ultimate Garage Contest Rules THE FOLLOWING ARE CONTEST RULES FOR the J015 Ultimate Garage contest”).

¹¹ See *id.* at Ex. 3, paras. 3 (referring to multiple winners), 6 (referring to single and multiple winners), 8–9 (referring to a single winner). See also *infra* note 56 (explaining why the website rules more strongly indicate there would be multiple winners, as opposed to a single winner).

¹² See *NAL*, 25 FCC Rcd at 2801–2, paras. 9–12.

¹³ *Id.* at 2801–2, paras. 9–10.

¹⁴ *Id.* at 2799 and 2801, paras. 6 (“The [website] Rules also do not list the prizes to be awarded, or their value.”) and 9 (noting that several of the Station’s recorded promotions vary in content and only mention certain prizes).

¹⁵ See Letter from John W. Bagwell, Esq., and Sally A. Buckman, Esq., counsel for Journal Broadcast Corporation, to Hillary S. DeNigro, Chief, Investigations and Hearings Division, FCC Enforcement Bureau, at 8 (April 23, 2010) (on file in EB-08-IH-5307) (NAL Response).

itself, “Ultimate Garage,” clearly disclosed that there would be a single winner.¹⁶ In addition, Journal asserts that two of its ten recorded broadcast announcements included disclosures of the winner-take-all nature of the Contest.¹⁷ It also claims that the Station disclosed how a winner would be selected when it advertised that listeners had to “qualify” for the Contest.¹⁸ It further claims that other selection criteria were immaterial.¹⁹ We reject these arguments, as discussed below.

III. DISCUSSION

5. Under Section 73.1216 of the Commission’s rules, 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.”²⁰ Material terms, among other things, include the time and means of selection of winners and the extent, nature, and value of prizes.²¹ Generally speaking, the time and manner of disclosure of the material terms are within a licensee’s discretion, as recognized by Journal in its NAL Response.²² However, that discretion is not unfettered.²³ Rather, a licensee is obligated to disclose material terms “at the time the audience is first told how to enter or participate.”²⁴ Moreover, this obligation “continues” and “material terms should be disclosed periodically by announcements broadcast on the station conducting the contest.”²⁵

¹⁶ *Id.* at 4–5.

¹⁷ *Id.*

¹⁸ *Id.* at 7–8.

¹⁹ *Id.*

²⁰ 47 C.F.R. § 73.1216.

²¹ *Id.*, Note 1(b).

²² NAL Response at 3. *See also* 47 C.F.R. § 73.1216, Note 2 (“In general, the time and manner of disclosure of the material terms of a contest are within the licensee’s discretion.”); *Multicultural Radio Broadcasting Licensee, LLC*, Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 21555, 21558, para. 7 (Enf. Bur. 2007).

²³ *See Good Karma Broadcasting, LLC*, Forfeiture Order, 27 FCC Rcd 10938, 10943, para. 11 (Enf. Bur. 2012) (rejecting claim that it was within licensee’s discretion to withhold broadcasting information about certain contest prizes that the licensee believed were not worthy of disclosure) (forfeiture paid); *cf. Multicultural Radio Broadcasting Licensee, LLC*, 22 FCC Rcd at 21559, para. 10 (holding that the licensee violated Section 73.1216 by failing to disclose that employees were ineligible to participate in a contest, rejecting the licensee’s argument that disclosure was unnecessary because employees were expected to know they were ineligible).

²⁴ 47 C.F.R. § 73.1216, Note 2 (“the obligation to disclose the material terms arises at the time the audience is first told how to enter or participate and continues thereafter”). *See also Kiro, Inc.*, Letter, 5 FCC Rcd 7105 (Mass Media Bur. 1990) (holding that the station violated Section 73.1216 where contest term was not announced at the outset of the contest or in a reasonable number of announcements thereafter).

²⁵ 47 C.F.R. § 73.1216, Note 2 (“The material terms should be disclosed periodically by announcements broadcast on the station conducting the contest, but need not be enumerated each time an announcement promoting the contest is broadcast.”). *See also Good Karma*, 27 FCC Rcd at 10942, para. 9 (holding that the station violated Section 73.1216 by failing to broadcast with sufficient frequency announcements disclosing material terms).

