

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

In the Matter of)	
)	File No. EB-06-IH-1116
ENTERCOM WICHITA LICENSE, LLC)	FRN: 0005374145
)	NAL/Acct. No. 200732080005
Licensee of Station KDGS(FM),)	Facility ID No. 70266
Andover, Kansas)	

FORFEITURE ORDER

Adopted: February 5, 2009

Released: February 5, 2009

By the Chief, Investigations and Hearings Division:

I. INTRODUCTION

1. In this *Forfeiture Order* (“*Order*”), we assess a monetary forfeiture in the amount of \$4,000 against Entercom Wichita License, LLC (“Entercom”), licensee of Station KDGS(FM), Andover, Kansas (the “Station”), for its willful violation of Section 73.1216 of the Commission’s Rules.¹ As discussed below, Entercom failed to announce all of the material terms of a designated caller contest and neglected to conduct the contest in accordance with its material terms, in violation of the Commission’s rules.

II. BACKGROUND

2. On March 2, 2007, the Investigations and Hearings Division of the FCC’s Enforcement Bureau (the “Bureau”) issued a *Notice of Apparent Liability for Forfeiture* (“*NAL*”) in the amount of \$4,000 to Entercom for failing to announce all of the material terms of its contest and for failing to timely award the prize (a \$1,000 cash prize) to a contest winner, in violation of Section 73.1216 of the Commission’s Rules.² As discussed in the *NAL*, the contest, called “Santa’s Sack,” was a designated caller contest whereby the Station, on each day of the contest, would give its listeners a clue as to what was in “Santa’s Sack” and would indicate which numbered caller would have the chance to guess what was in “Santa’s Sack.”³ With a correct guess, the designated caller received what was in “Santa’s Sack” as well as a teddy bear. The Complainant, Ms. Darelene Harris, alleged that on December 8, 2005, she responded to an invitation to call the Station during an episode of the contest, and was the designated

¹ See 47 C.F.R. § 73.1216 (“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.”)

² See *Entercom Wichita License, LLC*, Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 4212 (Enf. Bur. Investigations & Hearings Div. 2007) (“*NAL*”).

³ See *id.* at 4212-13; Letter from Brian M. Madden and Jean W. Benz, Attorneys, Leventhal, Senter & Lerman PLLC, to Mary Turner, Program Analyst, Investigations & Hearings Division, Enforcement Bureau, dated July 24, 2006 (“*LOI Response*”). See also note 10, *infra*.

caller for that contest. Although Ms. Harris correctly guessed that there was \$1,000 in “Santa’s Sack,” the on-air announcer who took her call that day said she was incorrect. She continued to listen to the Station, and the next day heard that another listener guessed the same amount of \$1,000 in “Santa’s Sack” and the on-air personality announced that \$1,000 was the correct answer and awarded the prize to that listener. Ms. Harris later visited the Station to dispute the Station’s decision not to award her the prize.⁴ She stated that several Station employees agreed with her contention, but that no one at the Station ever rectified the situation, prompting her to file a complaint with the Commission.⁵

3. In response to the Bureau’s Letter of Inquiry, Entercom “acknowledg[ed] that its investigation revealed that the Station did not broadcast the material terms of the Contest,” but argued that there was no rule violation because the terms of the Contest were at all times available on the Station’s website.⁶ Further, Entercom admitted that a mistake in not awarding the prize to Ms. Harris was made due to confusion among members of the Station about the contest.⁷ Specifically, the on-air announcer who took the Complainant’s call apparently thought that the Station’s contest required that the correct answer include not only the total amount in “Santa’s Sack” but also the value of the teddy bear, which was worth \$10. The Station later clarified to its staff that the value of the teddy bear did not need to be included in the total amount answered by a contestant. Entercom urged that no further action against it was warranted because it had rectified the error by awarding the Complainant a \$1,000 check and that it had taken steps to ensure that such a mistake would not be made in the future.⁸ In the *NAL*, the Bureau found that Entercom, by its own admission, violated Section 73.1216 of the Commission’s Rules by failing to award the cash prize as required under the rules of the “Santa Sack” contest and by failing to broadcast the material terms of the contest and, thereby, proposed a \$4,000 forfeiture.⁹

4. On April 2, 2007, Entercom filed a response to the *NAL* (“Response”), requesting that the proposed forfeiture be cancelled or reduced to, at most, an admonishment.¹⁰ In support of its request, Entercom reiterates much of the same points it previously made, and asserts that its actions demonstrate that it endeavored to run the contest fairly and in good faith. Further, it states that although the Station did not broadcast all material terms of the contest, the essential terms of the contest were understood by the Station’s listeners through the promotional advertisements aired (or “promo”) and that listeners were advised in each promo that the full contest rules were posted on the Station’s website. Entercom states that it has undertaken remedial measures to ensure that the mistakes that occurred in conducting this contest would not happen again in the future. Relying in a 1990 letter decision in which an admonishment was issued by the Mass Media Bureau concerning a contest rule violation in *Kevin Cooney*, Entercom argues that, at most, the circumstances of this case might merit an admonishment, but not a forfeiture.¹¹

⁴ See E-mail from Ms. Darlene Harris to the Federal Communications Commission via fccinfo@fcc.gov, sent January 10, 2006 (“Complaint”).

