

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

In the Matter of)	
)	File No. EB-04-IH-0330
NM LICENSING LLC)	FRN: 0005804810
)	NAL/Acct. No. 200632080164
Licensee of Station WYAV(FM),)	Facility ID No. 36947
Myrtle Beach, South Carolina)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: July 19, 2006

Released: July 20, 2006

By the Chief, Investigations and Hearings Division:

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture* (“NAL”), we find NM Licensing, LLC (“NextMedia”), licensee of Station WYAV(FM), Myrtle Beach, South Carolina, apparently liable for a monetary forfeiture in the amount of \$4,000 for its apparent violation of section 73.1216 of the Commission’s rules.¹ That rule requires a broadcast licensee to “fully and accurately disclose the material terms of a contest...and conduct the contest substantially as announced or advertised.”² As discussed below, we find that NextMedia substantially altered material terms of a contest, in apparent violation of the Commission’s rule.

II. BACKGROUND

2. The Commission received a complaint alleging that NextMedia made a significant change to the rules governing the station’s advertised promotional contest for a concert during “Bike Week 2004,” in Myrtle Beach, South Carolina (the “Contest”).³ According to the complainant, beginning in April 2004, the station launched a contest in which a customized motorcycle would be awarded to the person who drew the one key capable of starting it.⁴ At the start of the Contest, the station announced that it would periodically air a specific sound effect. After each airing of the sound effect, a certain numbered caller to the station would receive a free ticket to a concert on May 15, 2004 and a key certificate that on the concert date would be exchanged for an ignition key.⁵ Each contestant would then attempt to start the motorcycle, and the contestant possessing the actual ignition key would win the motorcycle.

¹ 47 C.F.R. § 73.1216.

² *Id.*

³ See Complaint from Danny Muckelroy to the Federal Communications Commission, dated May 24, 2004 (“Complaint”).

⁴ *Id.*

⁵ *Id.*

3. The complainant won a key certificate to participate in the Contest. On May 14, 2004, the complainant went to the station, as directed, to pick up his free ticket to the concert and his key certificate. At that time, the complainant received his ticket, his key certificate and a concert “flyer” containing handwritten instructions to arrive at the concert on or before 7:00 p.m. to exchange the key certificate for an actual key. When the complainant arrived at the concert location the next day at 6:30 p.m., he learned the drawing for the motorcycle had already taken place and that he was denied his opportunity to participate in the drawing.⁶

4. Based on the allegations contained in the Complaint, the Investigations and Hearings Division of the Enforcement Bureau sent a letter of inquiry to NextMedia on October 20, 2004.⁷ NextMedia responded by letter dated November 22, 2004, and included a CD and written transcript of the promotional spots it aired for the Contest.⁸ NextMedia states that the Contest involved the chance to win a \$35,000 custom motorcycle.⁹ NextMedia states that it co-promoted the Contest along with a motorcycle shop, as a promotion for a concert to be produced by the Myrtle Beach Rescue Squad. NextMedia broadcast promotional spots for the concert “at least 6 times a day, seven days a week, from April 16, through May 15, 2004.”¹⁰ NextMedia awarded key certificates to the tenth caller to the station after each broadcast of the sound effect. Those successful callers were then required to appear at the station on May 14, 2004, to pick up a free ticket to the concert and a key certificate. They also received the concert flyer described above, containing handwritten instructions from the station to appear at the concert on or before 7:00 p.m. on May 15, 2004. NextMedia qualified 35 people in all to participate in the drawing.