A. Journal Failed to Fully and Accurately Disclose When a Winner Would Be Selected

6. Neither the live-read announcements nor the recorded promotions disclosed when the winner would be selected.²⁶ Thus this material term was never broadcast. The website rules referenced in the live-read announcements imply that winner(s) would be selected on April 26, 2008.²⁷ However, we repeatedly have 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.”²⁸ Because no broadcast promotion disclosed when a winner would be selected, Journal violated Section 73.1216.²⁹

B. Journal Failed to Fully and Accurately Disclose How a Winner Would Be Selected

7. Neither the live-read announcements nor the recorded promotions disclosed the means of selection of winners.³⁰ We reject Journal’s claim that by announcing that listeners had to “qualify,” the Station properly disclosed how a winner would be selected.³¹ Merely telling listeners that they had to qualify for the Contest told them nothing about the two-hour, multi-step elimination process in which they would be required to participate (even after qualifying) in order to have a chance at winning.³² Briefly, after the 105 qualifying contestants were assembled on the day of the event, each pulled a numbered toy from a bucket; the number corresponded to a “qualifier bag” that the Station then distributed to each contestant.³³ The Station next winnowed the contestants to ten by eliminating those whose bags did not contain certain specific items.³⁴ The ten finalists’ bags contained a key code, and whoever’s key code unlocked the garage door won all prizes.³⁵ None of Journal’s broadcast promotions

²⁶ See LOI Response at Ex. 1 (recorded promotions), Ex. 2 (representative live-read announcement).

²⁷ In particular, the website rules state that Contest qualifiers “must appear on April 26th, 2008, at Stor More [sic] Sheds,” “must check in by 3pm,” and “must be present to win.” See *id.* at Ex. 3.

²⁸ *CBS Radio Holdings, Inc.*, Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 10099, 10102, para. 8 (Enf. Bur. 2012) (response pending); see *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); *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; also finding the substance of the online rules to be deficient in communicating material terms to the public).

²⁹ 47 C.F.R. § 73.1216. See also *AMFM Broadcasting Licenses, LLC*, Notice of Apparent Liability for Forfeiture, 24 FCC Rcd 1529, 1533, para. 9 (Enf. Bur. 2009) (holding that station violated Section 73.1216 by failing to properly disclose when the drawing would take place, among other material contest terms).

³⁰ See LOI Response at Ex. 1 (recorded promotions), Ex. 2 (representative live-read announcement).

³¹ NAL Response at 7.

³² Complaint at 2 (stating that there was a “2-1/2 hours [sic] wait” before a winner was selected).

³³ See *NAL*, 25 FCC Rcd at 2797–98, para. 3 (describing selection process).

³⁴ *Id.*

³⁵ *Id.*

disclosed that contestants would need to participate in this lengthy process; nor did they disclose any part of this process, in violation of Section 73.1216.

8. Journal argues that Section 73.1216 grants licensees “broad discretion” in “determining which terms must be disclosed as material.”³⁶ We disagree. Section 73.1216 states that licensees “shall fully and accurately disclose the material terms of the contest.”³⁷ Failure to do so violates Section 73.1216. Licensees have no discretion to completely withhold material terms from disclosure.³⁸ We also reject Journal’s claim that the only material term here was telling listeners that they had to “qualify” to win.³⁹ Although material terms may vary based on the nature of a contest,⁴⁰ Section 73.1216 is clear that the “means of selection of winners” is generally considered a “material term.”⁴¹ In this case, the facts do not warrant departing from that general assessment, particularly given the length and complexity of the selection process used in the Contest. Therefore, we affirm our *NAL* finding that Journal violated Section 73.1216 by failing to disclose how a winner would be selected.

C. Journal Failed to Appropriately Disclose the Single-Winner Nature of the Contest

9. Journal was required to disclose the single-winner nature of the Contest when it first disclosed how listeners could enter or participate in the Contest.⁴² Journal first disclosed how listeners could enter or participate in the Contest in a live-read announcement, which explained how listeners could “qualify” for the Contest.⁴³ That announcement also referenced the Station’s website,⁴⁴ which contained supplemental qualification information.⁴⁵ However, the live-read announcement failed to disclose that the Contest would award all of the prizes to a single winner. Thus, Journal failed to announce the single winner nature of the Contest at the time the audience was first told how to enter or participate, in violation of Section 73.1216.

³⁶ *NAL Response* at 3.

³⁷ 47 C.F.R. § 73.1216.

³⁸ *See supra* note 23 (citing relevant cases).

