



Virginia Association of Broadcasters Legal Review



Brooks, Pierce, McLendon, Humphrey & Leonard, LLP
Counsel to VAB • (919) 839-0300

250 West Main Street, Suite 100
Charlottesville, VA 22902 • (434) 977-3716

SPECIAL REPORT

SPECIAL REPORT

December 12, 2012

TABLE OF CONTENTS

STATION-CONDUCTED CONTESTS—A REVIEW.....1

When the FCC doles out fines to broadcasters for violation of the FCC’s station-conducted contest regulation, many other stations take notice. Here are some tips to help avoid complaints and unbudgeted expenses or fines.

PETITION ASKS FCC TO AMEND “CONTEST RULE” TO ALLOW CONTEST INFORMATION DISCLOSURE ON STATION WEBSITES4

The FCC has received a petition requesting that the Commission amend its contest rule to allow stations to disclose information regarding contests by airing announcements (the current rule) or in written form on a website.

STATION-CONDUCTED CONTESTS—A REVIEW

All broadcasters take notice when the FCC fines a station for violation of the FCC's station-conducted contest regulations. When stations conduct contests and promotions, they must keep in mind the FCC's following rules: (1) if a station mentions on air how to enter or participate in a contest, all "material terms" of the contest must be fully and accurately disclosed and (2) the contest must be conducted substantially as announced or advertised—no contest description may be false, misleading, or deceptive with respect to any material term.

The "base" FCC fine is \$4,000, but the FCC has discretion to impose higher fines. Often, fines are imposed by the FCC after a disgruntled contestant files a complaint. That, in fact, is what happened several times in 2012, including a significant case in which the FCC levied a \$22,000 fine.

In that case, a station offered a contest on its website. No component of the contest was conducted on the air, but the station advertised it on the air. Unfortunately, the station did not read its own rules carefully, and there were inconsistent entry deadline dates in the rules. This inconsistency created an opportunity for a listener to complain to the FCC. Once the complaint was filed, the FCC investigated the entire contest and found that the station had not announced all of the contest's material terms on the air. When the station defended itself on the grounds that the FCC's station-conducted contest regulation should not apply because it was a website contest, the FCC countered by pointing out that the station advertised the contest on the air, thereby bringing it within the FCC's regulation.

This was not the first time the FCC determined a station's on-air promotion of a web-based contest triggered the FCC's station-conducted contest regulations. In fact, in 2009, the FCC fined another station—owned by the same company—\$6,000 for a similar type of violation. Specifically, the FCC noted: "as the Commission has stated, [t]he rule applies to all contests conducted by the licensee and broadcast to the public. Although the rule does not apply to licensee-conducted contests that are not broadcast or advertised to the public. . . In this case, [the station] promoted the Contest over the air, but did not fully disclose to the listening audience the Contest's material terms, including the time and means of selection of winners, when prizes can be won, and the total number of prizes. Therefore, we find that [the station] violated the rule."

Contest-related complaints are frequently filed by "losing" contestants or disgruntled employees—but winners have also been known to file complaints for various reasons, including dissatisfaction with the valuation of a prize (for example, where the winner feels that the prize value is "inflated" which leads to higher tax consequences for the winner) and disappointment that an event ticket awarded as a prize did not guarantee the winner's entrance into the event.

Here are some tips to help stations minimize the likelihood that contest participants will file complaints with the FCC and to help stations avoid incurring unbudgeted expenses for extra prizes, legal fees, or FCC fines.

- * Use complete and accurate official rules to govern your contest. If you anticipate the possibility that the operation of the contest or the contest rules may need to be changed mid-stream, disclose that possibility in the rules and describe the nature of the reasons for any such potential changes as well as their potential impact on the operation of the contest. Generally speaking, though, once a contest begins or the rules are “published,” you cannot thereafter change the rules.
- * Stations should make the official contest rules available at the station and on the station’s website (if the station has a website), and rules should be posted and available at any location where participants can submit an entry.
- * Operate and administer your contest as described in the rules. Ensure that any contest co-sponsors correctly and properly execute their contest responsibilities consistently with the official rules. The station may find itself in hot water when a co-sponsor fails to execute its contest responsibilities properly.
- * Disclose all material terms of your contest. Stations must disclose all material terms when first announcing how to enter or participate in the contest, and then periodically thereafter. Disclosure of the material terms is not required every time the contest is promoted on air, but the station must disclose the material terms in a “reasonable number” of announcements throughout the course of the contest. Many stations create a special promotional spot designed to fulfill (or partially fulfill) this requirement.
- * Material terms will, of course, vary from contest to contest. According to the FCC’s station-conducted contest regulations, material terms generally include, but are not limited to, the following:
 - ✓ How to enter or participate;
 - ✓ Eligibility restrictions;
 - ✓ Entry deadline dates;
 - ✓ Whether prizes can be won;
 - ✓ The odds of winning;
 - ✓ The extent, nature, and value of prizes;
 - ✓ The basis for valuation of prizes (e.g., approximate retail value);
 - ✓ Time and means of selection of winners; and
 - ✓ Tie-breaking procedures, if any.