5. NextMedia admits that the drawing for the motorcycle did not take place as announced in its instructions to the winners of the key certificates, but argues that the changes were necessary.¹¹ Specifically, on the date of the concert at approximately 6:00 p.m., the Myrtle Beach Rescue Squad informed station personnel that, due to contractual arrangements with the second band, the drawing for the motorcycle could not take place as planned. According to NextMedia, the contract provided that no intervening activity could take place on stage between the performances of the two bands, which were scheduled to begin playing at 7:00 p.m., and required to stop playing at 10:00 p.m., due to noise restriction ordinances in effect for Myrtle Beach, South Carolina.¹² As a result, station personnel were requested to begin the drawing at 6:20 p.m., instead of 7:45 p.m., as originally planned. Station personnel read the list of initial winners three times between 6:20 and 6:45 p.m. By 6:45 p.m., all but five initial winners had received their keys. The contest was then held and the motorcycle awarded. After the

⁶ *Id.*

⁷ See Letter from William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission to Next Media Group, dated October 20, 2004.

⁸ See Letter from Martin Leibowitz, Esq., counsel for NextMedia, to David Brown, Esq., Assistant Chief, Investigations & Hearings Division, Enforcement Bureau, dated November 22, 2004 (“Response”).

⁹ *Id.* at 1.

¹⁰ *Id.* at 2.

¹¹ *Id.* at 3-4.

¹² *Id.*

contest was over but before 7:00 p.m., three more initial winners arrived at the concert.¹³ A station representative apologized to these three and offered additional free concert tickets as compensation.¹⁴

III. DISCUSSION

6. Under section 503(b)(1) of the Communications Act of 1934, as amended (the "Act"), any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a monetary forfeiture penalty.¹⁵ In order to impose such a forfeiture 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 forfeiture penalty should be imposed.¹⁶ The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has violated the Act or a Commission rule.¹⁷ As we set forth in greater detail below, we conclude under this standard that NextMedia is apparently liable for a forfeiture for its apparent willful violation of section 73.1216 of the Commission's rules.

7. Section 73.1216 of the Commission's rules provides:

A licensee that broadcasts or advertises information about a contest it conducts shall fully and accurately disclose the material terms of the contest, and shall conduct the contest substantially as announced or advertised. No contest description shall be false, misleading or deceptive with respect to any material term.

Note 2 to the rule states:

In general, the time and manner of disclosure of the material terms of a contest are within the licensee's discretion. However, the obligation to disclose the material terms arises at the time the

¹³ *Id.* at 2, 3.

¹⁴ *Id.* at 4.

¹⁵ 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1); *see also* 47 U.S.C. § 503(b)(1)(D) (forfeitures for violation of 14 U.S.C. § 1464). 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. 47 U.S.C. § 312(f)(1). The legislative history to section 312(f)(1) of the Act clarifies that this definition of willful applies to both sections 312 and 503(b) of the Act, H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the term in the section 503(b) context. *See, e.g., Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991) ("*Southern California Broadcasting Co.*"). The Commission may also assess a forfeiture for violations that are merely repeated, and not willful. *See, e.g., Callais Cablevision, Inc.*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359 (2001) (issuing a Notice of Apparent Liability for, *inter alia*, a cable television operator's repeated signal leakage). "Repeated" merely means that the act was committed or omitted more than once, or lasts more than one day. *Southern California Broadcasting Co.*, 6 FCC Rcd at 4388, ¶ 5; *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362, ¶ 9.

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

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

audience is first told how to enter or participate and continues thereafter. 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. Disclosure of material terms in a reasonable number of announcements is sufficient. In addition to the required broadcast announcements, disclosure of the material terms may be made in a non-broadcast manner.¹⁸

8. In this case, it appears that NextMedia violated section 73.1216 of the Commission's rules by failing to conduct the Contest substantially as advertised.¹⁹ Indeed, NextMedia does not dispute that it failed to conduct the drawing for the Contest as announced.²⁰ The rules, as established for the 35 participants, stated that, in order to be eligible to win the motorcycle, key certificate holders would have to be present at the concert on May 15, 2004, on or before 7:00 p.m. However, even though the complainant and two others complied with the station's requirements, alterations in the contest's parameters prevented them from participating in the contest. The Commission has stated previously that, for the purposes of the rule, "a term is considered material if it defines operation of, or affects participation in a contest."²¹ In this case, station management changed the rules regarding the operation of the contest by changing the time for appearing to participate in the drawing as well as the time of the drawing itself. These changes substantially altered the material terms of the Contest. NextMedia concedes that three contestants who complied with the requirement to appear at the concert on or before 7:00 p.m. were prevented from participating in the contest because it had already taken place.²²