³⁹ *NAL Response* at 7.

⁴⁰ 47 C.F.R. § 73.1216, Note 1(b).

⁴¹ *Id.*

⁴² 47 C.F.R. § 73.1216, Note 2 (stating that “the obligation to disclose the material terms arises at the time the audience is first told how to enter or participate”). *Cf. Access 1 New Jersey Licensing Co.*, 22 FCC Rcd at 4235 (holding that station violated Section 73.1216 when it changed a rule governing the operation of the contest).

⁴³ *See LOI Response* at 2 (explaining that it was the Station’s practice to initiate live-read announcements prior to, or on the same date as, the recorded announcements); *id.* at Ex. 2 (representative live-read announcement).

⁴⁴ *See LOI Response* at Ex. 3 (stating “[o]nly one qualifier or winner per family and per household is permitted,” that “[q]ualifiers will be chosen at random,” and that the “Contest can be entered at specified sponsor locations, or via on-air contesting”).

⁴⁵ *See AK Media Group, Inc.*, 15 FCC Rcd at 7543, para. 7 (holding that while non-broadcast disclosures can supplement broadcast announcements, they cannot act as a substitute for broadcast announcements).

10. We recognize that Bob Rosenthal, General Manager of the Station, has stated under penalty of perjury (in a declaration attached to Journal's NAL Response) that the recorded promotions were broadcast throughout the contest period.⁴⁶ Journal argues that this "evidenc[es] that the Station affirmatively broadcast disclosure of the single winner material term."⁴⁷ We agree. However, neither Journal nor Rosenthal has shown that the Station broadcast any announcement disclosing the single-winner nature of the Contest when it *first* told the audience how to enter or participate in the Contest.

11. In addition, only two of the recorded promotions disclosed the single winner aspect of the contest. Even if we credit Journal with broadcasting those recorded announcements on a few occasions over the four week Contest period, we cannot find that Journal "periodically" broadcast this material term as required by Section 73.1216.⁴⁸ We note that Journal previously admitted that "[t]he Station's records . . . do not reflect which recorded announcement was broadcast at which time."⁴⁹ Moreover, the live-read announcements, which were read multiple times during each of the four daily shifts, wholly failed to disclose the single-winner format.⁵⁰ Indeed, the live-read announcements referred listeners to the Station's website, where the alleged "Official" Contest rules disclosed that there would be multiple winners.⁵¹ We therefore affirm the finding in the *NAL* that Journal violated Section 73.1216 by failing to initially or periodically disclose the single-winner aspect of the Contest.

12. We find no merit in Journal's claim that the contest name, "Ultimate Garage," clearly disclosed that there would be a single winner.⁵² Journal cites no precedent in support of its position. It also fails to cite any direct evidence showing that any listener or contestant equated "Ultimate Garage" with "single winner," let alone evidence sufficient to warrant a finding that the Contest name inherently disclosed a single winner. We note that two contestants (the complainant and her son) were confused,⁵³

⁴⁶ NAL Response, Declaration of Bob Rosenthal (Rosenthal NAL Response Declaration).

⁴⁷ NAL Response at 4.

⁴⁸ See *supra* note 42; see also *Isothermal Community College*, Notice of Apparent Liability for Forfeiture, 18 FCC Rcd 23932, 23933–34, paras. 4–6 (Enf. Bur. 2003) (holding that the station violated Section 73.1216 for failing to regularly broadcast announcements disclosing the contest's rules; rejecting argument that there was no need to periodically broadcast "simple" contest rules); cf. *Arnold*, Notice of Apparent Liability for Forfeiture, 8 FCC Rcd 41 (Mass Media Bur. 1992) (noting that the station's records failed to show that the contest prize was ever awarded, holding that the station violated Section 73.1216 by failing to conduct the contest substantially as advertised).

⁴⁹ See LOI Response at 2; see also *Good Karma*, 27 FCC Rcd at 10942, para. 9 (holding that the station violated Section 73.1216 by failing to broadcast with sufficient frequency announcements disclosing material terms).

⁵⁰ See LOI Response at 2–4.

⁵¹ See *infra* note 56.

⁵² See NAL Response at 5 (arguing that the "contest name, the 'Ultimate Garage,' inherently states that the contest winner was to receive a single prize").