- * Stations should pay close attention to the terms and conditions imposed by prize sponsors. Tickets for many sporting events, for instance, are subject to limitations and restrictions printed on the tickets themselves—including restrictions governing the use of tickets as prizes in a promotion, sweepstakes, or contest. Should a station, without working out an arrangement with an event promoter, choose to use tickets containing such a restriction as a prize, the station faces the possibility of legal action by the event promoter and the possibility of facing the embarrassment and negative publicity from having to retract the ticket offer and substitute a different prize. A prize substitution may cause a winner to complain to the FCC, and the FCC has fined stations in connection with some prize substitutions.
- * Stations may wish to reserve the right to substitute a prize and should disclose the specific circumstances under which prize substitution may become necessary. Stations should be very careful about substituting prizes—the FCC has sometimes viewed a station’s prize substitution as the failure to conduct the contest substantially as announced.
- * Educate station staff—receptionists, webmasters, on-air talent, programming, promotions, and marketing staff, and anyone else who has responsibilities that may relate to contests and promotions—about the importance of adhering to the FCC’s contest rules and each contest’s official rules.
- * If something goes awry during the contest, contact your communications counsel immediately for advice on how best to address the problems.

In addition to the FCC’s station-conducted contest rules, state laws also govern contests, promotions, and sweepstakes. Consultation with local counsel on the specifics of applicable state law is strongly encouraged to ensure compliance with all such regulations. These laws and regulations may subject a station to civil and criminal liability, and it cannot be overemphasized that stations should consult with counsel during the development stage of a contest, sweepstakes, or promotion—i.e., before the contest, sweepstakes, or promotion begins—to minimize the risks associated with these activities.

* * * * *

PETITION ASKS FCC TO AMEND “CONTEST RULE” TO ALLOW CONTEST INFORMATION DISCLOSURE ON STATION WEBSITES

One of the most vexing issues for broadcast stations who conduct promotional contests—especially radio stations who don’t have the benefit of visual graphics—is the FCC’s regulation that requires stations to disclose on-air all “material terms” of station-conducted contests. In fact, in January 2012, the FCC fined a radio broadcaster more than \$20,000 for having failed to disclose all material terms on the air, and the FCC disagreed with the broadcaster that disclosure of material terms on a station website was sufficient. (The FCC had previously, in other cases, also found that website disclosure by itself was inadequate and that the station-conducted contest rule required on-air disclosure for all station contests mentioned or conducted on the air.)

Not long after the FCC issued its hefty fine in January, a broadcast group filed a petition with the FCC seeking to change the FCC’s station-conducted contest rule. In late November, the FCC put the petition on Public Notice and announced that it will accept comments on the petition until December 20, 2012. The petition asks the FCC to change its rule so that radio and television stations would be permitted to disclose information regarding contests either: (a) by broadcasting announcements on the station (the current rule); or (b) in written form on a website. The petition requests that the rule be amended to allow stations to provide contest information by email, facsimile, mail, or in person upon request. The proposed changes to the rule would provide flexibility for broadcasters and simplify compliance not only by making dissemination of complete contest information easier for stations but also by making contest information more accessible to the public. The petition astutely argues that the public has become accustomed to accessing information through station websites and it makes sense for the public to expect to obtain contest information through this medium.

For broadcasters that do not have dedicated websites, the petition asks the Commission to allow contest information to be posted to the website of their state broadcasters association as the Commission has proposed in other circumstances.

Although nearly a year has passed since the petition was filed, it is encouraging that the Commission is now seeking comment. If the proposed rule changes gain any traction at the FCC, then stations could, in the future, have the flexibility to handle their required material terms disclosures over the Internet. It remains to be seen whether the FCC will initiate a formal rulemaking regarding the proposed changes. In the meantime, however, comments supporting the petition are due December 20, 2012.

We will keep you apprised of significant developments related to this proceeding.

* * * * *

If you should have any questions concerning the information discussed in this memorandum, please contact your communications counsel or any of the undersigned.

BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.

Wade H. Hargrove
Mark J. Prak
Marcus W. Trathen
David Kushner
Coe W. Ramsey
Charles E. Coble
Charles F. Marshall
Stephen Hartzell
J. Benjamin Davis
Julia C. Ambrose
Elizabeth E. Spainhour
Eric M. David
Mary F. Peña
Dorrian H. Horsey
Laura S. Chipman

* * * * *

This Legal Review should in no way be construed as legal advice or a legal opinion on any specific set of facts or circumstances. Therefore, you should consult with legal counsel concerning any specific set of facts or circumstances.

* * * * *

© 2012 Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P.