

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Saga Communications of New England, L.L.C.)	File No. EB-06-IH-0825
)	NAL Account No. 200732080018
Licensee of Station WAQY(FM),)	Facility ID No. 58551
Springfield, Massachusetts)	FRN No. 0002749406

ORDER ON REVIEW

Adopted: December 2, 2011

Released: December 5, 2011

By the Commission:

I. INTRODUCTION

1. In this *Order on Review*, we deny the *Application for Review* filed by Saga Communications of New England, L.L.C. (“Saga”),¹ licensee of Station WAQY(FM), Springfield, Massachusetts (the “Station”). Saga seeks review of a *Memorandum Opinion and Order* (“*MO&O*”) issued by the Enforcement Bureau (“Bureau”) on April 1, 2010.² In that *MO&O*, the Bureau denied Saga’s *Petition for Reconsideration* of a \$4,000 monetary forfeiture for violating section 73.1216 of the Commission’s rules³ for failure to conduct a broadcast contest substantially as announced. As discussed below, we deny the *Application for Review* and affirm the \$4,000 forfeiture.

II. BACKGROUND

2. In December 2005, the Bureau received a complaint from Robert Naginewicz alleging that Station WAQY(FM) failed to conduct a contest broadcast in June and July 2005 according to that contest’s advertised rules.⁴ Mr. Naginewicz states that he won the contest’s “Grand Prize Giveaway” on July 15, 2005. The prizes included (1) a free two-year lease on a 2005 Buick LaCrosse automobile, or its cash equivalent, from contest co-sponsor Bob Pion Pontiac and (2) a “trunk load full” of Aerosmith memorabilia.⁵ Mr. Naginewicz alleges that, although he was assured by the Station’s staff that all of his

¹ See Saga Communications of New England, L.L.C., Application for Review (filed May 3, 2010) (“*Application for Review*”).

² See *Saga Communications of New England, L.L.C.*, Memorandum Opinion and Order, 25 FCC Rcd 3289 (Enf. Bur. 2010) (“*MO&O*”), *aff’g* *Saga Communications of New England, L.L.C.*, Forfeiture Order, 24 FCC Rcd 11934 (Enf. Bur. 2009) (“*Forfeiture Order*”), *aff’g* *Saga Communications of New England, L.L.C.*, Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 4206 (Enf. Bur., Investigations & Hearings Div. 2007) (“*NAL*”).

³ See 47 C.F.R. § 73.1216. We also refer to Section 73.1216 as “the contest rule.”

⁴ See Letter from Mr. Robert Naginewicz to the FCC, dated December 31, 2005 (“*Complaint*”).

⁵ See *id.* at 1-2.

prizes would be delivered to him by July 22, 2005, he did not receive the monetary portion of his prize⁶ until August 18, 2005, and that, despite numerous queries made of the Station's staff, he was still awaiting delivery of the memorabilia portion as of December 31, 2005.⁷

3. Following receipt of Mr. Naginewicz's complaint, the Bureau sent a letter of inquiry to Saga concerning the allegations.⁸ Saga responded, contending that its one-month delay in delivering the monetary portion of the prize, although less than ideal, was "within the zone of reasonableness."⁹ Saga acknowledged, however, that its failure to fulfill the memorabilia portion until after Mr. Naginewicz had contacted the Commission was a "problem" that it claimed to have resolved after the Commission's inquiry.¹⁰ Saga indicated that, because of its delay in delivering the memorabilia to Mr. Naginewicz, it had enhanced the award with additional prizes.¹¹

4. On March 2, 2007, the Bureau issued a Notice of Apparent Liability ("NAL") for \$4,000 against Saga, finding that Saga had apparently violated the Commission's contest rule.¹² In response to the NAL,¹³ Saga argued that its failure to award the contest prizes promptly is not a rule violation because "promptness" is not an enumerated requirement in the contest rule.¹⁴ Saga further argued that, even if its conduct could be deemed to have violated the contest rule, the NAL erred in concluding that Saga acted "willfully."¹⁵ Saga contended that its failure to promptly award prizes was due to inadvertence and employee miscommunication, not any deliberate or conscious attempt to avoid its obligations, as demonstrated by its ultimate award of all promised prizes, including bonus items to compensate the complainant for the delay.¹⁶ Saga urged that the Bureau cancel or substantially reduce the proposed \$4,000 forfeiture amount.¹⁷ In the resulting *Forfeiture Order*, the Bureau rejected Saga's arguments and affirmed the \$4,000 forfeiture.¹⁸

⁶ Mr. Naginewicz elected to receive the cash equivalent of the two-year lease on a Buick LaCrosse automobile, which totaled \$8,000. *See id.* at 1-2.