⁵ See *id.*

⁶ *LOI Response* at 2.

⁷ See *id.* at 3-4.

⁸ See *id.* at 1-2.

⁹ See note 2, *supra*.

¹⁰ See Letter and Response to Notice of Apparent Liability for Forfeiture from Brian M. Madden and Dennis P. Corbett, Attorneys, Leventhal Senter & Lerman PLLC, to Hillary S. DeNigro, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated April 2, 2007 (“*NAL Response*”).

¹¹ See note 25, *infra*.

III. DISCUSSION

5. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Communications Act,¹² Section 1.80 of the Commission's Rules,¹³ and the Commission's forfeiture guidelines set forth in its *Forfeiture Policy Statement*.¹⁴ 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.¹⁵ As discussed further below, we have examined Entercom's response to the *NAL* pursuant to the aforementioned statutory factors, our rules, and the *Forfeiture Policy Statement*, and find no basis for cancellation or reduction of the forfeiture.

6. Although Entercom's corrective measure to award the prize to the Complainant after the commencement of this investigation is commendable, it is well-settled that neither the improper actions of a licensee's employees¹⁶ nor subsequent remedial actions undertaken by a licensee can excuse or nullify a licensee's rule violation.¹⁷ We find that Entercom's argument in this regard, when considered along with other circumstances of this case, does not justify cancellation or reduction of the forfeiture.¹⁸

7. Furthermore, as explained in the *NAL*, it is undisputed that Entercom failed to broadcast all the material terms of the contest as Section 73.1216 requires, including a clear statement of how the Station would determine the winner.¹⁹ As Entercom stated in its LOI Response, "Entercom acknowledges that its investigation revealed that the Station did not broadcast the material terms of the Contest, in contravention of written Corporate policy . . . and Corporate training materials . . . both of

¹² See 47 U.S.C. § 503(b).

¹³ See 47 C.F.R. § 1.80.

¹⁴ 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*").

¹⁵ See 47 U.S.C. § 503(b)(2)(E).

¹⁶ See *Nationwide Communications, Inc.*, Letter, 9 FCC Rcd 175 (Mass Media Bur. 1994) (finding forfeiture for violating contest rules imposed, notwithstanding licensee's contention that its failure to conduct a contest substantially as announced was due to "inadvertence") (subsequent history omitted); *George McKay, III*, Letter, 6 FCC Rcd 7385 (Mass Media Bur. 1991) (forfeiture imposed for violating contest rules, notwithstanding licensee's contention that its failure to conduct a contest substantially as announced was due to acts of third parties).

¹⁷ See, e.g., *Capstar TX Limited Partnership*, Notice of Apparent Liability, 20 FCC Rcd 10636, 10640 (Enf. Bur., Investigations & Hearings Division 2005) (remedial actions undertaken by licensee, after it received complaint about a contest that resulted in a finding of a rule violation, does not absolve licensee of proposed forfeiture); *Padre Serra Communications, Inc.*, Letter Decision, 14 FCC Rcd 9709, 9714 (Mass Media Bur. 1999) (citing *Gaffney Broadcasting, Inc.*, Memorandum Opinion and Order, 23 FCC 2d 912, 913 (1970); *Eleven Ten Broadcasting Corp.*, Notice of Apparent Liability, 33 FCC 2d 706 (1962)).

¹⁸ We point out that Entercom certainly could have addressed the situation with the Complainant, Ms. Harris, after she complained directly with Station personnel and before Ms. Harris filed her complaint, but it did not do so until after this investigation was initiated. In its LOI Response (at 4), Entercom stated that the Complaint "is largely factually correct," but "does not have adequate information to confirm or deny" some of the Complainant's statements with respect to her conversations with specific Station employees. The Declaration of the Station's Market Manager, Jackie Wise, confirms that Ms. Harris contacted the Station to dispute the results of the contest. See *id.*, at Declaration of Jackie Wise.

