

**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

MEMORANDUM OPINION AND ORDER

Adopted: March 31, 2010

Released: April 1, 2010

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we deny the petition for reconsideration filed by Saga Communications of New England, L.L.C. (“Saga”),¹ licensee of Station WAQY(FM), Springfield, Massachusetts (the “Station”), of an Enforcement Bureau (“Bureau”) *Forfeiture Order* issued September 25, 2009.² The *Forfeiture Order* imposed a monetary forfeiture of \$4,000 against Saga for violating Section 73.1216 of the Commission’s rules³ by failing to conduct a broadcast contest substantially as announced. As discussed below, we deny the *Petition* and affirm the \$4,000 forfeiture.

II. BACKGROUND

2. The *Forfeiture Order* held that the Station failed to conduct a contest substantially as announced in violation of Section 73.1216 of the Commission’s rules because it did not timely deliver a contest prize consistent with its own contest rules. The *Forfeiture Order* held that the Station’s contest rules required delivery of the prize within 30 days, but the prize was not delivered until approximately seven months after the contest was held and without sufficient justification for the significant delay.⁴ Saga seeks reconsideration of this finding and remission or mitigation of the forfeiture. The salient facts are not in dispute, and thus are incorporated by reference from the *NAL* and *Forfeiture Order*.⁵

3. In support of its *Petition*, Saga contends: (1) that, contrary to the Bureau’s finding, promptness is not required by the Commission’s licensee-conducted contest rule;⁶ (2) that the Bureau

¹ See Saga Communications of New England, L.L.C., Petition for Reconsideration (filed Oct. 26, 2009) (“*Petition*”).

² See *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.

⁴ See *Forfeiture Order*. See also paragraph 6, *infra*.

⁵ See *Forfeiture Order*, 24 FCC Rcd at 11934-35; *NAL*, 22 FCC Rcd at 4206-07.

⁶ See *Petition* at 4.

incorrectly found that Saga's own contest rules required it to award its contest prizes within thirty days;⁷ (3) that the Bureau failed to prove that Saga possessed the requisite scienter required to establish "willfulness" under Section 503(b) of the Act;⁸ (4) that the precedent relied upon by the Bureau regarding "willfulness" is untested by the courts and is, therefore, unreliable;⁹ and (5) that the Bureau erred by finding that Saga's misconduct was "repeated" within the meaning of Section 503(b) of the Act.¹⁰ Below, we discuss each of Saga's contentions in turn.

III. DISCUSSION

4. Reconsideration is appropriate only where the petitioner shows a material error or omission in the original order or raises additional facts not known or existing until after the petitioner's last opportunity to present such matters.¹¹ A petition that simply repeats arguments previously considered and rejected will be denied.¹² Saga has failed to either demonstrate error, or to present new facts or changed circumstances, as required. As such, the matter before us does not warrant reconsideration and we uphold the Bureau's finding in the *Forfeiture Order*.

5. First, we find incorrect Saga's contention that the Commission's contest rule does not require that prizes be awarded promptly. As discussed in the *Forfeiture Order*, the Commission has stated that contest prizes must be awarded promptly.¹³ Saga asserts that the Commission's prior statements regarding promptness are insufficient to support a forfeiture and require additional notice and rulemaking, because if the Commission had intended for this specific element to create liability for a licensee in a broadcast contest, then it would have included the term in an exhaustive list of elements in the rule.¹⁴ We reject Saga's assertion. It is evident from the rule itself and accompanying notes that the enumerated material terms do not constitute an exhaustive list of every element that is material to a contest. As an example, Note 1(b) of the rule recognizes that "material terms may vary widely depending on the exact nature of the contest" and sets forth contest terms that "generally" would be included in a station's contest rules.¹⁵ Further, the law is clear that the Commission may properly interpret its own

⁷ See *id.* at 5.

⁸ See *id.* at 7-8.

⁹ See *id.* at 7; 47 U.S.C. § 503(b).

¹⁰ See *id.* at 3; 47 U.S.C. § 503(b).

¹¹ See *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. 1965), *cert. denied*, 383 U.S. 967 (1966); 47 C.F.R. § 1.106(c).

¹² See *Infinity Broadcasting Operations, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 4216 (2004); *Bennett Gilbert Gaines*, 8 FCC Rcd 3986 (Rev. Bd. 1993).