⁷ *See id.* at 2-3.

⁸ *See* Letter from William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, to Saga Communications of New England, L.L.C., dated January 24, 2006 ("LOF").

⁹ *See* Letter from Lawrence D. Goldberg, Vice President, Saga Communications of New England, L.L.C., to William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, dated February 28, 2006, and filed through its counsel on March 2, 2006, at 4 ("LOI Response").

¹⁰ *See id.* at 4-5.

¹¹ *See id.* at 3. The memorabilia portion of the prize was ultimately delivered to Mr. Naginewicz on February 8, 2006. *See id.*

¹² *See supra* note 2.

¹³ *See* Saga Response to Notice of Apparent Liability for Forfeiture, dated April 2, 2007 ("NAL Response").

¹⁴ *See id.* at 4-6 (citing *Nat'l Black Media Coalition v. FCC*, 775 F.2d 342, 355 (D.C. Cir. 1985), and *Airmark Corp. v. FAA*, 758 F.2d 685, 692 (D.C. Cir. 1985), for the proposition that an agency's departure from its precedent "must provide a principled explanation for its change of direction").

¹⁵ *See NAL Response* at 6-10.

¹⁶ *See id.* at 2.

¹⁷ *See id.* at 6, 10.

¹⁸ *See Forfeiture Order*, 24 FCC Rcd 11934.

5. Saga then filed a *Petition for Reconsideration* with the Bureau, and contended that: (1) contrary to the Bureau's finding, promptness is not required by the Commission's licensee-conducted contest rule;¹⁹ (2) the Bureau incorrectly found that Saga's own contest rules required it to award its contest prizes within thirty days;²⁰ (3) the Bureau failed to prove that Saga possessed the requisite scienter required to establish "willfulness" under section 503(b) of the Communications Act of 1934, as amended (the "Act");²¹ (4) the precedent relied upon by the Bureau regarding "willfulness" is untested by the courts and is, therefore, unreliable;²² and (5) the Bureau erred in finding that Saga's misconduct was "repeated" within the meaning of section 503(b) of the Act.²³ The Bureau, in the *MO&O*, rejected these arguments and affirmed the *Forfeiture Order*.²⁴

III. DISCUSSION

6. Pursuant to section 1.115(b)(2) of the Commission's rules, to obtain relief through an application for review an aggrieved party must specify, *inter alia*, how an action taken pursuant to delegated authority conflicts with a relevant "statute, regulation, case precedent, or established Commission policy," or that "the action involves a question of law or policy which has not previously been resolved by the Commission."²⁵ In its *Application for Review*, Saga reiterates arguments previously raised at the Bureau level. Specifically, Saga repeats its argument that promptness in the awarding of contest prizes is not required by the Commission's contest rule.²⁶ It also again contends that its failure to promptly award the subject prize was not "willful."²⁷ Although we find that the Bureau fully and correctly addressed these arguments in the *MO&O* and *Forfeiture Order*, we will address them here.

7. Saga again contends that promptness in the awarding of contest prizes is not required by the contest rule, and thus the Bureau's finding of a rule violation in this instance is contrary to both the contest rule and relevant Commission precedent.²⁸ We disagree with Saga's previously made arguments for the reasons set out in the Bureau's *MO&O*.²⁹ In its *Application for Review*, however, Saga now cites *Reuters Limited v. FCC* in support of its contention that the forfeiture was inappropriate because the Bureau may not depart from the Commission's rules.³⁰ Saga's reliance on *Reuters* is misplaced. In

¹⁹ See Saga Communications of New England, L.L.C., *Petition for Reconsideration* (filed Oct. 26, 2009) ("*Petition*") at 4.

²⁰ See *id.* at 5.

²¹ See *id.* at 7-8.

²² See *id.* at 7; 47 U.S.C. § 503(b).

²³ See *Petition* at 3; 47 U.S.C. § 503(b).

²⁴ See *MO&O*, 25 FCC Rcd 3289.

²⁵ See 47 C.F.R. § 1.115(b)(2); *Beasley Broadcast Group, Inc., WQAM Limited Partnership, Application for Renewal of License of Station WQAM(AM), Miami, Florida*, Memorandum Opinion and Order, 23 FCC Rcd 15949, 15955 (2008).