⁵³ Journal represented in its LOI Response that promotions used at the giveaway event "emphasized" that it was the "Ultimate Garage" contest. See LOI Response at 7. Yet the complainant and her son, both of whom were contestants, nevertheless were confused about the number of winners.

which weakens Journal's claim that the single-winner nature of the Contest was "baked into" its name.⁵⁴ Moreover, the website rules refer to both single and multiple winners,⁵⁵ and appear more strongly to disclose that there would be *multiple* winners,⁵⁶ which underscores the lack of clarity on this point.

D. Journal Failed to Fully and Accurately Disclose the Nature, Extent, and Value of Prizes

13. The Station awarded the following prizes to the winner:

- A 2001 Honda Civic
- A set of tires and wheels for the Honda Civic
- Tinting and Customizing for the Honda Civic
- A \$500.00 gift card from R.C. Willey
- A \$500.00 gift certificate from Stor Mor Sheds
- Custom Garage Cabinets
- A Trimmer
- A Honda CRF-50 dirt bike
- A stair stepper
- A Traeger wood pellet grill
- A 15 drawer tool chest
- A toolbox shaped refrigerator and beer
- A Nintendo Wii system and 6 games
- A one-night stay from Anniversary Inn⁵⁷

However, Journal failed to fully and accurately disclose in its broadcast promotions the nature, extent, and value of these prizes. Each of Journal's recorded promotions referenced only a few select prizes,⁵⁸ and the live-read announcement only (and vaguely) referenced "cool stuff from Larry Miller Honda and

⁵⁴ See NAL Response at 8.

⁵⁵ See *AMFM Broadcasting Licenses, LLC*, 24 FCC Rcd at 1533, para. 9 (holding that broadcast announcements and website rules failed to inform the public of the contest's material terms).

⁵⁶ See LOI Response at Ex. 3, paras. 2–3, 6, 8–9. In particular, paragraph 2 states that there can only be one "winner" per family; paragraph 3 refers to multiple "winners"; and paragraph 6 begins with "winners" and uses the term near the end of that paragraph, which implies that the use of "winner" in the middle of that paragraph is a reference to individual winners of certain prizes. See *id.* In light of the foregoing, one reasonably could infer that "winner" found in later paragraphs is referring to specific winners of different prizes. See *id.*

⁵⁷ *Id.* at 5.

⁵⁸ *Id.* at Ex. 1. The ten recorded promotions, collectively, identify the following specific prizes that would be awarded: "a Honda Accord . . . [p]imped-out by Sun Busters and Big-O Tires," a Honda Civic, a Nintendo Wii, a Traeger grill, and a toolbox refrigerator from Budweiser. The ten recorded promotions, collectively, also state or imply that the Ultimate Garage would contain other products provided by Carl's Cycle, Treasure Valley Echo Dealers, Total Garage, Idaho Athletic Club, and Stor Mor Sheds; however, the promotions do not further specify the Contest prizes being provided by these entities. *Id.*; see also *NAL*, 25 FCC Rcd at 2798, para. 4, n.18 (discussing prizes disclosed by recorded promotions).

Mountain Dew.”⁵⁹ In its LOI Response, Journal claimed that the “Contest’s . . . prizes . . . were posted on the Station’s website.”⁶⁰ However, the website screenshots that Journal cited in support of its position do not list the prizes.⁶¹

14. In addition, to the extent we credit Journal with broadcasting all recorded promotions during the Contest period,⁶² we can reasonably infer that the Station promoted it would give away a “Honda Accord from Larry Miller Honda . . . Pimped Out by Sun Busters and Big-O Tires” as well as a “Honda Civic from Larry Miller Honda.”⁶³ Yet the Station only awarded a Honda Civic, which generally is a less expensive car than a Honda Accord. Moreover, the Civic was more than six years old at the time of the Contest.⁶⁴ No broadcast promotion disclosed that the Station was giving away used or older model car(s), was giving away only a single car, or was substituting a lower tier model (the Civic) for the higher tier model (the Accord).⁶⁵ These failures violate Section 73.1216.⁶⁶ We note that the website rules state that the Station “may, due to the unavailability of prizes awarded, substitute another prize of equal or greater value.”⁶⁷ However, online disclosure of contest terms does not substitute for broadcast announcements of such terms.⁶⁸ In any event, the instant record does not demonstrate that the 2001 Civic in question was equal or greater value to a “Pimped Out” Accord, and no prize of equal or greater value was substituted for the missing Accord.