¹³ See *Forfeiture Order*, 24 FCC Rcd at 11936-37 (citing *Public Notice Concerning Failure of Broadcast Licensees to Conduct Contests Fairly*, Public Notice, 45 FCC 2d 1056 (1974) ("1974 Public Notice"); *Amendment of Part 73 of the Commission's Rules Relating to Licensee-Conducted Contests*, Notice of Proposed Rulemaking, 53 FCC 2d 934 (1975) ("1975 NPRM"); and *Amendment of Part 73 of the Commission's Rules Relating to Licensee-Conducted Contests*, Report and Order, 60 FCC 2d 1072, 1073 (1976) ("1976 R&O").

¹⁴ See *Petition* at 4-5.

¹⁵ See 47 C.F.R. § 73.1216. Note 1(b) 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

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rules consistent with existing regulation.¹⁶ As the *Forfeiture Order* correctly held, the Commission's prior statements consistently maintain that prizes must be awarded promptly,¹⁷ and Saga cites no precedent that is inconsistent with or disavows that position in any manner that might implicate the need for a rulemaking.

6. Second, we find no merit in Saga's contention that the thirty-day time period for prize fulfillment specified in its own contest rules did not apply to the Station.¹⁸ Saga argues that the intent of its contest rule provision is to "persuade" winners to claim their prizes within thirty days, not to impose an obligation on Saga to award prizes within thirty days.¹⁹ Saga's contest rule provision, however, when read in its full context, belies such claims. Saga's rule states that "[w]inners will be expected to claim prize (sic) at the [Station] between 9am – 5pm, Monday through Friday (excluding holidays) within 30 days of being notified that they are winners, unless there is an expiration date on prize which will be specifically stated."²⁰ 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. Moreover, accepting Saga's interpretation of its own contest rule would render it harmless from liability for ever failing to award a contest prize, effectively allowing it to claim that fulfillment would occur at some unspecified future time of its own choosing. This result would render Saga's obligations under the Commission's contest rule meaningless, and it would also be unfair to contest participants.

7. Third, we disagree with Saga's assertion that in order to impose a forfeiture for its failure to award the prizes promptly, the Commission must demonstrate scienter to establish that the conduct was "willful."²¹ The case which Saga cites as authority for this argument²² arose in the broadcast indecency

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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."

¹⁶ See *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 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."

¹⁷ See *1974 Public Notice, 1975 NPRM, and 1976 R&O*, *supra* note 13.

¹⁸ See *Petition* at 5.

¹⁹ See *id.*

²⁰ 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 Attachment 4, unnumbered pages 3-4.

²¹ See *Petition* at 7-8 (citing *CBS Corporation et al. v. FCC*, 535 F.3d 167 (3rd Cir. 2008) ("*CBS v. FCC*", *cert. granted, vacated, and remanded*, 129 S. Ct. 2176 (2009)).

²² See *Petition* at 7-8 (citing *CBS v. FCC*).

context in which “scienter is the constitutional minimum showing for penalizing the speech or expression of broadcasters.”²³ There is no such constitutional requirement in cases regarding violations of the licensee-conducted contest rule; therefore, the cited authority is inapposite. It is well established that Section 312(f)(1) of the Act provides that “the term ‘willful,’ when used with reference to the commission or omission of any act, means the conscious or deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission.”²⁴ As noted in the *Forfeiture Order*, “willful” does not require a finding that the rule violation was intentional or that the violator was aware that it was committing a rule violation. Rather, the term “willful” simply requires that the violator knew it was taking or failing to take the action in question, irrespective of any intent to violate the Commission’s rules.²⁵ Moreover, Saga’s claim regarding its lack of intent is not supported by the facts of this case.²⁶ As noted in the *Forfeiture Order*, the complainant repeatedly contacted Saga over several months seeking the memorabilia portion of his prize, to no avail.²⁷ It was not until Saga received the Bureau’s letter of inquiry that it finally awarded the prizes.²⁸ Under these circumstances, Saga’s assertion of mere inadvertence is not plausible.

8. Fourth, Saga questions the authority of the Commission decision²⁹ that the Bureau relied on for interpreting the “willfulness” standard because it is untested by the courts.³⁰ We find no validity in this unsupported assertion. It is well established that the Commission may rely on its precedents in the absence of controlling court opinions to the contrary.³¹

²³ *CBS v. FCC*, 535 F.3d at 205.

²⁴ 47 C.F.R. § 312(f)(1). The legislative history of 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 Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991), *recon. denied*, 7 FCC Rcd 3454 (1992) (“*Southern California*”).