9. Licensees, as public trustees, have the affirmative obligation to prevent the broadcast of false, misleading or deceptive contest announcements,²³ and to conduct their contests substantially as announced.²⁴ The Commission has noted in this regard that "[t]he standards are high, for while contests are particularly susceptible to abuse, abuses can be prevented by diligent licensee attention to the planning and conduct of contests."²⁵ Here, NextMedia changed material terms of the Contest. The fact

¹⁸ ABC, INC., Notice of Apparent Liability for Forfeiture, 18 FCC Rcd 25,647 (Enf. Bur. 2003).

¹⁹ 47 C.F.R. § 73.1216.

²⁰ *Response* at 2.

²¹ *Application for Review of Staff Ruling Concerning Complaint of Violation of Section 73.1216 of the Commission's Rules*, Memorandum Opinion and Order, 2 FCC Rcd 5638 (1987).

²² NextMedia does not dispute that three initial winners arrived at the concert before 7:00 p.m., the designated time in the contest rules. Therefore, we need not decide the precise time the complainant arrived at the concert.

²³ *WMJX, Inc.*, Decision, 48 RR 2d 1339, 1355 (1981); *Rules Relating to Licensee-Conducted Contests*, Report and Order, 60 FCC 2d 1072 (1976).

²⁴ *Headliner Radio, Inc.*, Memorandum Opinion and Order, 8 FCC Rcd 2962 (Mass Media Bur. 1993); *Lincoln Dellar*, Memorandum Opinion and Order, 8 FCC Rcd 2582, 2585 (Mass Media Bur. 1993) (where the cancellation of a pre-announced contest violated the pertinent Commission rule because the contest was not then conducted "substantially as announced").

that the change was at the behest of a third party, in this case the Myrtle Beach Rescue Squad, in its capacity as the producer of the concert, does not absolve NextMedia of its responsibility to fulfill the contest terms.²⁶ In any event, the changes in the contest rules and instructions appear to be the result of NextMedia's inadequate planning and management of the Contest. Similarly, NextMedia's contention that the station ultimately awarded the advertised prize, and that it offered compensation to the participants that were unable to participate due to the alteration in schedule, does not mitigate its liability. The Commission has stated previously that a showing of harm is not necessary to establish a violation.²⁷ However, in this case three contestants were harmed by being denied the chance to win the contest prize.

10. Based upon the evidence before us, we find that NextMedia apparently willfully violated section 73.1216 of the Commission's rules. The Commission's *Forfeiture Policy Statement* sets a base forfeiture amount of \$4,000 for failure to conduct a station contest substantially as announced.²⁸ In assessing the monetary forfeiture amount, we must take into account the statutory factors set forth in section 503(b)(2)(D) of the Act,²⁹ 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. After considering the record, the factors contained in section 503(b)(2)(D) of the Act, 47 U.S.C. § 503(b)(2)(D), and the *Forfeiture Policy Statement*, we believe that a \$4,000 forfeiture is appropriate in this case. Specifically, we conclude that the violation occurred due to inadequate planning and control, and not due to a deliberate attempt to deceive or to favor a particular contestant or class of contestants.³⁰

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²⁵ *Honeyradio, Inc.*, Memorandum Opinion and Order, 19 FCC 2d 833 (1978), quoting *Notice of Proposed Rulemaking*, 40 Fed. Reg. 26692 (1975) (holding licensee responsible for mistakes made during its conduct of a contest, and affirming forfeiture and denying petition for reconsideration of a letter of admonishment for violation of the Commission's contest rules).