15. Journal claims that it structured the Contest to provide the winner with a variety of prizes that would result in that individual “possessing” the “Ultimate Garage.”⁶⁹ However, the phrase “Ultimate

⁵⁹ See LOI Response at Ex. 2 (representative live-read announcement).

⁶⁰ See *id.* at 4 (“In addition to the material terms contained in the on-air announcements broadcast by the station, the Contest’s rules, prizes and sponsors, and the locations of enter-to-qualify drop-boxes were posted on the Station’s website. See Exhibit 3.”).

⁶¹ See *id.* at Ex. 3.

⁶² See NAL Response, Rosenthal NAL Response Declaration at para. 2 (“The recorded promotional announcements submitted by Journal regarding the 2008 KJOT(FM) Ultimate Garage contest were broadcast throughout the period in which that contest was conducted by KJOT(FM).”).

⁶³ LOI Response at Ex. 1.

⁶⁴ See *Stoner Broadcasting System, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 3574, para. 2 (Mass Media Bur. 1992) (finding that forfeiture was appropriate where “broadcast promotions . . . appeared to indicate that \$100,000 worth of automobiles would be given away as prizes, when in fact the prize was one car worth substantially less than that amount”).

⁶⁵ See *id.*; see also *Good Karma*, 27 FCC Rcd at 10943, para. 12 (“By announcing one prize and awarding another without any broadcast notice that such a substitution might occur, Good Karma failed to adequately announce the nature of the prize and failed to conduct the contest as announced.”).

⁶⁶ See *Good Karma*, 27 FCC Rcd at 10942–43, paras. 10–12.

⁶⁷ LOI Response at Ex. 3, para. 10.

⁶⁸ See *Good Karma*, 27 FCC Rcd at 10943, para. 13.

⁶⁹ LOI Response at 2.

Garage” provides no information about the actual prizes being awarded. We note that some of the prizes (for example, a one-night stay from Anniversary Inn) are not consistent with the alleged “Ultimate Garage” contest theme. We also note that the winner was *not* awarded an actual garage, but a \$500.00 gift certificate from Stor Mor Sheds, which begs the question (unanswered on the record before us) whether the garage itself was a prize, and if so, whether the \$500.00 gift certificate reflected the value of the actual garage structure. We therefore find that Journal failed to fully and accurately disclose the nature, extent, and value of the Contest prizes, in violation of Section 73.1216.⁷⁰

E. Proof of Actual Listener Injury Is Not Required to Sustain a Forfeiture

16. Journal claims that the *NAL* improperly relied on announcements made at the giveaway event, as opposed to broadcast announcements, as a basis for finding Journal apparently liable. We disagree. The *NAL* found that Journal violated Section 73.1216 because it failed to disclose material terms in its broadcast promotions, errors that were exacerbated by Journal’s web-based contest rules.⁷¹ We also reject Journal’s contention that the Complaint only focused on off-air conduct. The Complaint explains that the complainant’s son apparently “never heard” the “winner-take-all theme” that Journal’s General Manager claimed had been advertised on the station.⁷² Journal appears to concede that the Complainant’s son (who had pre-qualified for the event) was a Station listener.⁷³ It therefore seems reasonable to interpret the “never heard” phrase in the Complaint as follows: the son was a Station listener that never heard any information (including in any broadcast promotion) disclosing there would be a single winner. In other words, insofar as the Complainant’s son was a listener allegedly harmed by Journal’s failure to disclose material terms of the Contest, the Complaint itself evidences actual listener harm.

17. Yet we need not find that the Complaint evidences listener harm to take action and impose a forfeiture. Journal’s on-air promotion of the Contest provides sufficient grounds for the Bureau to take action.⁷⁴ Moreover, “proof of actual injury to the public” is not a necessary component when

⁷⁰ See *Good Karma*, 27 FCC Rcd at 10942–43, paras. 10–11.

⁷¹ See *NAL* at paras. 9 (finding that Journal failed to disclose there would be a single winner in its broadcast promotions, errors that were “replicated in its web-based Rules”) and 10 (holding that “neither the live-read nor the recorded promotional announcements mention the Drawing or disclose how the winner would be selected,” and that “[i]his deficiency” was “exacerbated by the same omission in the Station’s web-based Rules”).

⁷² Complaint at 2 (explaining that the General Manager told complainant “a ‘winner take all’ theme was advertised on the station,” but complainant’s “son never heard that . . .”).