¹⁹ See *NAL*, 22 FCC Rcd at 4214.

which were provided to the Station prior to the commencement of the Contest.”²⁰ Entercom attempts to excuse that error by claiming that listeners nevertheless could understand the rules of the contest from Entercom’s promotional announcements of the contest, which directed listeners to the Station’s website.²¹ This contention, however, is undercut by the fact that even Station personnel were unclear as to how winners were selected, which is a material term under the Rule. Additionally, as we have previously stated:

The rules state that, although disclosure by non-broadcast means (such as making rules available at the stations and on the World Wide Web) can be considered in determining whether adequate disclosure has been made, the non-broadcast disclosures must be “[i]n addition to the required broadcast announcements” Thus, although non-broadcast disclosures may supplement broadcast announcements, they cannot act as a substitute for broadcast announcements.²²

8. Finally, Entercom argues that its conduct, at most, warrants an admonishment.²³ In support, Entercom cites one case, *Kevin Cooney*, in which an admonishment was adjudged to be the appropriate remedy concerning allegations of a Station’s violation of the Commission’s contest rule.²⁴ We disagree that the circumstances of this case warrant the same result. The Commission has broad discretion to consider a variety of factors in determining an amount of forfeiture, if appropriate, when faced with a violation of its Rules.²⁵ As set forth in the *NAL*, the various factors applicable in proposing the forfeiture were duly considered in this case.²⁶ As described below, the violations in Entercom’s cited precedent are of a more minor degree when compared to the instant case and, therefore, justifies a different result.

9. In *Kevin Cooney*, the complainant misunderstood that the station’s contest term stating “enter as often as you like” – which, according to the Station, contemplated participation in various segments of the contest – actually prohibited duplicate entries.²⁷ 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. The Mass Media Bureau 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.²⁸ The circumstances of the violations in the instant case, however, justify a forfeiture. In the instant case, Entercom failed to advertise *any* material term of the contest, as it has acknowledged. In contrast, in *Kevin Cooney*, the Station did announce materials terms, except that one term was open to various

²⁰ *LOI Response* at 2-3.

²¹ *See NAL Response* at 4.

²² *Isothermal Community College*, Notice of Apparent Liability, 18 FCC Rcd 23932, 23934-935 (Enf. Bur. 2003) (internal citations omitted).

²³ *See NAL Response* at 5.

²⁴ *See id.* (citing *Kevin Cooney*, Letter, 5 FCC Rcd 7105 (Mass Media Bur. 1990)).

²⁵ *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).

²⁶ *See NAL*, 22 FCC Rcd at 4214.

²⁷ *Kevin Cooney*, 5 FCC Rcd at 7105.

²⁸ *See id.*

interpretations, which the Mass Media Bureau determined should have been better defined. Additionally, it is clear in this case, as opposed to *Kevin Cooney*, that Station personnel misapplied its own contest rules that resulted in the actual denial of the prize to the Complainant in the first instance.²⁹

10. Furthermore, the Bureau's decision in this case is consistent with recent decisions concerning Section 73.1216.³⁰ For example, both in *NM Licensing*³¹ and in *Clear Channel Broadcasting Licenses, Inc.*,³² the Bureau proposed a \$4,000 forfeiture based on a licensee's failure to conduct a contest as announced despite the respective licensee's efforts to rectify the situation directly with the complainant in each case.³³ Accordingly, as a result of our review of Entercom'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.

IV. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act³⁴, and Sections 0.111, 0.311 and 1.80(f)(4) of the Commission's Rules,³⁵ Entercom Wichita License, LLC **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of four thousand dollars (\$4,000) for willful violation of Section 73.1216 of the Commission's Rules.³⁶ 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 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. Entercom Wichita License, LLC will also send electronic notification on the date said payment is made to Hillary.DeNigro@fcc.gov, Ben.Bartolome@fcc.gov, Kenneth.Scheibel@fcc.gov, and Anjali.Singh@fcc.gov.

²⁹ In *Kevin Cooney*, it could not be determined whether the complainant in that case would have won the contest because the dispute concerned the number of times and the method by which she could participate in a drawing. Notwithstanding that uncertainty, the Station nevertheless decide to compensate the complainant. *See id.*

³⁰ *See NM Licensing, LLC*, Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 7916 (Enf. Bur., Investigations & Hearings Div. 2006); *Clear Channel Broadcasting Licenses, Inc.*, Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 4072 (Enf. Bur. Investigations & Hearings Div. 2006).

³¹ *See NM Licensing, LLC*, 21 FCC Rcd 7916.

³² *See Clear Channel Broadcasting Licenses, Inc.*, 21 FCC Rcd 4072.

³³ *See NM Licensing, LLC*, 21 FCC Rcd. 7916, 7918-7920.

³⁴ *See* 47 U.S.C. § 503(b).

³⁵ *See* 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).

³⁶ *See* 47 C.F.R. § 73.1216.

12. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class Mail and Certified Mail Return Receipt Requested to Entercom Wichita License, LLC, 401 City Avenue, Suite 809, Bala Cynwyd, Pennsylvania, 19004, and to its counsel, Brian M. Madden and Dennis P. Corbett, 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