²⁵ *See Southern California*, 6 FCC Rcd at 4387-88 (stating that “inadvertence . . . is at best, ignorance of the law, which the Commission does not consider a mitigating circumstance” and applying the definition of willful in Section 312(f)(1) to forfeiture cases). *See also Abocom Systems, Inc.*, Memorandum Opinion and Order, 22 FCC Rcd 7448, 7451 (Enf. Bur. 2007) (rejecting Abocom’s argument that it was only “inadvertently noncompliant” and that “its actions were not deliberate or intended to violate the rules”); *Five Star Parking d/b/a Five Star Taxi Dispatch*, Forfeiture Order, 23 FCC Rcd 2649, 2651-52 (Enf. Bur., Spectrum Enf. Div. 2008) (declining to reduce or cancel forfeiture for late-filed renewal based on licensee’s administrative error); *Domtar Industries, Inc.*, Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 13811, 13815 (Enf. Bur., Spectrum Enf. Div. 2006) (same).

²⁶ *See Forfeiture Order*, 24 FCC Rcd at 11937-38.

²⁷ *See id.* (citing Letter from Mr. Robert Naginewicz to the FCC, dated December 31, 2005).

²⁸ *See Forfeiture Order*, 24 FCC Rcd at 11938.

²⁹ *See Southern California*, 6 FCC Rcd at 4388.

³⁰ *See Petition* at 6-7.

³¹ The absence of interpretive court opinion does not diminish the vitality or applicability of the Commission’s own precedents, and Saga has cited no authority demonstrating otherwise. To the contrary, under principles of administrative *stare decisis*, an agency is bound by its precedents, and has flexibility to depart from them only when it finds, and can adequately explain, sound reasons for doing so, which Saga has not offered. *See, e.g., Atchison, Topeka & Santa Fe Railway v. Wichita Board of Trade*, 412 U.S. 800, 806-17 (1973) (citing, *inter alia*, *SEC v.*

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9. Finally, Saga argues that its violations of Section 73.1216 of the Rules were not repeated as that term is contemplated by Section 503(b) of the Act.³² Commission precedent clearly holds that “repeated” means that the act was committed or omitted more than once, or lasts more than one day.³³ In this case, nearly seven months passed between the drawing and the time that Saga awarded the memorabilia portion of the prize.³⁴ We find that the violations were repeated. Therefore, after reviewing Saga’s *Petition* and the underlying record, we find no basis for reconsideration.

IV. ORDERING CLAUSES

10. Accordingly, **IT IS ORDERED**, pursuant to Section 1.106 of the Commission’s rules,³⁵ that the *Petition for Reconsideration* filed on October 26, 2009, by Saga Communications of New England, L.L.C., **IS DENIED**, and the *Forfeiture Order* **IS AFFIRMED**.

11. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the rules³⁶ within thirty (30) days of the release of this *Memorandum Opinion and Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.³⁷ 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 Hillary.DeNigro@fcc.gov, Ben.Bartolome@fcc.gov, Kenneth.Scheibel@fcc.gov, and Paul.Noone@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.

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Chenery Corp., 332 U.S. 194 (1947); *Secretary of Agriculture v. United States*, 347 U.S. 645, 653-54 (1954); and *Columbia Gas Transmission Corp. v. FERC*, 628 F.2d 578, 585-86 (D.C. Cir. 1979).

³² See *Petition* at 3.

³³ See *Sudbury Service, Inc., Licensee of Station KLCN(AM), Blytheville, Arkansas*, Forfeiture Order, 23 FCC Rcd 11232, 11234 (Media Bur., Audio Div. 2008) (rejecting licensee’s argument that its violations were not repeated where licensee had not properly maintained its public inspection file over a four-year period); *Global Teldata II, LLC*, Order of Forfeiture, 22 FCC Rcd 8710, 8716-17 (2007) (rejecting licensee’s argument that, under Section 503(b)(1)(B), an entity cannot be held liable for a *continuing* violation in a case involving the licensee’s violations of several rules related to the Universal Service Fund).

³⁴ See *Forfeiture Order*, 24 FCC Rcd at 11937.

³⁵ See 47 C.F.R. § 1.106.

³⁶ See 47 C.F.R. § 1.80.

³⁷ See 47 U.S.C. § 504(a).

12. **IT IS FURTHER ORDERED** that a copy of this Order 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

P. Michele Ellison
Chief
Enforcement Bureau