⁷³ See *NAL* Response at 7 (“other attendees, could have, *like the Complainant*, been attending the event with *Station listeners* who had pre-qualified” (emphasis added)).

⁷⁴ See *AMFM Broadcasting Licenses, LLC*, 24 FCC Rcd at 1532, para. 8 (explaining that the contest rule applies to all contests conducted by the licensee and broadcast to the public (citing *Amendment of Part 73 of the Commission’s Rules Relating to Licensee-Conducted Contests*, Notice of Proposed Rulemaking, 53 FCC 2d 934 (1975))); *CBS Radio Inc. of Philadelphia*, Memorandum Opinion and Order, 24 FCC Rcd 10993, 10994–95, para. 4 (Enf. Bur. 2009) (rejecting argument that non-listener lacked standing to file broadcast contest complaint; explaining that the contest rule is designed to protect the general public from false, misleading, or deceptive licensee-conducted and advertised contests and does not preclude any member of the public from filing a complaint).

determining a violation of Section 73.1216.⁷⁵ As shown above, Journal failed to broadcast accurate statements concerning the nature and value of contest prizes, the time and means of selection of winners, and the winner-take-all format of the Contest. This had the tendency to mislead the public about key elements of the operation of the Contest.⁷⁶ In addition, Journal's live-read announcements referred to the Station's website, so it is reasonable to infer that at least a portion of the listening public would have encountered the erroneous website information disclosing "multiple" winners.⁷⁷

F. Forfeiture Amount

18. Based on the evidence before us, and in view of the applicable law and Commission precedent, we find that Journal willfully and repeatedly violated Section 73.1216 of the Commission's rules and assess a monetary forfeiture in the amount of four thousand dollars (\$4,000). The forfeiture amount in this case was assessed in accordance with Section 503(b) of the Communications Act,⁷⁸ Section 1.80 of the Commission's rules,⁷⁹ and the Commission's forfeiture guidelines set forth in its *Forfeiture Policy Statement*.⁸⁰ In assessing forfeitures, Section 503(b) of the Act requires that we take into account the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other matters as justice may require.⁸¹ As discussed above, we have examined Journal's response to the *NAL* pursuant to the aforementioned statutory factors, our rules, and our *Forfeiture Policy Statement*, and find insufficient basis for reduction.

19. Journal argues that its conduct, at most, warrants an admonishment. In support, Journal cites the Mass Media Bureau's admonishment in *Kevin Cooney*.⁸² The Mass Media Bureau's judgment as to the appropriate sanction in that case, however, is not binding precedent and does not prevent the Bureau from imposing a forfeiture here.⁸³ The Bureau has broad discretion to consider a variety of

⁷⁵ 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).

⁷⁶ See *id.* at 269-70, n.82.

⁷⁷ See *CBS Radio Holdings, Inc.*, Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 10099, 10103, para. 10 (Enf. Bur. 2012) (holding that the public, which used a website to vote on pictures entered as part of a contest, would certainly have encountered the erroneous website postings).

⁷⁸ See 47 U.S.C. § 503(b).

⁷⁹ See 47 C.F.R. § 1.80.

⁸⁰ See the Commission's *Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997), *recons. denied*, 15 FCC Rcd 303 (1999) (*Forfeiture Policy Statement*).

⁸¹ See 47 U.S.C. § 503(b)(2)(E).

⁸² See *NAL Response* at 8 (citing *Kevin Cooney*, Letter, 5 FCC Rcd 7105 (Mass Media Bur. 1990)).

⁸³ See *Gaston College*, Forfeiture Order, 25 FCC Rcd 982, 986, para. 10 (Enf. Bur. 2010) (imposing a forfeiture for licensee's failure to maintain and make available a public inspection file, declining to follow prior Media Bureau ruling that admonished a licensee for similar behavior); see also *Forfeiture Policy Statement*, 12 FCC Rcd (continued....)

factors in determining an amount of forfeiture, if appropriate, when faced with a violation of Commission rules.⁸⁴ As set forth in the NAL, the various factors applicable in proposing the forfeiture were duly considered in this case.