²⁶ See *Application for Review* at 3-7.

²⁷ See *id.* at 3, 7-9.

²⁸ See *id.* at 6-7.

²⁹ See *MO&O*, 25 FCC Rcd at 3290-91 ¶ 5 (finding that Saga's contention that the contest rule does not require prizes to be awarded promptly is incorrect).

³⁰ See *Reuters Limited v. FCC*, 781 F.2d 946 (D.C. Cir. 1986) ("*Reuters*").

Reuters, the Commission rescinded a license grant in order to allow a second applicant, whose applications had been filed late, to be considered. The court of appeals reversed that decision, finding that the Commission could not engage in an *ad hoc* departure from its licensing rules in order to achieve “laudable aims” or “justice in the individual case.”³¹ Notably, in *Reuters*, the court found that the Commission departed from an unambiguous requirement found in the licensing rules.³²

8. In the instant case, however, the Bureau did not depart from the contest rule. Instead, the Bureau properly held that the contest rule itself and the accompanying notes enumerating certain material terms of broadcast contests do not constitute an exhaustive list of every element that is material to a contest.³³ As the Bureau stated, the rule’s notes explicitly recognize that “material terms may vary widely depending on the exact nature of the contest” and the terms listed in the rule are merely those that may “generally” be included in a station’s contest rules.³⁴ The *MO&O* and *Forfeiture Order* properly held that the Commission has consistently maintained that prizes must be awarded promptly.³⁵ Moreover, the Bureau’s finding was also based on the fact that Saga’s own contest rules created a reasonable expectation on the part of winners that prizes would be awarded within thirty days.³⁶ In sum, the contest rule contemplates the existence of material terms other than those specifically listed therein; the Commission has previously stated that prizes must be awarded promptly;³⁷ and the law is clear that the Commission may properly interpret its own rules consistent with existing regulation.³⁸

³¹ See *id.* at 950-51.

³² See 47 C.F.R. § 1.962(f) (1984). This section provided that “[n]o application subject to the provisions of this section, as originally filed or substantially amended, will be granted by the Commission prior to the 31st day following the issuance of public notice of the acceptance for filing of such application.” *Id.* The court found that the Commission’s error lay in its ignoring the rule’s express limitation to accept an otherwise untimely application. See *Reuters*, 781 F.2d at 950-52.

³³ See *MO&O*, 25 FCC Rcd at 3290-91 ¶ 5.

³⁴ See *id.* (citing 47 C.F.R. § 73.1216, Note 1(b), which states that “[m]aterial terms include those factors which define the operation of the contest and which affect participation therein. Although the material terms may vary widely depending upon the exact nature of the contest, they will generally include: how to enter or participate; eligibility restrictions; entry deadline dates; whether prizes can be won; when prizes can be won; the extent, nature and value of prizes; basis for valuation of prizes; time and means of selection of winners; and/or tie-breaking procedures”).

³⁵ See *MO&O*, 25 FCC Rcd at 3291 n.17; *Forfeiture Order*, 24 FCC Rcd at 11936-37 nn.24-25 & 28.

³⁶ See *MO&O*, 25 FCC Rcd at 3291 ¶ 6 (noting that “Saga’s own contest rule creates a reasonable expectation on the part of winners that prizes would be awarded within thirty days because winners are explicitly given thirty days in which to claim prizes, and a prize must be awarded in order to be claimed”).

³⁷ See *id.* at 3290-91 ¶ 5 (citing *Public Notice Concerning Failure of Broadcast Licensees to Conduct Contests Fairly*, Public Notice, 45 FCC 2d 1056 (1974); *Amendment of Part 73 of the Commission’s Rules Relating to Licensee-Conducted Contests*, Notice of Proposed Rulemaking, 53 FCC 2d 934 (1975); and *Amendment of Part 73 of the Commission’s Rules Relating to Licensee-Conducted Contests*, Report and Order, 60 FCC 2d 1072, 1073 (1976)).

³⁸ See *MO&O* at 3290-91 ¶ 5, citing *Cost-Based Terminating Compensation for CMRS Providers; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Calling Party Pays Service Offering in the Commercial Mobile Radio Services*, Order, 18 FCC Rcd 18441, 18450 ¶ 22 (2003):

The D.C. Circuit has repeatedly held that interpretive rulings are properly used to clarify the original meaning and application of an agency’s substantive rules. The Supreme Court in reaffirming the authority (continued....)