²⁶ See *George McKay, III*, Notice of Apparent Liability for Forfeiture, 6 FCC Rcd 7385 (Mass Media Bur. 1991) (forfeiture for violating contest rules imposed, notwithstanding licensee's contention that its failure to conduct a contest substantially as announced was due to acts of third parties); *Nationwide Communications Inc.*, Notice of Apparent Liability for Forfeiture, 9 FCC Rcd 175 (Mass Media Bur. 1994) (forfeiture for violating contest rules imposed, notwithstanding licensee's contention that its failure to conduct a contest substantially as announced was due to "inadvertence"), *forfeiture reduced*, *Nationwide Communications Inc.*, Memorandum Opinion and Order, 9 FCC Rcd 2054 (Mass Media Bur. 1994) (licensee's history of compliance with Commission rules warranted forfeiture reduction, whereas licensee's general good faith efforts, "awarding the contest prize as announced, and receiving no benefit from its error" did not).

²⁷ See *WMJX*, 48 RR 2d 1339, ¶ 37.

²⁸ *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), *recon. denied* 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*"); 47 C.F.R. § 1.80(b).

²⁹ 47 U.S.C. § 503(b)(2)(D).

³⁰ We note that NextMedia is a publicly traded company with total revenue of more than \$115 million last year. See NextMedia Operating Inc., press release, March 10, 2005. This could support an upward adjustment pursuant to section 1.80's "Ability to pay /relative disincentive" factor. See section 1.80, note to paragraph (b)(4), Section II. However, in this case that factor is counterbalanced by the downward adjustment factor of NextMedia's history of overall compliance. *Id.*, Downward Adjustment criterion No. 2. We find that a baseline forfeiture is appropriate in this case.

V. ORDERING CLAUSES

11. ACCORDINGLY, IT IS ORDERED, pursuant to section 503(b) of the Communications Act of 1934, as amended,³¹ and sections 0.111, 0.311, and 1.80 of the Commission's rules,³² that NM Licensing, LLC, is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of \$4,000 for willfully and repeatedly violating section 73.1216 of the Commission's rules.

12. IT IS FURTHER ORDERED, pursuant to section 1.80 of the Commission's rules, that within thirty (30) days of the release of this Notice, NM Licensing, LLC SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

13. Payment of the forfeiture must be made by mailing check or similar instrument, payable to the order of the Federal Communications Commission. The payment MUST INCLUDE the FCC Registration Number ("FRN") and the NAL/Account Number specified in the caption of this *NAL*. Payment by check or money order may be mailed to the Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. Payment by overnight mail may be sent to Bank One/LB 73482, 525 West Monroe Street, 8th Floor Mailroom, Chicago, IL 60661. Payment by wire transfer may be made to ABA Number 071000013, receiving bank Bank One, and account number 1165259.

14. The response, if any, must be mailed to William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 3-B433, Washington, D.C. 20554 and MUST INCLUDE the NAL/Acct. No. referenced above.

15. 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.

16. Requests for payment of the full amount of this *NAL* under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.³³

17. IT IS FURTHER ORDERED that the complaint filed by Danny Muckleroy IS GRANTED to the extent indicated herein and IS OTHERWISE DENIED, and the complaint proceeding IS HEREBY TERMINATED.³⁴

³¹ 47 U.S.C. § 503(b).

³² 47 C.F.R. §§ 0.111, 0.311 and 1.80.

³³ See 47 C.F.R. § 1.1914.

³⁴ For purposes of the forfeiture proceeding initiated by this *NAL*, NM Licensing, LLC, shall be the only party to this proceeding.

18. IT IS FURTHER ORDERED that a copy of this Notice shall be sent, by Certified Mail/Return Receipt Requested, to NM Licensing, LLC, 6312 S. Fiddlers Green Circle, Suite 360E, Englewood, Colorado, 80111-4946, and to its counsel, Mathew L. Leibowitz, Esq., Suntrust International Center, One Southeast Third Ave., Miami, Florida 33131-1715.

FEDERAL COMMUNICATIONS COMMISSION

William H. Davenport
Chief, Investigations and Hearings Division
Enforcement Bureau