20. In any event, we disagree that the circumstances of this case warrant the result in *Kevin Cooney*, which involved more minor violations and justified a different result. In *Kevin Cooney*, the complainant misunderstood the contest term “enter as often as you like.”⁸⁵ According to the licensee in that case, the term contemplated participation in various segments of the contest at issue, but actually prohibited duplicate entries (like the complainant’s) from the same listener for the same music segment. The Mass Media Bureau determined that this exclusion, which could have been reasonably misunderstood, was a material term of the contest that should have been announced by the Station. It then determined that the overall circumstances of the case, which included consideration of the Station’s offer to compensate the complainant and to take steps to assure accuracy in its contests, warranted an admonition.⁸⁶ The circumstances of the violations in the instant case, however, justify a forfeiture. Here, Journal failed to broadcast virtually any Contest term, and, in particular, failed to disclose there would only be a single winner, when and how that winner would be selected, and the nature, extent, and value of prizes. In contrast, in *Kevin Cooney*, the Station did announce material terms, except that one term was open to various interpretations, which the Mass Media Bureau determined should have been better defined.⁸⁷

21. The Bureau’s decision in this case is consistent with recent decisions concerning Section 73.1216. For example, in *Entercom* the Bureau entered a \$4,000 forfeiture based on a licensee’s failure to conduct a contest as announced, even where (unlike Journal) the Station rectified the error with the complainant and assured the FCC it had taken steps to ensure that the mistake at issue would not occur in the future.⁸⁸ Accordingly, as a result of our review of Journal’s response to the NAL, and in view of the statutory factors and the *Forfeiture Policy Statement*, we affirm the *NAL* and issue a forfeiture in the amount of \$4,000.⁸⁹

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at 17102, para. 31 (rejecting proposal to always issue a warning to first-time violators, except in particular cases, because doing so “would greatly undermine the credibility and effectiveness of our overall compliance efforts”).

⁸⁴ See 47 U.S.C. § 504(b) (authorizing the Commission to remit or mitigate forfeitures imposed “under such regulations and methods of ascertaining the facts as may seem to it advisable”); 47 C.F.R. § 1.80 (setting forth factors that the Commission must consider in determining what amount of forfeiture to impose).

⁸⁵ See *Kevin Cooney*, 5 FCC Red 7105.

⁸⁶ See *id.*

⁸⁷ See *id.*

⁸⁸ See *Entercom Wichita License, LLC*, Forfeiture Order, 24 FCC Red 1270, 1271, para. 4 (Enf. Bur. 2009).

⁸⁹ We caution licensees that future violations of comparable severity may incur higher penalties.

IV. ORDERING CLAUSES

22. **ACCORDINGLY, IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended,⁹⁰ Section 1.80 of the Commission's rules,⁹¹ and authority delegated by Sections 0.111, 0.204, and 0.311 of the Commission's rules,⁹² Journal Broadcasting Corporation **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of four thousand dollars (\$4,000) for repeated and willful violations of Section 73.1216 of the Commission's rules.⁹³

23. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules by close of business on or before ten days after the date of the entry of this Order.⁹⁴ If the forfeiture is not paid within the period specified, the case may be referred to the U.S. Department of Justice for enforcement of the forfeiture pursuant to Section 504(a) of the Act.⁹⁵ Journal Broadcasting Corporation shall send electronic notification of payment to Evan Parke at Evan.Parke@fcc.gov, Kenneth M. Scheibel, Jr. at Kenneth.Scheibel@fcc.gov, and Jeffrey J. Gee at Jeffrey.Gee@fcc.gov on the date said payment is made.

24. The payment must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account number and FRN referenced above. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.⁹⁶ 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.

⁹⁰ 47 U.S.C. § 503(b).

⁹¹ 47 C.F.R. § 1.80(f)(4).

⁹² 47 C.F.R. §§ 0.111, 0.204, 0.311.

⁹³ 47 C.F.R. § 73.1216.

⁹⁴ 47 C.F.R. § 1.80.

⁹⁵ 47 U.S.C. § 504(a).

⁹⁶ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

- 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.

25. 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. 20554.⁹⁷ 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.

26. **IT IS FURTHER ORDERED**, that a copy of this FORFEITURE ORDER shall be sent by First Class Mail and Certified Mail, Return Receipt Requested, to the Licensee at its address of record, and to its counsel John W. Bagwell, Esq., and Sally A. Buckman, Esq., Lerman Senter PLLC, 2000 K Street, NW, Suite 600, Washington, D.C. 20006.

FEDERAL COMMUNICATIONS COMMISSION

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

⁹⁷ See 47 C.F.R. § 1.1914.