9. In support of its contention that the forfeiture should be reduced or canceled because its failure to promptly award the subject prize was not “willful,” Saga cites *U.S. v. Daniels*.³⁹ We find *Daniels* inapposite. That case involved the repeated violation of a rule concerning broadcasting hours that had been recently amended. The licensee in that case lacked actual knowledge of the rule change, had been complying in good faith with the broadcasting hours permitted under the previous rule, and ceased broadcasting immediately upon notification of the violation.⁴⁰ Accordingly, the district court found a reduction in the forfeiture appropriate due to the “nature of the violations involved here, the lack of complaints and the [licensee’s] good faith inadvertent mistakes.”⁴¹

10. In this case, however, the rule at issue was well-established, having last been amended in 1976, and Saga’s rule violation resulted in a complaint. Saga also relies on *Daniels* for the assertion that a forfeiture cannot be collected until it is afforded a trial *de novo* in accordance with section 504(a) of the Act.⁴² However, section 503(b)(4) of the Act allows the Commission to issue forfeitures without a hearing, using the notice of apparent liability written response procedures.⁴³ If a party fails to pay a forfeiture issued in accordance with these procedures, the case will be referred for enforcement to the U.S. Department of Justice for a trial *de novo* in federal district court pursuant to section 504(a).⁴⁴ As Saga has not paid the forfeiture issued in this case, the government filed a complaint in federal district court against Saga for enforcement of the \$4,000 forfeiture.⁴⁵ That enforcement proceeding is currently pending in U.S. District Court. On July 15, 2010, the court issued an “Order to Stay” the district court case pending the outcome of this proceeding.⁴⁶

V. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED** that, pursuant to section 1.115 of the Commission’s rules,⁴⁷ the Application for Review filed by Saga Communications of New England, L.L.C., **IS DENIED**, and the Bureau’s *Memorandum Opinion and Order* **IS AFFIRMED**.

12. Payment of the forfeiture shall be made in the manner provided for in section 1.80 of the rules within thirty (30) days of the release of this *Order on Review*. On June 18, 2010, the government filed a complaint in federal district court against Saga Communications of New England, L.L.C. for enforcement of the \$4,000 forfeiture, *U.S. v. Saga Communications of New England, LLC*, Civ. No. 10-12407 (E.D. MI). On July 15, 2010, the court issued an Order to Stay the district court case pending the

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of agencies to interpret their own rules stated that “a new APA rulemaking is required only if an agency adopt[s] a new position inconsistent with any of the [agency’s] existing regulations” (citations omitted).

³⁹ See *Application for Review* at 8 (citing *U.S. v. Daniels*, 418 F. Supp. 1074 (D.S.D. 1976) (“*Daniels*”)).

⁴⁰ See *Daniels*, 418 F. Supp. at 1081.

⁴¹ See *id.*

⁴² See 47 U.S.C. § 504(a).

⁴³ See 47 U.S.C. § 503(b)(4); 47 C.F.R. § 1.80(e).

⁴⁴ See 47 U.S.C. § 504(a); 47 C.F.R. § 1.80(f)(5).

⁴⁵ See *U.S. v. Saga Communications of New England, LLC*, Civ. No. 10-12407 (E.D. MI).

⁴⁶ See *U.S. v. Saga Communications of New England, LLC*, Civ. No. 10-12407 (E.D. MI), Order to Stay (July 15, 2010).

⁴⁷ See 47 C.F.R. § 1.115.

outcome of the administrative proceeding. Upon timely payment in full of the forfeiture, the government will dismiss the district court case. 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 No. and FRN No. referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank-Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account Number in block number 24A (payment type code). Saga will also send electronic notification on the date said payment is made to Theresa.Cavanaugh@fcc.gov, Kenneth.Scheibel@fcc.gov, and Amelia.Brown@fcc.gov. 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.

13. **IT IS FURTHER ORDERED** that a copy of this *Order on Review* shall be sent, by Certified Mail/Return Receipt Requested, to Saga Communications of New England, L.L.C., 73 Kercheval Avenue, Grosse Pointe Farms, Michigan 48236, by regular mail to its counsel, Gary S. Smithwick, Esq., Smithwick & Belendiuk, P.C., 5028 Wisconsin Avenue, N.W., Suite 301, Washington, D.C. 20016.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary