

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

In the Matter of)	MB Docket No. 16-357
)	
Entercom License, LLC)	Facility ID No. 65483
Applications for Renewal of License for Station)	File Nos. BRH-20050728AUU and
KDND(FM), Sacramento, California		BRH-20130730ANM

**HEARING DESIGNATION ORDER
AND NOTICE OF OPPORTUNITY FOR HEARING**

Adopted: October 26, 2016

Released: October 27, 2016

By the Commission:

I. INTRODUCTION

1. The Commission has before it the above-captioned applications (“Applications”) for the renewal of the license for FM Station KDND, Sacramento, California (“Station KDND”), filed by Entercom License, LLC (“Entercom”) on July 28, 2005 and July 30, 2013.¹ Also before the Commission are the following pleadings: (1) a petition to deny the 2013 Application filed by Media Action Center and Sue Wilson (“Wilson”) (collectively, “MAC”) on October 31, 2013 (“MAC Petition”);² (2) a petition to deny the 2005 Application filed by Irene M. Stolz (“Irene Stolz”) on November 1, 2005 (“2005 Stolz Petition”)³; (3) a petition to deny the 2013 Application filed by Edward R. Stolz II (“Stolz” or “Edward Stolz”) on November 1, 2013, which, for the reasons discussed below, we consider as an informal objection (“2013 Stolz Objection”); and (4) an informal objection to the 2013 Application filed by Roger D. Smith (“Smith”) on October 22, 2013 (“Smith Objection”).⁴

¹ The original applicant was Entercom Sacramento License, LLC, a wholly-owned subsidiary of Entercom Communications Corp. (“Entercom Corp.”). On September 26, 2013, the Commission granted a *pro forma* application for consent to assign the Station license to Entercom Kansas City License, LLC, another Entercom Corp. subsidiary, as part of the merger of these two entities. See File No. BALH-20130918AFN. The surviving entity, renamed Entercom License, LLC, amended File No. BRH-20130730ANM (“2013 Application”) to substitute itself as the licensee. Although Entercom License, LLC did not amend File No. BRH-20050728AUU (“2005 Application”) with a similar substitution, we recognize it as the licensee of KDND for the purposes of both Applications. In this Order, we use “Entercom” to refer to the licensee of the Station, Entercom Sacramento License, LLC, or Entercom License, LLC. Because there is no dispute that Station KDND employees were acting as agents of Entercom in the course of their employment, we may specify individual employees where appropriate or simply refer to “Entercom.” See *William A. Strange et al. v. Entercom Sacramento LLC et al.*, Superior Court of California, County of Sacramento (“Court”) (Dept. 44), Case No. 07AS00377 (“Trial” or “*Strange v. Entercom*”), Trial Transcript (In Limine Motions Aug. 31, 2009) at 32:3-6.

² On December 2, 2013, Entercom filed an opposition to the MAC Petition (“MAC Opposition”). On December 20, 2013, MAC filed a reply to the MAC Opposition (“MAC Reply”).

³ Edward Stolz was substituted as petitioner in his capacity as the executor for the estate of his mother, the late Irene Stolz. On December 1, 2005, Entercom filed an opposition to the 2005 Stolz Petition (“2005 Opposition”), to which Stolz replied on December 21, 2005 (“2005 Reply”).

⁴ On November 27, 2013, Entercom filed an opposition to the 2013 Stolz Objection (“Stolz Opposition”). On December 23, 2013, Stolz filed a reply to the Stolz Opposition (“Stolz Reply”). On January 3, 2014, Entercom filed

(continued....)

2. Information now before the Commission raises serious questions as to whether Entercom operated Station KDND in the public interest during the most recent license term.⁵ As discussed below, the record suggests that Entercom formulated, promoted, conducted and aired over the station an inherently dangerous contest in which one listener-contestant died of water intoxication and many others suffered serious physical distress. This information could lead to the conclusion that Entercom failed to serve the public interest with the Station during the previous license term, warranting denial of the above-captioned renewal applications. In this Hearing Designation Order and Notice of Opportunity for Hearing, we commence a hearing proceeding before the Administrative Law Judge to determine ultimately whether Entercom's license for Station KDND should be renewed.

3. As discussed more fully below, on the morning of Friday, January 12, 2007, Entercom's Station KDND held a contest called "Hold Your Wee for a Wii" ("Contest") broadcast live on its 5:30-10:00 a.m.⁶ Morning Rave Show ("Show"), in which the contestant who was able to drink water at regular intervals for the longest time without urinating or vomiting won a Nintendo Wii video game console. During the week of the Contest, Station KDND solicited contestants by having listeners call in and, to qualify, describe the worst Christmas present they had received.⁷ During these segments, the Show hosts announced eleven times that the contestants would be drinking water every fifteen minutes (giving the quantity once as "eight ounces" and once as "an eight-ounce or 16-ounce glass of water") and that "the last person standing without going wee wins the Nintendo Wii."⁸ These pre-Contest announcements did not mention any risks associated with the Contest in general or water intoxication (hyponatremia) specifically.⁹

(Continued from previous page)

a supplemental response to the Stolz Reply ("Supplemental Response"). On January 15, 2014, Stolz filed an opposition to the Supplemental Response ("Opposition to Supplemental Response").

⁵ In addition to the pleadings from MAC, Irene Stolz, Stoltz, and Smith, as discussed, *infra*, paras. 11-20 the Enforcement Bureau investigated Entercom. See Letter from Benigno E. Bartolome, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, to John C. Donlevie, Executive Vice President and General Counsel, Entercom Sacramento License, LLC (File No. EB-07-IH-3992) (EB Jan. 31, 2007) ("LOI"). Entercom submitted its response to the LOI on March 2, 2007, which it supplemented on March 5, 20, 30, and April 4, 2007. See Letter from Brian M. Madden, Esq., Leventhal Senter & Lerman, PLLC, counsel for Entercom Sacramento License, LLC, to Benigno E. Bartolome, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau (Mar. 2, 2007) ("LOI Response"). On March 2 and in its March 5, 2007 supplement to its LOI Response, it requested that certain portions of its LOI Response, as supplemented, "be held in confidence and not made available for public inspection." Noting the then-pending criminal investigation of the Contest being conducted by the Sacramento County Sheriff's Office, and the likelihood of related civil litigation, it requested that the materials "be kept confidential for as long as the civil or criminal litigation remains pending or threatened with respect to the Contest." On March 30, Entercom filed "Errata" to its March 2 request. By its April 4 filing, it advised that the Office of the District Attorney of Sacramento had announced that it had decided not to file criminal charges against Entercom or any of its employees. As noted in paragraph 10, below, the civil litigation has also been resolved. These developments render moot its confidentiality request.

⁶ See LOI Response at 4.

⁷ LOI Response at 5.

⁸ LOI Response, Exh. H, Contest Advertisement Transcripts at 6, 20, 40, 14, 44, 45, 47, 57, 76, 93, 95. In so doing, the Show hosts touted the desirability of the Contest prize ("Wii, that would be awesome... And I'm not a big gamer, but that sounds like it would be fun.") *Id.* at 9. At the time, the Wii was difficult to get, being in extremely high demand. As discussed *infra*, para. 10, the family of one of the contestants filed a wrongful death civil action against Entercom and Entercom Corp. in California state court in the proceeding referred to in footnote 1 *supra*. References to the transcript from that Trial are referred to herein as "Trial Transcript." See Trial Transcript at 1090 (Baghaei Testimony).

⁹ Hyponatremia is a sodium imbalance in the blood that, if acute, can lead to brain damage, coma, or death. Mayo Clinic, *Hyponatremia*, <http://www.mayoclinic.org/diseases-conditions/hyponatremia/basics/definition/con-20031445> *et seq.* Dr. George Alan Kaysen, a medical expert, testified at the Trial that the pressure that

(continued...)

4. As discussed below, upon their arrival at Station KDND for the “Hold Your Wee for a Wii” contest, the contestants were told by Entercom staff that they would be drinking eight-ounce bottles of water every ten minutes rather than at the fifteen minute intervals previously announced on the Show.¹⁰ The contestants were also told that, not only would they would be disqualified for urinating, but also for leaving the Station kitchen area in which the Contest was to be conducted, vomiting, failing to finish a bottle, or eating.¹¹ They were not informed of the potential danger of water intoxication.¹² All 18 contestants were instructed to sign the release form provided by the Station KDND, which contained a generic waiver of liability.¹³ It did not mention any specific risk, including hyponatremia. No medical personnel were present.¹⁴

5. The contestants consumed their first water at about 6:20 a.m.¹⁵ Just before 8 a.m.,¹⁶ one of the Show hosts announced that the water quantity was going up, and contestants began drinking 16.9-ounce bottles of water every 10 minutes,¹⁷ commencing at about 8:15 a.m.¹⁸ At about 9:15 a.m.,¹⁹ after consuming (according to Entercom) approximately nine 8-ounce bottles and eight 16.9-ounce bottles, Jennifer Lea Strange (“Ms. Strange”) and Lucy Davidson were the only contestants left.²⁰ Station KDND offered the two remaining contestants tickets to a Justin Timberlake concert as a second prize, if one would withdraw, making the other the Contest winner. Both remaining contestants initially refused the offer.

6. As discussed more fully below, as Ms. Strange continued to drink water, she complained of a headache and lightheadedness, and exhibited disorientation, all of which could have been signs of illness from drinking too much water.²¹ When Entercom staff again offered her the concert tickets if she

(Continued from previous page) _____

hyponatremia causes in the brain leads to confusion, disorientation, impaired judgment, and ultimately, risk of death. Trial Transcript at 2225-26, 2229.

¹⁰ Trial Transcript at 1545-46 (Williams Testimony).

¹¹ Trial Transcript at 1776-77, 1825 (Davidson Testimony).

¹² Trial Transcript at 1775 (Davidson Testimony), 1597 (Ochoa Testimony), 1468-69 (Ybarra Testimony).

¹³ LOI Response, Exh. E (“Release For All Claims Including Personal Injury”).

¹⁴ LOI Response at 7.

¹⁵ LOI Response at 5.

¹⁶ LOI Response at 5.

¹⁷ LOI Response, Exh. B, Contest Transcript II at 24 (“Contest Transcript II”); Trial Transcript at 1025 (Inzerillo Testimony) (“From my knowledge, it was going too slow and they ran out of small bottles, so they decided to get bigger ones to move along the contest because they were worried it was going to go beyond the four-hour show.”); Sweet Deposition at 266 (“We were getting bigger bottles because we were afraid that the contest was going to go on all day.”; February 2, 2008, Deposition of Entercom promotions associate Jessica Venegas at 102 (“I went into the studio to talk to whoever was in there, and it was [Show hosts] Trish and Lukas. And Lukas goes, ‘Let’s switch to the bigger bottles, so that way the contest can get wrapped up.’...That’s how we ended up going to the bigger bottles.”). Throughout the Contest broadcast, the Show hosts expressed concern about how long the Contest would last. *See, e.g.*, Contest Transcript I at 44, 66, 95; Contest Transcript II at 28, 48, 50. After the switch to the 16.9 ounce bottles was announced, Cox predicted that, with the “big bottles...[w]e’ll start seeing them drop like flies here in a second. I love it.” Contest Transcript II at 64. When the Contest had ended, Show host Sweet stated, “I can’t believe we finished before the show ended...I didn’t think we would.” Contest Transcript II at 93.

¹⁸ LOI Response at 6.

¹⁹ LOI Response at 6.

²⁰ LOI Response at 5-6.

²¹ Trial Transcript at 2244 (Kaysen Testimony).

would withdraw from the Contest, facing yet another 16.9 ounce bottle of water,²² Ms. Strange accepted the offer. After Ms. Strange accepted the tickets, the Show hosts brought Ms. Strange and Lucy Davidson, the Contest winner, to the broadcast booth, not yet allowing them to use the restroom. Shortly thereafter, and despite being unsteady on her feet, Ms. Strange claimed her second-place prize, left the station, and drove herself home. Later that day, she slipped into a coma and died. Autopsy results indicated she died of water intoxication. Water intoxication is a potentially fatal disturbance in brain functions that results from the over-consumption of water. Ms. Strange was 28 years old, leaving a husband and three children.

7. Based on the totality of the evidence, there are substantial and material questions of fact as to whether Entercom: (i) designed and conducted a contest that was inherently dangerous; (ii) increased the danger to the contestants by changing the announced Contest terms; (iii) was aware of the potential dangers of the Contest and water intoxication; (iv) failed to protect the contestants from the potential dangers of the Contest; (v) failed to warn the contestants of the Contest's potential dangers; (vi) prioritized entertainment value over the welfare of the contestants; and (vii) failed to conduct adequate training and exercise appropriate supervision of Station KDND employees and the Contest to ensure the safety of the contestants.

8. Section 309(k)(1) of the Communications Act of 1934, as amended (the "Act"), requires the Commission to determine, in the case of each application filed with it to which Section 308 applies, whether the "public interest, convenience, and necessity" will be served by the granting of such application.²³ "[I]f the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience and convenience would be served by the granting thereof, it shall grant the application."²⁴ If "a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding [that the station has served, *inter alia*, the public interest] it shall formally designate the application for hearing."²⁵ If the Commission determines, after notice and opportunity for a hearing, that a licensee has failed to meet the requirements for renewal specified in Section 309(k)(1) and that no mitigating factors justify the imposition of lesser sanctions, the Commission shall issue an order denying the renewal application.²⁶ Here, before the Commission can make the requisite finding under Section 309(e) of the Act, there are substantial and material facts that must be determined as to whether, in the face of a contest which endangered the health of its listener-participants, caused many of them significant personal suffering, and resulted in the death of Ms. Strange, Entercom served the public interest during the license term at issue. Consistent with our obligations under Section 309(e) of the Act, therefore, we hereby designate the 2005 and 2013 Applications for administrative hearing.²⁷ At hearing, Entercom

²² Contest Transcript II at 88.

²³ 47 U.S.C. § 309(k)(1)(A).

²⁴ 47 U.S.C. § 309(a).

²⁵ 47 U.S.C. § 309(e).

²⁶ 47 U.S.C. § 309(k)(3).

²⁷ The Contest and related events at issue herein occurred after Entercom filed its 2005 Application, but before it filed its 2013 Application. Although the most recently issued license for the Station bore an expiration date of December 1, 2005, by operation of Section 307(c)(3) of the Act, 47 U.S.C. 307(c)(3), with the continued pendency of the 2005 Application, the license term continued, and the Station's next license term will not commence until the grant of its last pending renewal application. When the Commission makes its public interest determination on a broadcast license renewal application, it considers the licensee's performance since the beginning of its most recent license term. Thus, because the operative events here occurred during the most recent license term, consideration of those matters is relevant to our public interest determination involving both Applications. See *RKO General, Inc.*, 670 F. 2d 215 (D.C. Cir.1981), *cert. denied*, 456 U.S. 927 (1982); *Fox Television Stations, Inc.*, Memorandum Opinion and Order, 29 FCC Rcd 9564 (MB 2014), n.40 and precedent cited therein, *app. for review pending*.

may, *inter alia*, rebut facts officially noticed, introduce relevant facts not admitted at the Trial or withheld from its LOI Response,²⁸ raise any mitigating factors and remedial actions taken, and present instances of meritorious programming or other public services.²⁹

II. BACKGROUND

A. Previous Investigation

9. The Contest and Ms. Strange's death were brought to the Commission's attention by numerous complaints from listeners and one from Ms. Strange's family (her surviving husband and three children).³⁰ After the Strange Complaint was filed with the Commission on January 22, 2007, as discussed in note 5 above, the Commission's Enforcement Bureau initiated an investigation into Entercom's conduct in the Contest, issuing the LOI on January 31, 2007.³¹ Also as noted earlier, Entercom submitted its response to the LOI on March 2, 2007, as supplemented on March 5, 20 and 30 and April 4, 2007.³²

10. Ms. Strange's family also pursued a wrongful death civil action against Entercom and Entercom Corp. in California state court which was fully litigated before a jury.³³ At Trial, Entercom stipulated that Ms. Strange's death was caused by water intoxication. At the Trial's conclusion in October 2009, the jury unanimously found that Entercom had been negligent in its conduct during the Contest, and that such negligence was a substantial factor in causing Ms. Strange's death.³⁴ The jury also found that Ms. Strange herself had not been contributorily negligent and that Entercom Corp. had not been negligent.³⁵ The jury awarded the Strange family approximately \$16.5 million dollars. Following the verdict, Ms. Strange's family and Entercom entered into a settlement agreement in "full satisfaction" of the Judgment based on the family's acceptance of "payment or performance other than specified in the judgment."³⁶ The Commission takes official notice of the transcript of the Trial ("Trial Transcript"), as well as the available pleadings and exhibits in that proceeding, and Court orders.³⁷ Ms. Strange's family subsequently withdrew its complaint to the Commission.³⁸

²⁸ In its LOI Response, Entercom limited the information that it was providing to "non-privileged information available to it at this time, taking into account the pending proceedings in California." LOI Response at 1-3.

²⁹ See, e.g., *Action Radio, Inc.*, Decision, 51 FCC 2d 803 (1975) (finding that although licensee did not have appropriate policies in place and failed to adequately supervise employees who conducted a lottery contest, a licensee's record of meritorious programming warranted short-term renewal rather than non-renewal).

³⁰ See Letter from Roger A. Dreyer, Esq. to Chairman Kevin J. Martin, Federal Communications Commission (Jan. 22, 2007) ("Strange Complaint").

³¹ See *supra* note 5.

³² See *supra* note 5.

³³ See *supra* note 1.

³⁴ See *Strange v. Entercom*, Judgment on Verdict (Oct. 29, 2009) ("Judgment") at 2.

³⁵ Judgment at 2-3.

³⁶ See *Strange v. Entercom*, Full Acknowledgment of Satisfaction of Judgment (Feb. 8, 2010).

³⁷ At the Trial, the presiding judge permitted counsel to enter into the record the videotaped deposition testimony of various Entercom Corp. officers and employees and former Entercom employees whom the defendants did not call as Trial witnesses. In so ruling, he instructed the jury "to give it the same weight as if the witness had testified here at trial." Trial Transcript at 1737. References herein to such testimony will provide the Trial Transcript page at which the deposition was played for the jury, followed, as appropriate, by the pertinent page(s) from the deposition transcript admitted into evidence. Where a deposition is quoted that was submitted with a pleading, that pleading will be cited, along with the relevant pages from the deposition transcript.

³⁸ See Letter from Roger A. Dreyer, Esq. to P. Michele Ellison, Chief, Enforcement Bureau, Federal Communications Commission (Nov. 9, 2009).

B. Related Pleadings

11. *MAC Petition.* On October 31, 2013, Media Action Center and Sue Wilson (“Wilson”) (collectively, “MAC”) filed a petition to deny the 2013 Application. MAC’s primary objection to the renewal of the Station KDND license is based on the Contest and events surrounding it, as discussed herein. MAC characterizes the Contest as a “stupid radio stunt designed to raise the ratings and revenues” of the Station.³⁹ It alleges that the Station staff “clearly knew” that a person could die from drinking too much water, yet never informed the contestants of that fact.⁴⁰ Rather, MAC states, Entercom and its employees demonstrated a “callous and wanton disregard for the safety and health of the people involved” both during and after the Contest, pointing out that the Trial jury found Entercom liable for the death of Jennifer Strange.⁴¹ MAC also alleges that Entercom violated the Commission’s rule regarding broadcast contests, which requires broadcast licensees to “fully and accurately disclose the material terms” of any contest they conduct and to “conduct the contest substantially as announced or advertised.”⁴² It maintains that Entercom violated the Rule by failing to broadcast the Contest terms, by never advising the contestants of those terms, and by not following the terms that had been allegedly drafted but were never so communicated. In this regard, it alleges that, mid-Contest, the Station doubled the amount of water to be consumed because the morning show hosts were “worried the contest would not be over by the end of their program.”⁴³ Furthermore, according to MAC, Entercom’s corporate structure “favored ratings over [listener] safety... to have a thrill factor to boost ratings, as is a hallmark of Entercom programming.”⁴⁴ The Contest, MAC claims, was part of a “pattern of abuse” by Entercom that included other dangerous stunts on the Show, complaints of prizes not received, and a notice of apparent liability (“NAL”) for the broadcast of indecent material on Entercom Station KRXQ(FM), Sacramento, California.⁴⁵ MAC also refers to a payola investigation that led to a settlement in 2006 between Entercom parent Entercom Corp. and the New York Attorney General’s office, as well as various alleged public file violations.⁴⁶ MAC notes that the Commission had not yet acted on the 2005 Application and suggests that if it had, “Jennifer Strange would be alive today.”⁴⁷ In conclusion, MAC urges that the Applications be designated for a hearing to determine whether Entercom has the basic character qualifications to remain a Commission licensee.⁴⁸

12. In its MAC Opposition, Entercom contends that the MAC Petition should be dismissed because Wilson’s attendance at the Trial does not satisfy the Commission’s personal knowledge requirement of parties filing petitions to deny.⁴⁹ Entercom also claims that the Petition improperly asks the Commission to relitigate issues that were fully and finally resolved in the Trial.⁵⁰ The Contest and its consequences, according to Entercom, should not have “FCC repercussions” but rather should be left to

³⁹ MAC Petition at 2.

⁴⁰ MAC Petition at 2-3.

⁴¹ MAC Petition at 3, 7, 10.

⁴² 47 C.F.R. § 73.1216 (“Contest Rule”); MAC Petition at 12-14.

⁴³ MAC Petition at 13.

⁴⁴ MAC Petition at 11.

⁴⁵ MAC Petition at 14-15. MAC also refers to NALs issued to other Entercom Corp. subsidiaries.

⁴⁶ MAC Petition at 16-17. Therein, MAC notes a decreasing number of public comments in the Station’s public file and concludes that more recent comments may not have been filed.

⁴⁷ MAC Petition at 17.

⁴⁸ MAC Petition at 19.

⁴⁹ MAC Opposition at 4.

⁵⁰ MAC Opposition at 4.

the adjudication of “local decisionmakers.”⁵¹ In the same vein, Entercom argues that “the Commission has made clear that it is not in the business of policing contest safety,” citing the 2007 *Neidhardt* letter decision, in which the Media Bureau (the “Bureau”) renewed a station’s license despite objections that it had held a contest that potentially exposed participants to ammonia.⁵² In its LOI Response, Entercom cites a 1992 Bureau order, *Zapis*, in which the Bureau renewed a station’s license despite allegations that it had conducted “disorderly” contests that drew larger-than-expected crowds, causing property damage, personal injuries, and traffic disruption.⁵³

13. In response to the allegations regarding its character qualifications, Entercom maintains that adjudicated civil negligence is not a category of “non-FCC behavior of concern” that is taken into account when assessing an applicant’s character qualifications.⁵⁴ To the extent that Entercom’s conduct could be considered FCC-related, Entercom contends, “nothing in the findings of the Sacramento County District Attorney or the Sacramento County Superior Court impugn [its] basic qualifications to hold a broadcast license.”⁵⁵ A “technical” rule violation by itself, according to Entercom, does not typically raise basic qualifications concerns.⁵⁶ In support of this contention, Entercom cites various precedent in which the Bureau has granted broadcast renewals despite public file and contest rule violations.⁵⁷ Entercom responds to MAC’s claim that it “recklessly endanger[ed] the lives of the public it has been licensed to serve” by pointing out that the jury found it guilty of negligence, not recklessness, and that it was not charged with criminal negligence or involuntary manslaughter.⁵⁸ Moreover, Entercom points out that, at the Trial, licensee parent Entercom Corp. was not found negligent by the jury. According to Entercom, “the matter ended there.”⁵⁹ Regarding the alleged incompleteness of the Station’s public file, Entercom claims that MAC’s allegations are unsupported and that it is unaware of any public correspondence that should have been, but was not, placed in the public file.⁶⁰ Entercom also contends that allegations about Entercom-controlled stations other than KDND are precluded from Commission consideration here.⁶¹

14. *MAC Reply.* In the MAC Reply, MAC reiterates its previous arguments, adding that adjudicated facts may form the basis for a rule violation without “relitigating” the Trial.⁶²

⁵¹ MAC Opposition at 5.

⁵² MAC Opposition at 7-8 (citing *Seth A. Neidhardt*, Letter, 22 FCC Rcd 14042 (MB 2007) (“*Neidhardt*”).

⁵³ See LOI Response at 3 (citing *Zapis Communications Corp.*, Memorandum Opinion and Order, 7 FCC Rcd 3888 (MB 1992) (“*Zapis*”).

⁵⁴ MAC Opposition at 6 (citing *Policy Regarding Character Qualifications in Broadcast Licensees*, Report, Order, and Policy Statement, 102 FCC 2d 1179 (1986)) (subsequent history omitted) (“*1986 Character Qualifications Policy Statement*”).

⁵⁵ MAC Opposition at 5-6. Entercom also maintains that no officer, director or employee of corporate parent Entercom Corp. was aware of the Contest until it was over.

⁵⁶ MAC Opposition at 7.

⁵⁷ MAC Opposition at 8.

⁵⁸ MAC Opposition at 5.

⁵⁹ MAC Opposition at 5.

⁶⁰ MAC Opposition at 8-9.

⁶¹ MAC Opposition at 9; 47 U.S.C. § 309(k).

⁶² MAC Reply at 1-2.

15. *Stolz Pleadings*. Irene M. Stolz filed a petition to deny the 2005 Application on November 1, 2005 (“2005 Stolz Petition”).⁶³ Edward Stolz filed the 2013 Stolz Objection which, for the reasons discussed below, we consider as an informal objection. The 2013 Stolz Objection incorporates by reference arguments made in the pre-Contest 2005 Stolz Petition, which is provided as Exhibit B to the 2013 filing.⁶⁴ Thus, by incorporating his late mother’s 2005 filing, Stolz requests in his 2013 Objection that the Commission should designate issues against Entercom inquiring into the matters that she raised in her 2005 submission, none of which refer to the operation of the Station or the Contest.⁶⁵

16. In the Stolz Opposition, Entercom argues that Edward Stolz lacks standing to file either the 2005 or 2013 Petitions, citing to a 2012 letter decision in which the Bureau found that he lacked standing to oppose the renewals of other Entercom Sacramento stations.⁶⁶ Entercom contends that Stolz’s claims that he “own[s] a residence” in Sacramento and that “[w]hen [he is] at said residence, [he] listens to Broadcast Station KBZC” are insufficient to establish standing to oppose the renewal of Station KDND.⁶⁷ On the merits, Entercom maintains that the 2013 Stolz Objection merely recycles claims from the 2005 Stolz Petition, which have been repeatedly rejected by the Bureau in other contexts or are otherwise barred from consideration.⁶⁸ Specifically, Entercom argues that the Commission has already considered and rejected Irene Stolz’s allegation that Entercom exceeded the multiple ownership limit in the Sacramento market.⁶⁹ Entercom further observes that the only indecency-related citation against an Entercom Sacramento station is the NAL concerning Station KRXQ(FM), which cannot be used against

⁶³ As discussed in note 3 *supra*, Edward Stolz was substituted as petitioner in his capacity as the executor for the estate of his mother, the late Irene Stolz. On December 1, 2005, Entercom filed an opposition to the 2005 Stolz Petition (“2005 Opposition”), to which Stolz replied on December 21, 2005 (“2005 Reply”).

⁶⁴ 2013 Stolz Objection at 3, Exh. B. In the 2005 Stolz Petition (at 8), Irene Stolz claimed that Entercom and other Entercom Corp. subsidiaries had engaged in serious violations of the Act and Commission’s rules that, when taken together, constituted a pattern of abuse. Specifically, at pages 9-12, she referred to the NAL issued to Entercom for broadcasting indecent material on Station KRXQ(FM), as well as similar NALs issued to other Entercom Corp. subsidiaries. She also suggested (at 12-13) that Entercom Corp. “may be the target of a criminal prosecution” for payola in New York state. Stolz argued, at page 8, that violations by Entercom Corp., other Entercom Corp. subsidiaries, or other Entercom stations should be taken into account when considering the renewal of Station KDND. The 2013 Stolz Objection, at pages 5-6, appears to also incorporate arguments also made eight years earlier by Stolz’s Royce International Broadcasting Company (“Royce”) in a September 20, 2005, application for review of a petition for reconsideration of the August 22, 2005, grant of an assignment application for Entercom to acquire a station in the Sacramento market (File No. BALH-20021120ACE) (“Royce Application for Review”). In the Royce Application for Review, Royce contended that Entercom failed to comply with the multiple ownership limits in the Sacramento market when it acquired Station KUDL(FM) (formerly KWOD and KBZC), Sacramento, California, in 2003.

⁶⁵ 2013 Stolz Objection at 4. In the 2005 Opposition, Entercom objected that: (1) Irene Stolz lacked standing as a petitioner and lacked personal knowledge of the facts alleged in violation of 47 U.S.C. § 309(d)(1); (2) the 2005 Stolz Petition impermissibly raised matters concerning stations other than those up for renewal; (3) the one claim directly relating to the relevant stations, an indecency claim, was contested and in any case was not disqualifying; and (4) the multiple ownership issue raised by Irene Stolz had already been twice argued and rejected by the Bureau. In her December 21, 2005, Reply to the 2005 Opposition, Irene Stolz reiterated her earlier arguments.

⁶⁶ Stolz Opposition at 3 (citing *Mr. Edward R. Stolz II, et al.*, Letter, Ref. No. 1800B3-MM (MB 2012) (“2012 Letter Decision”) at 4 (finding that Stolz “fail[ed] to prove he lives within the broadcast contour of any of the listed [Entercom] stations,” and was at most a “periodic listener”).

⁶⁷ Stolz Opposition at 4.

⁶⁸ See, e.g., 2012 Letter Decision (granting renewals and denying 2005 Stolz Petition with respect to Entercom Sacramento Stations KCTC(AM) and KKDO(FM)).

⁶⁹ Stolz Opposition at 8 (citing *Andrew S. Kersting, Esq.*, Letter, Ref. 1800B3-BSH (MB rel. May 14, 200), *recon. denied*, *Royce International Broadcasting Co.*, Letter, 20 FCC Rcd 13720 (MB 2005), *rev. denied*, *Royce International Broadcasting Company, Assignor*, Memorandum Opinion and Order, 30 FCC Rcd 10556 (2015)).

Entercom under Section 504(c) of the Act.⁷⁰ Furthermore, to the extent that Stolz raises issues concerning Entercom stations other than KDND, Entercom notes that the Act limits the matters considered during a license renewal proceeding to the licensee's actions with respect to the particular station being evaluated for renewal.⁷¹ Finally, Entercom argues that the payola investigation was terminated by a 2007 consent decree between the Commission and Entercom Corp. and is therefore also prohibited from consideration in connection with the Applications.⁷² Neither the indecency allegations nor payola investigation, Entercom states, have been found by the Commission to give rise to a substantial and material question of fact that Entercom Corp. or any of its licensee subsidiaries lacks the requisite character qualifications to be a Commission licensee.⁷³

17. In his Reply, Stolz argues that, to establish standing, a petitioner need only show that he owns "a residence [*i.e.*, a house]" in the relevant station's service area, which need not be "his primary residence" or even his "domicile."⁷⁴ Stolz also objects that Entercom failed to serve the MAC Opposition on Stolz or the Stolz Opposition on MAC, in violation of the *ex parte* rules.⁷⁵ On the merits, Stolz adds that a hearing is necessary because the MAC Petition raises "substantial and material questions that cannot be resolved on the pleadings" whether Entercom's actions during the Contest call into question its character qualifications.⁷⁶ The fact that a prosecutor decided not to press criminal charges against Entercom is not dispositive in a renewal analysis, according to Stolz, in part because criminal charges carry a higher "evidentiary standard."⁷⁷

18. In the Supplemental Response, Entercom acknowledges its "inadvertent oversight" in not serving copies of the Oppositions on all parties challenging the 2013 Application.⁷⁸ It also notes, however, that the Commission issued a public notice of the filing of the objections, that they were available on the Commission's website, and that no party was disadvantaged by its "harmless omission."⁷⁹ Entercom maintains that Stolz impermissibly raised a new argument in his Reply by referring to the arguments presented in the MAC Petition, in violation of Section 1.45(c) of the Rules.⁸⁰

⁷⁰ Stolz Opposition at 6 (citing 47 U.S.C. § 504(c) (prohibiting the Commission from using the issuance of an NAL to the prejudice of the person to whom the NAL was issued unless a forfeiture was actually paid or a court has issued a final order that a forfeiture must be paid).

⁷¹ Stolz Opposition at 9; 47 U.S.C. § 309(k) ("the Commission shall grant the application if it finds, *with respect to that station*, during the preceding term of its license ... there have been no serious violations by the licensee of this chapter or the rules and regulations of the Commission....") (emphasis added).

⁷² Stolz Opposition at 7 (citing *Mr. Edward R. Stolz II, Executor*, Letter, 23 FCC Rcd 3695, 3702 (MB 2008) ("2008 Renewal Letter") ("Stolz's payola allegations are barred from consideration in connection with the [renewal] Applications"); *Entercom Communications Corp.*, Order, 22 FCC Rcd 7910 (2007) ("Consent Decree Order").

⁷³ Stolz Opposition at 5-7 (citing *Bruce G. Danziger*, Letter, 22 FCC Rcd 16644, 16645 n.4 (MB 2007) (granting assignment application to Entercom subsidiary over similar objections by Stolz); *2008 Renewal Letter*, 23 FCC Rcd at 3701 (granting 30 renewal applications filed by Entercom Corp. subsidiaries over similar objections by Stolz); *Consent Decree Order*, 22 FCC Rcd at 7121 ("[N]othing in the record before us creates a substantial and material question of fact in regard to these matters as to whether Entercom and its direct or indirect subsidiaries that hold FCC authorizations possess the basic qualifications, including character qualifications, to hold or obtain any FCC licenses or authorizations.")).

⁷⁴ Stolz Reply at 3.

⁷⁵ Stolz Reply at 2-3.

⁷⁶ Stolz Reply at 3-4.

⁷⁷ Stolz Reply at 3-4.

⁷⁸ Supplemental Response at 2.

⁷⁹ Supplemental Response at 2-3.

⁸⁰ Supplemental Response at 2-3; 47 C.F.R. § 1.45(c).

19. In his Opposition to the Supplemental Response, Stolz contends that Section 1.45(c) of the Rules permits a party to reply to a matter raised in any opposition, not just its own.⁸¹ In this case, according to Stolz, he properly commented on an issue raised in the MAC Petition.

20. *Smith Objection.* In the Smith Objection to the 2013 Application, a brief statement that he captions as an informal objection, Smith argues that Entercom has not fulfilled the public interest obligation necessary to continue to operate Station KDND due to its “reckless, on-air stunt” resulting in Ms. Strange’s death, and contends that its license should therefore not be renewed.⁸²

III. DISCUSSION

A. Applicable Legal Standard for Broadcast License Renewal

21. In evaluating an application for broadcast license renewal, the Commission's decision is governed by Section 309(k) of the Act. That Section provides that if, upon consideration of the application and pleadings, we find that, with respect to the station for which license renewal is sought, during its previous license term: (1) the station has served the public interest, convenience, and necessity; (2) there have been no serious violations of the Act or Rules; and (3) there have been no other violations which, taken together, constitute a pattern of abuse, we are to grant the renewal application.⁸³ If, however, the licensee fails to meet that standard, we may deny the application—after notice and opportunity for a hearing under Section 309(e) of the Act⁸⁴—or grant the application “on terms and conditions that are appropriate, including a renewal for a term less than the maximum otherwise permitted.”⁸⁵ For the following reasons, based on that statutory analysis, we designate the 2005 and 2013 Applications for hearing.

B. Procedural Issues

1. Standing

22. Under Section 309(d) of the Act,⁸⁶ a party has standing to file a petition to deny if grant of the petitioned application would result in, or be reasonably likely to result in, some injury of a direct, tangible or substantial nature.⁸⁷ In the broadcast regulatory context, standing is generally obtained by a petitioner in one of three ways: (1) as a competitor in the market suffering signal interference; (2) as a competitor in the market suffering economic harm; or (3) as a resident of the station's service area or regular listener of the station.⁸⁸ A claim of standing must be supported by affidavit or a declaration.⁸⁹

⁸¹ Opposition to Supplemental Response at 2-3.

⁸² Smith Objection at 1.

⁸³ See 47 U.S.C. § 309(k)(1).

⁸⁴ See 47 U.S.C. § 309(e).

⁸⁵ 47 U.S.C. §§ 309(k)(2)-(3).

⁸⁶ See 47 U.S.C. § 309(d)(1).

⁸⁷ See, e.g., *Pinelands, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 6058, 6063 (1992); *Telesis Corp.*, Memorandum Opinion and Order, 68 FCC 2d 696 (1978).

⁸⁸ See *Chapin Enterprises, LLC*, Memorandum Opinion and Order, 29 FCC Rcd 4250 (MB 2014); *CHET-5 Broadcasting, L.P.*, Memorandum Opinion and Order, 14 FCC Rcd 13041, 13042 (1999) (“*CHET-5 Broadcasting*”) (“[W]e will accord party-in-interest status to a petitioner who demonstrates either residence in the station's service area or that the petitioner listens to or views the station regularly, and that such listening or viewing is not the result of transient contacts with the station”); *Office of Communications of the United Church of Christ v. FCC*, 359 F.2d 994, 1000-1006 (D.C. Cir. 1966) (“*United Church of Christ*”) (expanding standing from traditional categories of electrical interference or economic injury to station listeners).

⁸⁹ 47 U.S.C. § 309(d)(1); 47 C.F.R. § 1.16 (allowing unsworn declaration under penalty of perjury in lieu of a sworn affidavit in certain circumstances).

While an organization may establish standing to represent the interests of local listeners or viewers, it must provide an affidavit or declaration of one or more individuals entitled to standing indicating that the group represents local residents and that the petition is filed on their behalf.⁹⁰

23. *Irene and Edward Stolz Standing.* In her 2005 Stolz Petition, Irene Stolz attested that she lived within the service area of all six Entercom Sacramento stations, including KDND.⁹¹ Therefore, we affirm that she had standing to file her Petition, and we have allowed that pleading to survive her death and be prosecuted by the executor of her estate.⁹² However, Edward Stolz fails to establish standing with respect to his 2013 Stolz Objection because he has not demonstrated either that he resides within KDND's primary service area or that he is a regular listener of the Station. Rather, he alleges only that he "owns a residence" within the primary service area of a different Entercom-owned station, KBZC(FM), Sacramento, California, and listens to KBZC "when at said residence."⁹³ Over decades of applying the listener standing test, the Commission has used the terms "residence," "resident," and "resides" interchangeably to refer to where a person lives.⁹⁴ This residency has served as a proxy for listenership for standing purposes.⁹⁵ Here, Stolz fails to allege that he is a resident of the Station's service area, only that he owns a "residence"—*i.e.*, a house—in the area. Property ownership without residency is not a reliable indicator of radio listenership, and, in fact, Stolz does not allege that he is a regular listener of the Station. Moreover, Stolz's Declaration is unsigned as required by Section 1.16 of the Rules.⁹⁶ For these reasons, we find that Stolz has failed to demonstrate that he has the requisite standing to file a petition to deny the 2013 Application on his own behalf. We will nonetheless consider the 2013 Stolz Objection as an informal objection pursuant to Section 73.3587 of the Rules.⁹⁷

24. *MAC/Wilson Standing.* Wilson demonstrates standing to file a petition to deny the 2013 Application because she certifies in her Declaration filed with the MAC Petition that she regularly listens to Station KDND.⁹⁸ Therefore, MAC also has organizational standing in this proceeding because it brings the Petition on behalf of its members, which include an individual with standing—namely, MAC Director Wilson.⁹⁹

⁹⁰ *Petition for Rulemaking to Establish Standards for Determining the Standing of a Party to Petition to Deny a Broadcast Application*, Memorandum Opinion and Order, 82 FCC 2d 89, 99 (1980) ("*Petition to Deny Standing Order*").

⁹¹ 2005 Stolz Petition at 2. Specifically, Irene Stolz stated that she was a resident of the city of Sacramento, which is entirely encompassed by the service contour of Station KDND.

⁹² *See, e.g., 2008 Renewal Letter* at 2, n.1; *see also* Ann. Cal. Code, § 377.20(a) ("Except as otherwise provided by statute, a cause of action for or against a person is not lost by reason of the person's death, but survives subject to the applicable limitations period."). We clarify that for our purposes here, an executor continuing an existing cause of action is not required to re-establish standing in his or her own right.

⁹³ 2013 Stolz Objection at 2, Exh. A.

⁹⁴ *See, e.g., Petition to Deny Standing Order*, 82 FCC 2d at 98 ("Any individual may qualify as a party in interest if he alleges that he is a listener or viewer of the station in question or that he *resides* within the station's service area.") (emphasis added); *CHET-5 Broadcasting*, 14 FCC Rcd at 13042 ("the standard set forth in *Maumee Valley* was intended to vindicate the principle that a broadcaster's responsibility is to serve the needs of *residents* within its service area.") (emphasis added).

⁹⁵ *Petition to Deny Standing Order*, 82 FCC 2d at 98 ("It is reasonable to presume that a local resident who petitions to deny a broadcast application is a listener or viewer of the station.").

⁹⁶ 47 C.F.R. § 1.16.

⁹⁷ 47 C.F.R. § 73.3587.

⁹⁸ MAC Petition at 1, 21.

⁹⁹ MAC Petition at 1.

2. Other Issues

25. *Ex Parte Allegations.* In his Reply, Stolz argues that Entercom failed to serve the MAC Opposition on Stolz or the Stolz Opposition on MAC, in violation of the *ex parte* rules.¹⁰⁰ The *ex parte* rules require service on all parties of presentations addressing the merits or outcome of restricted proceedings, such as this one.¹⁰¹ Accordingly, in failing to serve its Oppositions on both Stolz and MAC, Entercom violated Section 1.1208 of the Commission's rules (the "Rules"). However, we note that, because Entercom filed its Oppositions electronically, they were publicly available. Furthermore, Stolz did in fact obtain a copy of the MAC Opposition, as evidenced by his discussion of it in his Reply, which we consider herein. Under these circumstances, since Stolz was not prejudiced by Entercom's error, we take no action against Entercom for this violation. However, we reject Entercom's contention that its failure to serve the Oppositions was excused by the distinct issues raised in each pleading. As discussed below, parties may respond to issues raised by other parties. Therefore, we caution Entercom, an experienced broadcast licensee, to familiarize itself and comply with the *ex parte* requirements in the future.

26. *Contest Issue First Raised in Reply.* Section 1.45(c) of the Rules states that a reply is "limited to matters raised in the *oppositions*."¹⁰² Here, the issue of the Contest was raised by Entercom in the MAC Opposition. Therefore, it was appropriate for the Stolz Reply to include a discussion of the Contest.¹⁰³ At any rate, since those allegations were also initially and timely made by MAC, we would consider them in this Order even if they were not referenced in the Stolz Reply.

27. *Evidentiary Issues.* A petition to deny must contain specific allegations of fact, supported by affidavits from individuals with personal knowledge of the facts at issue, except for those facts of which official notice may be taken.¹⁰⁴ In this case, the evidence on record before us includes not only information provided directly by Entercom, but also the Trial Transcript, sworn depositions and declarations, exhibits admitted into evidence in the Trial, and Court rulings. It is well established that the Commission may take official notice of such materials, and we do so here.¹⁰⁵ Therefore, since we can take official notice of these materials, we need not consider whether the petitioning and objecting parties lacked personal knowledge of the facts otherwise alleged or improperly relied on the news media coverage of the events at issue.

28. *Allegations Unrelated to the Contest.* At the outset, regarding MAC's claim concerning the completeness of the KDND public inspection file, we find that MAC does not set forth facts sufficient to raise a substantial and material question of fact whether Entercom violated our public file requirements.¹⁰⁶ We find MAC's contention that it is "highly unlikely a radio station which once received an average of one comment a week from the public suddenly received none"¹⁰⁷ to be circumstantial and

¹⁰⁰ Stolz Reply at 2-3.

¹⁰¹ See 47 C.F.R. §§ 1.1208; 1.1202(b)(1) (an *ex parte* presentation includes a written one that "is not served on the parties to the proceeding").

¹⁰² 47 C.F.R. § 1.45(c) (emphasis added).

¹⁰³ See *Northstar Wireless LLC*, Memorandum Opinion and Order, 30 FCC Rcd 8887, ¶46 (2015).

¹⁰⁴ 47 U.S.C. § 309(d)(1).

¹⁰⁵ See, e.g., *Malin Christian Church, Inc.*, Letter, 25 FCC Rcd 915, 916 nn.4, 6 (MB 2010) (taking official notice of court judgment and associated testimony and letter from Bureau of Land Management to licensee); *Ms. Sandra Soho*, Letter, 24 FCC Rcd 13826, 13826-27, n.2 (MB 2009) (taking official notice of a court judgment and associated testimony); *Hicks Broadcasting of Indiana, LLC*, Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing, 13 FCC Rcd 10662 (1998) (relying partly on deposition testimony from a civil case as the evidentiary foundation for a hearing designation order).

¹⁰⁶ See 47 C.F.R. § 73.3526.

¹⁰⁷ MAC Petition at 17.

speculative, and we accordingly reject it.¹⁰⁸ Instead, we rely on Entercom's representation that it is "unaware of any public correspondence that should have been, but was not, placed in the Station's public inspection file."¹⁰⁹ We also agree with Entercom that any claims based on its participation in payola activities are barred from consideration by the terms of the *Consent Decree Order*. The arguments regarding indecency NALs issued to other Entercom stations are not germane to our consideration here because they do not concern KDND. As stated above, for renewal purposes, Section 309(k)(1) limits the scope of our review to the station for which license renewal is being considered. For this reason, to the extent that the MAC Petition raises these issues, we deny it. Finally, the issue raised by Irene and, later, by Edward Stolz of whether Entercom's 2003 purchase of Station KUDL(FM) (previously KBZC and KWOD) violated the multiple ownership rules in the Sacramento market has already been conclusively resolved by the Commission and is therefore moot.¹¹⁰ For these reasons, we find that Irene Stolz, in the 2005 Stolz Petition, failed to raise a substantial and material question of fact that grant of the 2005 Application would be *prima facie* inconsistent with Section 309(k) of the Act.¹¹¹ Accordingly, we deny the 2005 Stolz Petition and those portions of the 2013 Stolz Objection that derive from it.

29. *Jurisdiction.* Turning to the Contest, we reject Entercom's contention that it and the events surrounding it are *per se* outside the Commission's jurisdiction due to the Commission's 1985 elimination of its enforcement of the "disruptive contest" aspect of the Contest Rule. Although, in the *1985 Contest Policy Statement*, the Commission eliminated various specific policies governing contest safety, it did so not by abdicating authority over contest safety but by "relying upon the basic obligation of licensees to operate their stations *in the public interest*, and leaving the mechanism of compliance to licensees."¹¹² The Commission therefore did not exempt from regulatory scrutiny licensee-conducted contests that harm or disrupt the public safety. Rather, it merely eliminated unnecessarily prescriptive regulations, leaving to licensees the method of complying with their statutory obligation to operate in the public interest when conducting a contest.¹¹³ If a licensee's conduct leads the Commission to find that the licensee had not met its obligation to operate its station in the public interest—*i.e.*, its implementation of self-regulating measures failed to produce such compliance—then the Commission is well within its jurisdiction in taking appropriate action against the licensee. Therefore, while in both the *Neidhardt* and *Zapis* cases cited by Entercom the Bureau exercised its discretion to leave certain public safety matters to the local officials in the first instance rather than designate a station renewal application for hearing, the *1985 Contest Policy Statement* makes clear that the core statutory obligation that a licensee must operate its station in the public interest remains.¹¹⁴ This responsibility, in fact, is the statutory backstop that

¹⁰⁸ See *Stone v. FCC*, 466 F. 2d 316, 322 (D.C. Cir. 1972) (holding that a petition to deny must contain more than an "allegation of ultimate, conclusionary facts or more general allegations on information and belief, supported by general affidavits . . .")

¹⁰⁹ MAC Opposition at 9.

¹¹⁰ *Royce International Broadcasting Company, Assignor*, Memorandum Opinion and Order, 30 FCC Rcd 10556 (2015), *recon. denied*, Memorandum Opinion and Order, FCC 16-76 (rel. Jun. 23, 2016).

¹¹¹ 47 U.S.C. § 309(k).

¹¹² *Unnecessary Broadcast Regulation*, Policy Statement and Order, FCC 85-24, 57 RR 2d 939, 942 (emphasis added) ("*1985 Contest Policy Statement*").

¹¹³ See *1985 Contest Policy Statement*, 57 RR 2d at 942 ("[I]t is confusing to continue to single out certain violations for special emphasis which already are proscribed by more general policies. To do so gives the inference that certain misdeeds are more reprehensible than others, or that actions not specifically prohibited are permissible.") (citation omitted).

¹¹⁴ To the extent that the Bureau's decisions in either *Neidhardt* or *Zapis* could be interpreted as holding that the *1985 Contest Policy Statement* limited the Commission's statutory jurisdiction over public interest matters to *per se* exclude contest safety issues, we disavow that reasoning, for the reasons stated herein. It is well established that an agency is not bound by the actions of its staff if the agency has not endorsed those actions. See, e.g., *Comcast Corp.* (continued...)

enabled the Commission to eliminate its specific rules for so-called “disruptive contests.”¹¹⁵ Therefore, the Commission may consider the events surrounding the Contest (and any other matters relevant to the public interest issue) as part of its Section 309(k)(1) analysis.

30. *Contest Rule Violations.* As noted *supra*, MAC argues that Entercom violated the Commission’s Contest Rule,¹¹⁶ in that Entercom failed to broadcast the material terms of the Contest or otherwise advise the contestants of such terms and to follow the Contest terms that Entercom Promotions Director Robin Pechota had purportedly drafted but were never so communicated to listeners.¹¹⁷ At the outset, we note that at the time of the Contest in 2007, the Commission had not received the requisite approval of the Contest Rule as an information collection from the Office of Management and Budget, pursuant to the Paperwork Reduction Act.¹¹⁸ Although we have since received such approval, we cannot penalize Entercom for any violation of the Rule in 2007.¹¹⁹ Accordingly, we will not designate for hearing the issue of whether Entercom violated the Contest Rule and, if it did so, whether such a violation constituted a “serious violation” calling for the denial of renewal of the license for the Station pursuant to Section 309(k)(1)(B) of the Act.¹²⁰ Instead, and consistent with the Commission’s observation in the *1985 Contest Policy Statement*, noted above, that we consider the conduct of safe contests by a licensee as part of the licensee’s core statutory obligation to operate in the public interest, and for the reasons which follow, we designate for hearing the overarching issue of whether the Station “served the public interest, convenience and necessity” during the pertinent license term in light of Entercom’s development and execution of the Contest and the events that followed.¹²¹ Although the Contest Rule has been on the books for 40 years and provided guidance to stations regarding the Commission’s expectations of how stations should conduct contests, even if there had never been a contest rule, we believe that Entercom’s apparent conduct of the Contest so imperiled members of the Station’s community and constituted such a misuse of its licensed facilities that it would call into question whether the Station served the public interest, warranting renewal of its license.¹²² In eliminating “regulatory underbrush” rules and policies—

(Continued from previous page) _____

v. FCC, 526 F.3d 763, 769 (D.C. Cir. 2008) (“[U]nchallenged staff decisions are not Commission precedent, and agency actions contrary to those decisions cannot be deemed arbitrary and capricious.”).

¹¹⁵ *1986 Character Qualifications Policy Statement* at 9425 (“... [T]he end result of our action is to delete overly burdensome restrictions upon program content and to *return to basic statutory principles*, relying upon the basic obligation of licensees to operate their stations in the public interest . . .”) (emphasis added).

¹¹⁶ 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.”). Note 1(b) to Section 73.1216 defines “material terms” in the radio contest context: “[m]aterial terms include those factors which *define the operation* of the contest and *which affect participation therein*.” 47 C.F.R. § 73.1216, Note 1(b) (emphasis added). These provisions of the Rule existed in 2007, when the events in question took place.

¹¹⁷ MAC Petition at 12-14.

¹¹⁸ See 44 U.S.C. § 3512.

¹¹⁹ See *Saco River Cellular, Inc. v. FCC*, 133 F.3d 25 (D.C. Cir. 1998).

¹²⁰ *1985 Contest Policy Statement*, 57 RR 2d at 942.

¹²¹ 47 U.S.C. § 309(k)(1)(A).

¹²² See 47 U.S.C. § 309(k)(1)(A). As noted above, MAC in its Petition and Edward Stolz in his Reply each request that the Commission designate a character issue against Entercom. We decline to do so. As noted above, in determining whether a broadcast renewal application should be granted, Section 309(k) of the Act limits the factors that we may consider to: (1) whether the station has served the public interest, convenience and necessity; (2) whether there have been serious violations by the licensee of the Act, or the Commission’s Rules; and (3) whether there have been other violations of the Act or the Rules by the licensee which, taken together, would constitute a pattern of abuse. The limited scope of our review of renewal applications under the Act does not include

(continued....)

rules and policies deemed unnecessarily prescriptive or restrictive—in the 1980’s, the Commission emphasized that it would rely “upon the basic obligation of licensees to operate their stations in the public interest” to protect the public from abuses. It is that fundamental public interest obligation which informs our analysis of the Station’s 2005 and 2013 Applications for renewal for hearing under Section 309(k)(1)(A).

31. *Evidentiary Value of Jury Verdict and Settlement.* In this case, we find that the pleadings before us, the LOI Response, as supplemented, and the other record evidence, including the Entry of Judgment upon a jury verdict and the facts therein established in the Trial by sworn testimony, to be a sufficient basis to designate the public interest question for a hearing.¹²³ The fact that Entercom and the Strange family entered into a post-Judgment settlement agreement does not in any way moot the serious public interest questions raised by the Judgment and the facts established at the Trial.¹²⁴ A renewal applicant found liable for negligence in the operation of its broadcast station, particularly when that conduct results in a loss of life, cannot evade Commission scrutiny of its misconduct simply because it has chosen to settle its civil liability to the family of the victim of its actions rather than appeal or abide by an adverse judgment.¹²⁵ As detailed herein, not only have MAC and Stolz raised specific allegations of fact sufficient to show that a grant of the Applications would be *prima facie* inconsistent with the public interest, but we also find that “on the basis of the application, the pleadings filed, or other matters which [we] may officially notice... a substantial and material question of fact is presented” on this issue.¹²⁶ In sum, we find that the likelihood of establishing MAC’s and Stolz’s allegations is sufficient to warrant further hearing on the issue of whether Entercom operated the Station responsibly and in the public interest during the pertinent license term.¹²⁷

32. In this respect, we note that while many of the facts and findings established during the Trial may also be relevant to the Commission’s renewal analysis, the ultimate issue to be decided under the Commission’s statutory mandate (whether Entercom has served the public interest in operating the Station) is not the same as that litigated in the civil trial (whether Entercom was negligent in the matter of Jennifer Strange’s death and accordingly liable for damages to her surviving family). To take just one example, Entercom’s failure to have warned other contestants of Ms. Strange’s death, while determined at Trial to be irrelevant to the issue of whether Entercom’s negligence resulted in her passing, may be germane to the Commission’s public interest inquiry, which is concerned with Entercom’s service to the public.¹²⁸ Therefore, the hearing specified by Sections 309(e) and (k)(3) may consider not only the facts established at the Trial, but also develop additional relevant facts. As appropriate, the hearing will thus

(Continued from previous page) _____

consideration of questions of character that do not involve serious violations of the Act or Rules. Although, pursuant to Section 312 of the Act, 47 U.S.C. § 312, we could initiate a proceeding to consider the possible revocation of Entercom’s license for the Station based on whether it has the requisite character to continue as licensee, we do not believe that such action is necessary under the circumstances. As noted herein, the record before us provides an ample basis to designate the 2005 and 2013 Applications for renewal for hearing.

¹²³ See *WTAR Radio-TV Corp.*, Memorandum Opinion and Order, 55 FCC 2d 891, 895-96 (1975) (“*WTAR*”) (designating a renewal application for hearing based on a jury verdict that was subsequently settled).

¹²⁴ See *WTAR*, 55 FCC 2d at 895-96.

¹²⁵ See *WTAR*, 55 FCC 2d at 895.

¹²⁶ See 47 U.S.C. § 309(d)(2); *Citizens for Jazz on WRVR v. FCC*, 775 F.2d 392, 397 (D.C.Cir.1985); *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1562 (D.C.Cir.1988).

¹²⁷ See *WTAR*, 55 FCC 2d at 895.

¹²⁸ See Trial Transcript at 953 (Entercom’s attorney stating that, in determining at Trial the question of negligence in the death of Jennifer Strange, “[i]t is irrelevant what happened after the contest is over.”).

provide Entercom with an opportunity to challenge those portions of the record that have been officially noticed, the evidence adduced at hearing, and that provided by the petitioner and objectors.¹²⁹

C. Licensee Duty to Operate in the Public Interest

33. As a Commission licensee, Entercom had a duty to Ms. Strange and the other 17 contestants of the Contest, each a listener of the Station. All Commission licensees are “granted the free and exclusive use of a limited and valuable part of the public domain...[and, upon accepting] that franchise [licensees are] burdened by enforceable public obligations.”¹³⁰ Broadcasters are considered “public trustees” of a limited and valuable resource, and are thus held to a high standard of conduct in their relationship with the listening public whose needs and interests they are duty-bound to serve.¹³¹ The fact that Entercom used its licensed broadcast facilities to entice its listeners to participate in the Contest that appears to have physically endangered them is a serious matter and must be carefully considered. The Trial jury’s verdict that Entercom negligently caused the death of a member of the Station’s listening audience, appears to be *prima facie* evidence that Entercom’s conduct was contrary to the public interest duty and a breach of Entercom’s core obligations as a public trustee. Entercom’s actions relating to the Contest suggest an active indifference to the contestants’ safety, as evidenced by the negligence verdict and the licensee’s refusal, apparently at the direction of its parent, to warn the other contestants in the wake of Ms. Strange’s death, placing its corporate self-interest over their safety and well-being.

34. In view of the fact that the Contest was conducted and aired over a broadcast facility licensed by this Commission, we believe that the record calls into question whether Entercom has operated the Station in the public interest. Entercom’s status as a public trustee provided the basis for the expectation of Station listeners like Jennifer Strange that they could participate in the Contest without concern for their safety, that Entercom would not promote a contest that endangered their lives. As one contestant testified at the Trial, when she entered the Contest, she trusted the Station and expected that if it was running a contest, that contest would be safe.¹³² As discussed herein, this appears to have not been the case. We are therefore unable to find at this time that Entercom, by its operation of the Station during the license term under review in this proceeding, served the public interest during that license term and met the statutory renewal standard set forth in Section 309(k)(1).

D. Analysis of Relevant Facts Concerning the Contest

1. Entercom Personnel

35. As indicated in paragraph 3 above, the Contest was broadcast live on the Station KDND’s Morning Rave Show (“Show”). The Show was hosted by three on-air hosts: Adam Cox, (or “Lukas,” as he was known on the Show) (“Cox”), Steve Maney (“Maney”), and Patricia Sweet (known as

¹²⁹ Under Section 556(e) of the Administrative Procedure Act and Section 1.203 of the Rules, when a Commission decision rests on official notice of a material fact not appearing in the record, a party is entitled, on timely request, to an opportunity to show the contrary. 5 U.S.C. § 556(e); 47 C.F.R. § 1.203; *see also, e.g., Radio Lake Geneva Corp.*, Decision, 7 FCC Rcd 5586 (Rev. Bd. 1992).

¹³⁰ *Contemporary Media, Inc.*, Decision, 13 FCC Rcd 14437, 14460 (1998) (citing *United Church of Christ*, 359 F.2d at 1003).

¹³¹ *See, e.g., United Church of Christ*, 359 F.2d at 1003 (“... [A] broadcast license is a public trust subject to termination for breach of duty”); *Policy Regarding Character Qualifications in Broadcast Licensing*, Notice of Inquiry, 87 FCC 2d 836, 838 (1981); *WMJX*, 85 FCC 2d at 269, n.81 (noting that even prior to the adoption of Section 73.1216, licensees had the affirmative obligations as public trustees to prevent the broadcast of false, misleading or deceptive contests).

¹³² Trial Transcript at 1690-91 (Sherrod Testimony). Contest winner Lucy Davidson similarly testified, that, based upon that trust, she never thought that the Station would ever put her health at risk. Trial Transcript at 1754-55 (Davidson Testimony).

“Trish” on the Show) (“Sweet”) (collectively, the “Hosts”).¹³³ Each of the Hosts had a distinct on-air persona: Cox was the married, responsible “father figure,” Maney was the “wise ass” or “jerk,” and Sweet was the single, dating female character.¹³⁴ About once a week, the Show would also include, on-air, Peter Inzerillo (“Inzerillo”) (known as “Fester” on the Show), and Matt Carter (“Carter”). Inzerillo was the “gag guy” who would perform outrageous stunts, and Carter was the “play-by-play guy” for off-site activities.¹³⁵

36. Elahe Baghaei (known as “Liz Diaz” on air) (“Baghaei”) was the Show’s producer, and Robin Pechota (“Pechota”) was the Promotions Director for Station KDND, as well as for the other five Sacramento Entercom stations.¹³⁶ Steve Weed (“Weed”) was the KDND Station Manager and Program Director, directly in charge of Pechota and the Hosts.¹³⁷ Weed reported to John Geary (“Geary”), Entercom’s Vice President and Sacramento Market Manager.¹³⁸ Geary oversaw the operation of all six of Entercom’s Sacramento stations, including KDND.¹³⁹ His performance as Market Manager was supervised by Entercom Corp. Regional Vice President Louise Kramer.¹⁴⁰

2. The Inherent Dangers of the Contest

37. There is a substantial and material question of fact as to whether Entercom designed and conducted the Contest in a manner that was potentially dangerous. As the record reflects, the autopsy results indicated that Ms. Strange died from water intoxication.¹⁴¹ Also referred to as hyponatremia, water intoxication is a sodium imbalance in the blood resulting from the over-consumption of water that, if acute, can lead to brain damage, coma, or death.¹⁴² At the Trial, Dr. George Alan Kaysen, a nephrologist specializing in the study and treatment of the kidney, testified that the pressure that hyponatremia causes in the brain leads to confusion, disorientation, impaired judgment, and ultimately, risk of death.¹⁴³ It would appear, therefore, that there is an inherent danger in conducting a contest that, by its terms, requires the participants to consume large amounts of water and, to win, to retain the water in their bodies the longest. As discussed at paragraph 29, *supra*, Commission licensees have an obligation not to conduct contests that harm or disrupt the public safety. Accordingly, we designate for hearing the issue of whether Entercom designed and conducted a contest that was inherently dangerous.

3. The Increased Danger to Participants by Changing the Contest Terms

38. There is also a substantial and material question of fact as to whether Entercom increased the danger to the Contest participants by changing the Contest terms. As indicated above, on the weekday Shows during the week of the Contest, the record reflects that Entercom announced on air that water

¹³³ Trial Transcript at 693 (Maney Testimony).

¹³⁴ Trial Transcript at 693 (Maney Testimony).

¹³⁵ Trial Transcript at 699-702 (Maney Testimony); 919 (Inzerillo Testimony).

¹³⁶ Trial Transcript at 1063 (Baghaei Testimony); 1339-42 (Pechota Testimony).

¹³⁷ Trial Transcript at 1328 (Pechota Testimony); *Defendant Robin Pechota’s Statement of Evidence in Support of Motion for Summary Adjudication* (Jun. 5, 2008) (“Pechota MSA”), Exh. D, Geary Deposition at 278.

¹³⁸ Geary Deposition at 16; LOI Response at 10.

¹³⁹ Geary Deposition at 19; LOI Response at 10.

¹⁴⁰ Trial Transcript at 2057 (Geary Testimony).

¹⁴¹ The parties to the Trial stipulated that the cause of Ms. Strange’s death was acute water intoxication. *See* Trial Transcript at 2213 (Kaysen Testimony).

¹⁴² Mayo Clinic, *Hyponatremia*, <http://www.mayoclinic.org/diseases-conditions/hyponatremia/basics/definition/con-20031445> *et seq.*

¹⁴³ Trial Transcript at 2225-26, 2229.

would be consumed every fifteen minutes during the Contest. During these segments, the Hosts announced eleven times that the contestants would be drinking water every fifteen minutes (giving the quantity once as “eight ounces” and once as “an eight-ounce or 16-ounce glass of water”) and that “the last person standing without going wee wins the Nintendo Wii.”¹⁴⁴ One listener testified at the Trial that, based on the announcements, she understood the Contest to be based on who could hold their urine the longest rather than who could drink “a massive amount of water.”¹⁴⁵ Similarly, Nina Hulst, Jennifer Strange’s mother, testified at the Trial that her daughter had told her that “she was going to drink water and then have to sit around and hold her urine to see who would go the longest without having to go to the bathroom, that was it.”¹⁴⁶

39. The Station’s general contest rules were aired on January 8 at 12:55 a.m.; on January 10 at 3:35 a.m.; and on January 12, at 5:23 a.m..¹⁴⁷ Those rules were generic to all Station contests, rather than specific to the Contest. As such, the General Contest Rules covered matters such as contestant eligibility and the procedure for the distribution of prizes to winners, but not the specific manner in which the Contest was to be conducted and the winner selected. In addition, the Station apparently aired prerecorded announcements promoting the Contest 27 times during the week of the Contest. Those announcements also did not contain the Contest Terms, but only encouraged listeners to tune in to the Show, advising that the Station would be airing the Contest giving away a Nintendo Wii on the morning of January 12 and that listeners should call in to participate.¹⁴⁸

40. On the day of the Contest, just before the Contest began, the Hosts (acting throughout the Contest in the course of their employment for Entercom) increased the frequency with which water would be consumed from every fifteen minutes to every ten minutes.¹⁴⁹ Moreover, about 90 minutes into the Contest, when it appeared in doubt that enough contestants would drop out in time to be able to declare a winner by the Show’s scheduled finish at 10 a.m. and to maximize the entertainment value to listeners by concluding the Contest within the Show’s scheduled time slot, the Hosts more than doubled the volume of the water bottles to be consumed, from the announced and agreed-to 8 ounces to 16.9 ounces each.¹⁵⁰

41. At the Trial, Dr. Kaysen testified that Entercom’s last-minute modifications to the Contest—making contestants drink more water, faster—heightened the risk of death for the contestants,

¹⁴⁴ LOI Response, Exh. H, Contest Advertisement Transcripts at 6, 20, 40, 14, 44, 45, 47, 57, 76, 93, 95. In so doing, the Hosts touted the desirability of the Contest prize (“Wii, that would be awesome... And I’m not a big gamer, but that sounds like it would be fun.”) *Id.* at 9. At the time, the Wii was difficult to get, being in extremely high demand. Trial Transcript at 1090 (Baghaei Testimony).

¹⁴⁵ Trial Transcript at 1223-24 (Dohring Testimony) (“I understood it to be . . . a contest on how long you could actually hold—to hold before—the person who could hold out would win the contest. Not necessarily a massive amount of water, but whoever could hold their bladder the longest was going to win, is what the contest appeared to me to be.”).

¹⁴⁶ Trial Transcript at 1915 (Hulst Testimony).

¹⁴⁷ LOI Response at 8, citing Geary Deposition at para. 6. Entercom provided the General Contest Rules as Exhibit K to its LOI Response.

¹⁴⁸ LOI Response, Exh. J; March 30, 2007 Supplemental LOI Response, Exh. Q.

¹⁴⁹ Contest Transcript I at 26, 42.

¹⁵⁰ The Hosts changed the announced Contest terms in other ways. After announcing during of the week of the Contest that the winning contestant would be the one that was last to urinate, when the Contestants arrived at the Station on January 12, the Station disclosed to them other bodily activities, including vomiting, that would lead to disqualification. Contest Transcript I at 31. Pechota testified that the grounds for disqualification were not discussed at the meeting a week before the Contest and that, had it been, she would have not approved the Contest. Trial Transcript at 1359 (Pechota Testimony). Similarly, she would not have approved Inzerillo’s regurgitating at will before the contestants, to induce them to do the same, because “Well, that’s gross.” Trial Transcript at 1407 (Pechota Testimony).

including the late Jennifer Strange.¹⁵¹ Accordingly, we designate for hearing the issue of whether Entercom increased the danger to the Contest participants by changing the Contest terms.

4. Entercom’s Awareness of the Potential Dangers of the Contest and Water Intoxication

42. There is also a substantial and material question of fact as to whether Entercom was aware of the potential dangers to the contestants associated with the Contest. The record reveals that, prior to and during the running of the Contest, Entercom was apparently aware that water intoxication could cause severe health consequences, and even death.

43. During at least two Shows broadcast before the day of the Contest, the Hosts had discussed the fraternity hazing death of a college student, Matthew Carrington (“Carrington”), in Chico, California, by water intoxication.¹⁵² Specifically, the Hosts joked that dying from drinking water was “dumb” and challenged Inzerillo on the air to drink that much water on air without urinating.¹⁵³ Inzerillo testified at the Trial that they were trying to duplicate what happened in Chico “in a humorous fashion.”¹⁵⁴ After Inzerillo drank about two gallons of water from a flower vase, he experienced physical symptoms including nausea, headache, vision impairment, euphoria and dizziness. When Inzerillo was unable to drink any more water, the Hosts allowed him to stop drinking but pretended to continue, for the benefit of listeners, because they were not yet at the point in the broadcast where callers had predicted he would urinate.¹⁵⁵

44. Indeed, the record reflects that during the Contest broadcast, the Hosts again referred to the Carrington death and the possibility of “water poisoning”:

Sweet: Can’t you get water poisoning and like die?
 Inzerillo: (Inaudible) water.
 Cox: Your body is 98% water, why can’t you take in as much water as you want?
 Sweet: I don’t know.
 Inzerillo: How much [water] can you do, though, because that poor kid in college—
 Cox: I know.
 Sweet: That’s what I was thinking.
 Cox: You know, but he was doing other things.
 Sweet: Maybe we should have researched this before (laughter).¹⁵⁶

45. Thus, it appears not only that the Hosts had previously discussed at least twice on the air the death of Matthew Carrington, by water intoxication, but that Inzerillo had personally experienced, and

¹⁵¹ Trial Transcript at 2242-44 (Kaysen Testimony).

¹⁵² Trial Transcript at 922-24, 979-82 (Inzerillo Testimony).

¹⁵³ Trial Transcript at 922-24, 980-82 (Inzerillo Testimony) (testifying that the Hosts had made “a joke out of the fact that Matt Carrington had died as a consequence of drinking water”), 1221-22 (Dohring Testimony) (“[The Hosts] were making fun of him. They were laughing about how could—you know, how is someone dying drinking a lot of water? How dumb was that, you know, that [Inzerillo] could drink that much water . . . And they were just laughing about, you know, his death.”). These prior broadcast records were not preserved by Entercom, because its audio archiver only had a 30 day capacity and thus overwrote earlier broadcasts. Trial Transcript at 2039 (Geary Testimony). Maney testified that, contrary to Inzerillo’s testimony, he did not recall ever having had this on-air discussion. Trial Transcript at 904 (Maney Testimony).

¹⁵⁴ Trial Transcript at 987 (Inzerillo Testimony) (testifying that he heard the Hosts mention the Carrington incident on air a couple of days before he came in to do the stunt).

¹⁵⁵ Trial Transcript at 1002-1013 (Inzerillo Testimony).

¹⁵⁶ LOI Response, Exh. B, Contest Transcript I at 13 (“Contest Transcript I”).

the Hosts had choreographed and witnessed, symptoms of water intoxication during the broadcast Show stunt in which he drank water from a flower vase.¹⁵⁷

46. Moreover, and perhaps most significantly, the record reflects that the Show’s producer and Hosts received several phone calls from concerned listeners—including medical professionals—during the Contest broadcast before the first bottle was consumed and while the Contest was in progress (one just at the time that they decided to more than double the amount of water contestants had to consume), unambiguously cautioning the Show that the Contest posed serious, even potentially fatal, health risks to the contestants.

47. The first such call came from Kristina Bouyer, a pediatric nurse, who had heard the broadcast and was concerned that the Contest would be dangerous. She called the Station at about 6:15 a.m., before the Contest had begun. She testified at the Trial that she said to the man who answered (Cox or Maney), “I’m a nurse and I am—I am worried about this contest they are holding, that it’s dangerous, and then he interrupted and said, we’ve done this before, and they have signed waivers.” She testified further that he asked no questions and hung up.¹⁵⁸ Another call was received at about 7 a.m.,¹⁵⁹ from another listener, Elizabeth Dohring, who was familiar with the Carrington incident and became concerned that, contrary to her understanding of the Contest from the Show’s descriptions of it earlier that week,¹⁶⁰ the Contest was becoming “more of a water-pushing-drinking contest rather than a hold-your-urine contest.”¹⁶¹ Dohring testified at Trial that “I told [the Hosts] that I was calling because I was really worried about—about that they were having the contestants drink all of this water. And I had told them that I had been trained in advanced first-aid and if you drink that much water, it messes up your body system and it can—it can kill you.”¹⁶² Again, the Hosts laughed off her warning, telling her not to worry because the contestants had all signed waivers.¹⁶³ According to Dohring, after she continued to try to convince them of the potential danger, referring specifically to the Carrington incident, the Hosts hung up on her.¹⁶⁴ Dohring then called back and repeated her warning to Baghaei, who had answered the Station phone, telling Baghaei that at least the contestants should take some salt. Baghaei responded that the contestants had each signed a release and hung up on her.¹⁶⁵

48. At about 8:15 a.m.,¹⁶⁶ the Station received yet another listener call citing the potential danger posed by the Contest, from Eva Brooks, a nurse practitioner. That call was broadcast on the air,¹⁶⁷ during which the Hosts disregarded the caller’s warning and joked about the risk of death:

¹⁵⁷ See *supra*, para. 43.

¹⁵⁸ Trial Transcript at 1196-99 (Bouyer testimony).

¹⁵⁹ Trial Transcript at 1230 (Dohring Testimony).

¹⁶⁰ Trial Transcript at 1223 (Dohring Testimony).

¹⁶¹ Trial Transcript at 1225-26 (Dohring Testimony).

¹⁶² Trial Transcript at 1227 (Dohring Testimony).

¹⁶³ Trial Transcript at 1228 (Dohring Testimony) (“I wanted them to take me seriously. But nothing I said was making them take me seriously.”).

¹⁶⁴ Trial Transcript at 1228 (Dohring Testimony).

¹⁶⁵ Trial Transcript at 1231 (Dohring Testimony). Baghaei testified that she so responded because Maney had instructed her to say that to callers warning about danger. Trial Transcript at 1139 (Baghaei Testimony).

¹⁶⁶ LOI Response at 7.

¹⁶⁷ When Baghaei screened calls, to inform Cox about the nature of each call, she would type in the computer for his reference the subject of the call. For the call from Brooks, she typed in “dangers of water drinking.” Trial Transcript at 1134 (Baghaei Testimony).

Eva: I want to say that, um, that those people that are drinking all that water can get sick and possibly die from water intoxication.

Cox: Yeah, we're aware of that. We're—that's why—

Maney: Yeah, they signed releases, so we're not responsible. It's okay.

Cox: And if they get to the point—

Maney: (Laughing.)

Cox: —where they have to throw up, then they're going to throw up and they're out of the contest before they die. So that's good, right?

Eva: Oh, that's mean.

Maney: (Laughing.)

Eva: I suppose so.

Cox: Yeah. All right. Do you—how come you guys didn't do it?

Sweet: Thanks for looking out, though.

Eva: Because we don't want to die.

Cox: Oh, okay. Let me ask Carter if anybody's died.

Maney: We ain't dying.

Cox: Hey Carter, has anybody—is anybody dying in there?

Carter: We got a guy that's just about to die.
(General laughter.)

Maney: Good. Make sure you sign that release.

Cox: I like that we laugh at that, yeah?¹⁶⁸

After this call was broadcast, it appears that Baghaei stopped putting similar calls from concerned listeners through to the Hosts, although she went into the studio and informed them, off-air, that she was continuing to receive other warning calls.¹⁶⁹ Baghaei testified that she received a total of four to six calls warning about the danger contestants faced from possible water intoxication.¹⁷⁰

49. The record also reflects that during the Contest multiple contestants vomited and suffered other symptoms of water intoxication similar to those experienced by Inzerillo during the previous Chico-related water drinking stunt on the Show.¹⁷¹ When one contestant complained soon after the increase that “[i]t’s just choking down the water, and it’s—it’s just trying to get—I’m hurting so bad right now,” Maney reassured her on the air that: “. . . when it’s time your body will throw it back up if it can’t take anymore.”¹⁷² It appears that during the Contest, Inzerillo and Carter stayed with the contestants in the kitchen area. Inzerillo’s role as “Fester” was to try and get people out of the Contest by getting them to

¹⁶⁸ Contest Transcript II at 41-43. According to Maney’s testimony, these statements were made “in character” as Lukas and that Maney “as a human being” would not have made them. Trial Transcript at 857 (Maney Testimony).

¹⁶⁹ Trial Transcript at 1136-38, 1145-46 (Baghaei Testimony) (testifying that Baghaei stopped transferring warning calls from listeners to Cox because she had been trained not to put through repeated calls on the same topic).

¹⁷⁰ Trial Transcript at 1132-33 (Baghaei Testimony).

¹⁷¹ See *supra*, para. 43; Trial Transcript at 1608 (Ochoa Testimony) (“My bladder was distended to the point to where I couldn’t hold it anymore, I was uncomfortable. It ached.”), 1683 (Campos Testimony) (“[I]t felt like I was really, really dizzy, like I was really drunk, like my head was dizzy, my head was pounding, and it just—you felt really disoriented, and it felt like you were very drunk, and just—I don’t—out of—not able to control the stuff around you.”), 1714, 1719-21 (Sherrod Testimony) (reporting stomach pains, nausea, vomiting, pounding headache, and sense of disorientation), 1660-61 (Ybarra Testimony) (reporting pain from holding urine and nausea), 1800-01 (Davidson Testimony) (“[after the Contest was over]. . . I just felt really weak, my head felt like the worst hangover ever, and it was like my head was in my shoulders, and I just fell to my knees and I was just gagging over the toilet. . . [I felt] horrible, just sick and miserable.”).

¹⁷² LOI Response, Contest Transcript II at 68:5-20.

vomit or urinate.¹⁷³ Toward this end, with the approval of Maney, he self-induced vomiting into a garbage can, ran a hose on the windows, poured out water bottles, and made gagging noises.¹⁷⁴

50. The record also suggests that the Hosts were aware that Ms. Strange was not feeling well after participating in the Contest. There is evidence that after Ms. Strange decided to accept the second-prize Justin Timberlake tickets, the following exchange occurred between her and the Hosts on-air:

Cox: Does Jennifer want to give in now for the Justin Timberlake tickets?
 Carter: I think she may.
 Cox: All right, let's—
 Carter: You want to talk to her?
 Cox: Yeah, put her on.
 Carter: Hang on.
 Ms. Strange: Hello?
 Cox: Jennifer, I heard that it's not, you're not doing too well.
 Ms. Strange: My head hurts.
 Sweet: Ahhhh.
 Ms. Strange: They keep telling me that it's the water, that it's the water, that's it, it will tell my head to hurt and then it will make me puke, but—
 Cox: Who told you that, the intern?
 Ms. Strange: Yeah.
 Sweet: Somebody that wants you to lose.
 Ms. Strange: It kind of, it makes you, it hurts but it makes you feel lightheaded, so I'm not sure if I'm just like—
 Cox: This is what it feels like when you're drowning. There's a lot of water inside you.
 Ms. Strange: Oh, it hurts.¹⁷⁵

51. At this juncture, it appears that the Hosts also observed on air that Ms. Strange's abdomen was distended,¹⁷⁶ and that she could not walk.¹⁷⁷ Maney testified at the Trial that he escorted Ms. Strange out to the lobby after the Contest, and that she said, "I don't think I'm ready to go home yet."¹⁷⁸

52. Accordingly, we designate for hearing the issue of whether Entercom was aware of the dangers associated with the Contest, both before and while the Contest was taking place.

¹⁷³ Trial Transcript at 1016 (Inzerillo Testimony). Inzerillo testified at the Trial that, at the direction of Maney, his role was to create discomfort in the contestants in order to entertain the listening audience. Trial Transcript at 1018-19.

¹⁷⁴ Trial Transcript at 1016-17, 1020 (Inzerillo Testimony), 1301 (Michel Testimony).

¹⁷⁵ Contest Transcript II at 90-91.

¹⁷⁶ Contest Transcript II at 95 (Maney stating, "Oh, she looks sick...Jennifer, you look preg—oh, my gosh, look at her belly. Are you pregnant?") to which Sweet responded, "No, she said it looks like her belly like when she was pregnant. Look, it's totally sticking out."). Carter later commented on-air, "That was funny. I love seeing people in pain and agony." Contest Transcript II at 100.

¹⁷⁷ Contest Transcript II at 95 (Cox asking, "Come on over, Jennifer, you okay? You want to lay down, what do you—," with Sweet interjecting, "She can't even walk" and Cox following up, "You going to pass out right now? Too much water?"). Maney observed, "Oh my gosh, look at that belly," to which Sweet responded, "She's a tiny little thing too. That's so funny." Contest Transcript II at 95. Of another contestant, Maney also commented on air, "She does not sound good, right?" Sweet responded, "I know, she can't even like function." Contest Transcript II at 67-70.

¹⁷⁸ Trial Transcript at 874 (Maney Testimony) ("I told her that she could sit—there's two chairs over here. Sit here as long as you want. Theresa is right here if you need anything. I'm going to go back and sign off the show.").

5. Failure to Protect the Contestants from the Contest's Potential Dangers

53. There is also a substantial and material question of fact as to whether, despite its apparent knowledge before and during the Contest of the dangers of water intoxication, Entercom failed to take appropriate steps, including researching the safety of the Contest or having medical personnel on-site during the Contest, to ensure the safety of the contestants and protect them from the potential dangers of the Contest.

54. At the Trial, Dr. Kaysen testified that during the Contest, Jennifer Strange could “[a]bsolutely” have been saved if she were provided with medical assistance—in fact, at “[a]nytime prior to her having a convulsion or losing consciousness, she could have been saved and restored to essentially normal health.”¹⁷⁹ However, it appears that neither the Hosts nor anyone at the Station arranged for medical treatment, even after contestants began to complain of extreme discomfort. Dr. Kaysen also testified that patients suffering from hyponatremia experience decreased bodily salt concentrations, which cause their organs, including their brains, to expand and eventually cease functioning.¹⁸⁰ To treat this salt imbalance, salt is administered to raise the salt concentration in the patient’s bloodstream.¹⁸¹

55. Because of the lack of qualified medical personnel on site, this relatively simple treatment was not made available to the contestants, with tragic results. Indeed, as discussed in paragraph 47, one caller to the Show, Elizabeth Dohring, had urged that the contestants be provided salt to minimize the ill effects of their water consumption, a suggestion that was laughed off by the Show’s producer, who hung up on her, just as the Hosts had on her initial call to the Station minutes earlier.¹⁸² Accordingly, we designate for hearing the issue of whether Entercom failed to take appropriate steps to ensure the contestants’ safety and to protect them from the dangers of the Contest.

8. Failure to Warn Contestants of the Contest's Potential Dangers

56. There is a substantial and material question of fact as to whether Entercom warned the contestants about the possible dangers associated with the Contest and water intoxication before, during, or after the Contest having learned of Ms. Strange’s death. The record reflects that in the pre-Contest aired announcements, Entercom did not mention any risks associated with the Contest in general or water intoxication (hyponatremia) specifically.¹⁸³ It further appears that, on the morning of the Contest, Entercom did not explain any risks associated with the Contest in general or water intoxication (hyponatremia) specifically to the contestants.

57. Moreover, as indicated above, even after receiving repeated notice of the risk, Entercom employees took no steps to warn the contestants about the Contest’s potential danger. Instead, as discussed above, the record reflects that the Hosts laughingly dismissed the callers’ concerns, responding that each contestant had signed a release. Worse, the Hosts made statements, including some directly to

¹⁷⁹ Trial Transcript at 2174, 2260-62 (Kaysen Testimony).

¹⁸⁰ Trial Transcript at 2187 (Kaysen Testimony); *see also* Trial Transcript at 2716 (Fiore Testimony) (the “vast majority” of people with hyponatremia survive, with appropriate medical treatment).

¹⁸¹ Trial Transcript at 2233 (Kaysen Testimony). Salt is what Elizabeth Dohring had recommended that Entercom provide its contestants during her call to the Show at about 7 a.m. while the Contest was under way and Jennifer Strange was still alive; as noted above, Baghaei failed to take her seriously and hung up on her. *See supra*, para. 47.

¹⁸² In his testimony at the Trial, Geary, who was not present to oversee the conduct of the Contest, called the reaction of the Hosts and Show’s producer, who were under his supervision, “appalling.” Trial Transcript at 2022 (Geary Testimony).

¹⁸³ Hyponatremia is a sodium imbalance in the blood that, if acute, can lead to brain damage, coma, or death. Mayo Clinic, *Hyponatremia*, <http://www.mayoclinic.org/diseases-conditions/hyponatremia/basics/definition/con-20031445> *et seq.* Dr. George Alan Kaysen, a medical expert, testified at the Trial that the pressure that hyponatremia causes in the brain leads to confusion, disorientation, impaired judgment, and ultimately, risk of death. Trial Transcript at 2225-26, 2229.

contestants who had expressed concern to Show staff about the symptoms that they were experiencing, that dismissed or otherwise minimized the risk, such as “when it’s time your body will throw it back up if it can’t take it anymore.”¹⁸⁴ Overall, it appears that the competitive structure of the Contest created by Entercom itself may have encouraged participants to drink large quantities of water by offering a coveted prize for doing so.¹⁸⁵

58. In addition, the record reflects that Entercom failed to warn the contestants of the risks of water intoxication even after learning of Ms. Strange’s death. It appears that, after the Contest, Station Manager Weed learned of Ms. Strange’s passing from her co-worker, who called the Station at about 4 p.m. later that day. The caller, who advised Weed that Ms. Strange had died from “water drinking,” said that she was calling because “she wanted to convey this, and suggest that we might want to call and check on the other contestants who participated that morning.”¹⁸⁶ Despite receiving this information, apparently no Entercom employee called to let them know of her death from water intoxication or to suggest that they consider seeking medical attention.

59. It appears that Weed immediately went to Geary’s office and advised him of the call, including the caller’s suggestion that the Station notify the other contestants to warn them of the possible danger. At the Trial, Weed testified that Geary specifically instructed him not to “call anyone else and talk to them about this” until Geary had “talked to corporate.”¹⁸⁷ It also appears that Geary asked Weed and Pechota (who was also present) “if we had a signed release” and if the contest rules had been vetted through legal.¹⁸⁸ After that, it appears Weed went back to his office to await further instruction from Geary.¹⁸⁹ The record further reflects that Geary sought guidance from Entercom Corp. Executive Vice President, Secretary and General Counsel John C. Donlevie, who then apparently discussed the matter of the Contest with Entercom Corp. directors and management.¹⁹⁰ After Geary spoke with “corporate,” neither he nor Weed made any calls to the Contest contestants or instructed other Station staff to do so. Instead, Geary instructed Weed to “make some phone calls to get referrals for attorneys.”¹⁹¹

60. At the Trial, Geary testified that he “did not personally call the other contestants that evening or thereafter, nor did I instruct any other Entercom Sacramento employees to do so.”¹⁹² Explaining his decision not to call to warn the other contestants, Geary stated, “I had not received any request from any police, medical personnel, or other first responders to call, contact, or warn any other contestants, nor did I receive a request that I provide them with any contact information. I do not myself have any medical training.”¹⁹³ Weed later testified that he didn’t call the other contestants to warn them, notwithstanding the Ms. Strange co-worker’s suggestion to him, because “I was told by my supervisor not to until he had consulted the proper people at corporate.”¹⁹⁴ He stated that “I felt I had some understanding of what [my supervisor’s] responsibility was, and I honored his direction...he had a

¹⁸⁴ See e.g., Contest Transcript I at 14; Contest Transcript II at 68.

¹⁸⁵ According to Maney, “I think the fact that we had the Wii when nobody else had it was, you know, our big selling point.” Trial Transcript at 787 (Maney Testimony).

¹⁸⁶ MAC Petition, Exh. I, Weed Deposition at 254-55.

¹⁸⁷ MAC Petition, Exh. I, Weed Deposition at 257.

¹⁸⁸ MAC Petition, Exh. I, Weed Deposition at 258-59.

¹⁸⁹ MAC Petition, Exh. I, Weed Deposition at 269.

¹⁹⁰ March 20, 2007 Supplemental LOI Response, Declaration of John C. Donlevie at 1.

¹⁹¹ MAC Petition, Exh. I, Weed Deposition at 272.

¹⁹² MSA Geary Declaration at 3.

¹⁹³ MSA Geary Declaration at 3.

¹⁹⁴ MAC Petition, Exh. I, Weed Deposition at 272-273.

responsibility to protect the radio station, and that in a situation like this, he needed to confer with his higher-ups.”¹⁹⁵

61. Considering the repeated warnings to the Station from callers of the potentially dangerous nature of the Contest, the visible distress of many of the contestants during the Contest, and finally the knowledge of Geary and Weed that one of the contestants had died, Entercom’s apparent decision to not warn the other contestants to allow them to seek potentially critical medical treatment is strikingly callous and irresponsible, particularly since the Station had the telephone number of each of the 18 contestants on the waivers that it had demanded each sign before the Contest.¹⁹⁶ Contestant Gina Sherrod testified at the Trial, “For the rest of the day after the contest, I was confused about why I did not feel right physically. A call from the radio station to let me know that another contestant had died and that I might be at some kind of risk would have made me seek immediate medical help. My husband and I have a young daughter and would not have put her at risk of my death or some other injury if someone with knowledge of what was happening had given me a warning, especially someone in authority.”¹⁹⁷ After putting Sherrod and 17 other listeners at risk by inviting them to participate in what had proven to be a dangerous contest, Entercom’s failure to alert the Contest survivors, instead directing its energies to a search for an attorney to extricate itself from the potentially costly legal morass that it had created, suggests priorities antithetical to Entercom’s status as a public trustee. Accordingly, we designate for hearing the issue of whether Entercom warned the Contest contestants about the possible dangers associated with water intoxication.

7. Prioritization of Entertainment Value over the Welfare of Contestants

62. The record before us also suggests that there is a substantial and material question of fact as to whether the unsupervised Hosts ran the Contest to maximize its entertainment value to listeners at the expense of the dignity and well-being of the contestants. According to Pechota, the Show “wanted listeners to hear the discomfort...of those who were motivated to win the Wii...”¹⁹⁸ To engage the audience and get people to listen, producer Baghaei testified, it was necessary to hype and build energy, to create an atmosphere of noise and partying.¹⁹⁹ Thus, Maney, directing the Show staff in the kitchen, fostered an amped-up environment among the contestants that would translate well over the air.²⁰⁰ For example, rounds of water were welcomed with the 18 contestants shouting the word “Wii.”²⁰¹ The Hosts made the contestants crowded and uncomfortable, painting that picture for listeners.²⁰² The Hosts repeatedly described the scene in the deliberately cramped kitchen to listeners as “like a Katrina refugee

¹⁹⁵ MAC Petition, Exh. I, Weed Deposition at 274.

¹⁹⁶ LOI Response, Exh. E.

¹⁹⁷ MAC Petition, Exh. G, Deposition of Gina Sherrod. Contest winner Lucy Davidson similarly testified, “When I filled out the form at the radio station just before the contest started I gave my phone number. If someone from the radio station, especially someone like a manager in charge, had called me after they found out Jennifer Strange had died from consuming too much water, I would have gone to the hospital or an emergency medical clinic immediately. I would not have put myself and my family at risk had I been told that one contestant had already died as a result of participating in this contest.” MAC Petition, Exh. H, Declaration of Lucy Davidson.

¹⁹⁸ Trial Transcript at 1414 (Pechota Testimony).

¹⁹⁹ Trial Transcript at 1078-79 (Baghaei Testimony); 1286 (Michel Testimony) (“They’d get them really loud. That way they can hear them on the radio.”). Ironically, it was this environment, deliberately created by the Hosts of the Show under Geary’s ultimate supervision to appeal to Station listeners, that resulted in the noise about which he became agitated as interfering with the ability of the Entercom advertising sales staff to conduct its business. Trial Transcript 2031-32 at (Geary Testimony).

²⁰⁰ Trial Transcript at 802 (Maney Testimony).

²⁰¹ Contest Transcript I at, *e.g.*, 46, 50.

²⁰² Trial Transcript at 844-45 (Maney Testimony).

camp.”²⁰³ Inzerillo induced himself to vomit near the contestants to get them to also do so.²⁰⁴ He also poured water in a garbage can to simulate the sound of running water to stimulate them to urinate.²⁰⁵ As one contestant testified, “He was heckling pretty much anybody in there, anybody that was sick, he added to it, he became really obnoxious, rude and disrespectful.”²⁰⁶ While this was going on, Show staff photographed the contestants in various states of physical distress, including one who protested being photographed as she was emerging from the bathroom after having relieved herself.²⁰⁷ At the close of the Contest, Sweet announced that these photographs would be available on the Show’s website for its listeners’ entertainment.²⁰⁸

63. This apparently callous attitude toward the contestants continued through the end of the Contest, when Lucy Davidson, the Contest winner, and Ms. Strange were directed to the studio for an on-air interview and publicity photos with the Hosts and for Davidson to sign a release acknowledging her receipt of the Wii prize. In extreme physical pain from their three-hour participation in the Contest, Davidson asked to first be allowed to go to the bathroom, a request that the Hosts denied. She “felt horrible, just sick and miserable.”²⁰⁹ It was only after the Hosts had interviewed Ms. Strange and Davidson on the air, the photos had been taken and the paper signed, were Davidson and the similarly distressed Ms. Strange allowed by Entercom to finally relieve themselves. Afterwards, no one from the Station checked on Davidson as she used the Station bathroom and then walked out to her van.²¹⁰ These facts all tend to show that Entercom staff was willing to foster the discomfort and degradation of the contestants for entertainment value.

64. Accordingly, we designate for hearing the issue of whether Entercom may have prioritized the entertainment value of the Contest over the welfare of the contestants.

8. Failure to Properly Train and Exercise Appropriate Supervision of Station KDND Staff and the Contest to Ensure the Safety of the Contestants

65. There are also further substantial and material questions of fact raised by the record as to whether Entercom failed to adequately train Station KDND staff regarding the procedures for the development and conduct of Station contests generally and to supervise the manner in which Station staff conducted the “Hold Your Wee for a Wii” contest specifically.

66. It appears from the record that the idea for a Station contest in which participants would hold their urine to win a Nintendo Wii was first discussed in late November 2006 at a regular weekly Show staff meeting attended by Maney, Cox, Weed, and Pechota.²¹¹ At the close of that meeting, Pechota deferred any further work related to the Contest, awaiting word from Cox and Maney if and when they

²⁰³ Contest Transcript I at 55, 98.

²⁰⁴ Trial Transcript at 937, 1020 (Inzerillo Testimony).

²⁰⁵ Trial Transcript at 1023 (Inzerillo Testimony).

²⁰⁶ Trial Transcript at 1680 (Campos Testimony).

²⁰⁷ This contestant, Gina Sherrod, testified that, just after she had left the bathroom after dropping out of the Contest, she emerged to find “a girl with a camera, the girl who had been taking pictures all along stopped me and said that they had to take a parting photo, and I was just like, oh you know, I just threw up....And she was like, no, no, no, got to, so I said, okay. Took the picture.” Trial Transcript at 1720-21 (Sherrod Testimony).

²⁰⁸ At the close of the Contest, Sweet announced on-air, “we’re going to have pictures of [the Contest] at The End On Line dot com later, so we can all check that out.” LOI Response, Exh. B, Contest Transcript II at 99.

²⁰⁹ Trial Transcript at 1801 (Davidson Testimony).

²¹⁰ Trial Transcript at 1796-1803 (Davidson Testimony).

²¹¹ Trial Transcript at 1332-33, 1347 (Pechota Testimony); *see also* Trial Transcript at 692 (Maney Testimony).

decided to go forward with such a contest.²¹² On January 5, 2007, Maney, Cox, Weed, and Pechota met again to discuss the matter, and Pechota first learned that the Contest was to be conducted and aired on the Show a week later, on January 12, 2007 Pechota testified at the Trial that Weed then directed her to draft written contest rules setting out the basic parameters discussed at the January 5 meeting, including that Contest participants would drink one 8-ounce bottle of water every 15 minutes.²¹³ The record further reflects that, following the meeting, adapting rules used for a previous Entercom contest as a template, Pechota finished the Contest rules (“Written Contest Terms”) the Tuesday before the Contest.²¹⁴ However, it appears that Pechota did not distribute the Written Contest Terms to other Station KDND staff, including Geary, the Hosts, or Baghaei, who prepared the promotional announcements for the Show that would have disclosed the Contest terms,²¹⁵ nor were they posted on KDND’s website, announced on the Station or made available to listeners to pick up at the Station.²¹⁶

67. By way of further background, the Chief Executive Officer of Entercom Corp., the licensee’s parent, is David Field and, at the time of the events in question, its Executive Vice President, Secretary and General Counsel was John C. Donlevie, both of whom worked out of the parent company’s headquarters in Bala Cynwyd, Pennsylvania, near Philadelphia. At the parent’s legal department, Carmela Masi was one of three full-time and two part-time staff attorneys responding to requests for legal assistance from approximately 100 radio stations throughout the country.²¹⁷ Masi, whose work was supervised by Donlevie, who in turn reported to Field,²¹⁸ worked alone out of Boston, Massachusetts.²¹⁹ At the time of the events at issue, Masi fielded legal inquiries from subsidiary company stations in her assigned markets, which included Sacramento.²²⁰ In 2006, aware of Masi’s previous experience in managing contest compliance for other licensees for whom she had worked, Donlevie delegated to her the responsibility for the company’s contest policies.²²¹ He also assigned her the task of providing training regarding those policies to station employees.²²² “As a reminder of company procedures and policy with regard to contesting,” Masi distributed to the market managers, promotion directors, general managers and sales managers of Entercom Corp.’s subsidiaries (including Geary, Weed and Pechota) her

²¹² Trial Transcript at 1334 (Pechota Testimony). After the meeting, Pechota awaited “[c]onfirmation that they were going to do it; concepts came up all the time that never came to fruition, so until I got to a point or they came to me with we are going to do this, this is what we want to do, you know, it was like I had a lot of things going on, and so I needed to confirm that actually it was going to take place before I proceeded forward with a lot of things.” Trial Transcript at 1341-42 (Pechota Testimony). She testified that, at the time, she “was very busy;” among the other things that required her attention, all of the other Entercom stations whose promotions she handled had contests in the works. Trial Transcript at 1339-43 (Pechota Testimony).

²¹³ Trial Transcript at 1349, 1353, 1368-70 (Pechota Testimony).

²¹⁴ Trial Transcript at 1352 (Pechota Testimony); LOI Response, Exh. L.

²¹⁵ Trial Transcript at 1089-91 (Baghaei Testimony), 1379-80, 91 (Pechota Testimony).

²¹⁶ Trial Transcript at 1379-80, 1396 (Pechota Testimony); LOI Response at 8.

²¹⁷ Masi Deposition at 76, 78, 85, 87.

²¹⁸ Masi Deposition at 80-83.

²¹⁹ Masi Deposition at 78, 85.

²²⁰ Masi Deposition at 18. Masi’s assigned markets in 2007 were Seattle, Sacramento, Boston, Wichita, Gainesville and Milwaukee, comprising about 30 stations. Masi Deposition at 90, 105-111.

²²¹ Masi Deposition at 159-160.

²²² Trial Transcript at 2881-82, playing Masi Deposition.

August 31, 2006, e-mail and Entercom's Contest Guidelines.²²³ Those Guidelines were essentially those distributed to Entercom personnel in 2001 by Masi's predecessor.²²⁴

68. By her e-mail, Masi had directed Station management to send all contest rules to the legal department for review unless the contest in question was "simple" in nature.²²⁵ Thus, at the time that Pechota drafted the Written Contest Terms, Masi had instructed that "rules for all contests other than simple contests (e.g., call-in or random selection contests, such as 9th caller wins a prize) be submitted for review by [Entercom's] in-house counsel."²²⁶ Pechota and Weed testified that, after the January 7 meeting, they concluded that the Contest was a "simple" one and, because of that determination, never sent the Written Contest Terms that Pechota had prepared to the Entercom legal department for review.²²⁷ Pechota explained that, after concluding that the Contest was simple, she decided not to involve Masi: "There was some discussion between myself and Steve Weed. We both felt that it was a simple morning show contest that would fall under the general contest guidelines . . ." At another point in her testimony, she acknowledged that she had "no criteria, really" to decide if a contest was or was not simple and appeared to rely on an intuitive understanding of the word "simple," stating "I mean, I thought of something that [the Show] was doing like this to be pretty simple. . . ."²²⁸ In his deposition, Weed agreed that it was simple contest but explained that in any case such determinations were not made by him but by Pechota, interpreting Masi's guidance.²²⁹ Pechota did not provide Entercom corporate management with the Written Contest Terms until January 14, 2007, two days after the Contest.²³⁰

69. After the fact, Entercom Corp. management was united in denouncing KDND staff for failing to send the Contest rules to Masi for review. CEO Field testified, "[I]t was a contest that tripped the wire, and given the clear rules and requirements of our company that anything but the simplest of contests . . . should have been brought to legal."²³¹ General Counsel Donlevie's assessment was similar: "[the rules for the Contest] should have been sent to corporate."²³² Likewise, in Masi's view, the Contest should have been vetoed at the Station level as dangerous; but if the Station had been unable to conclude, since the Contest was not a simple one, Station management should have forwarded the Contest rules to her for review.²³³

²²³ Masi Deposition at 24, 93. Weed and Pechota also participated in two of Masi's five conference call training sessions with respect to the policies and procedures, doing so on October 3 and 5, 2006, respectively. LOI Response at 10, Declaration of Carmela Masi. Masi's e-mail and the Contest Guidelines that she distributed with it are provided as Exhibit N to the LOI Response.

²²⁴ Geary testified that the 2007 Contest Guidelines were virtually identical to those that he had received in 2001. Trial Transcript at 1978-79 (Geary Testimony).

²²⁵ See *supra*, para. 67; LOI Response, Exh. N.

²²⁶ LOI Response at 9, Exh. N at 2.

²²⁷ Trial Transcript at 1351, 1385 (Pechota Testimony)

²²⁸ Trial Transcript at 1385 (Pechota Testimony). At the Trial, however, Pechota conceded "in hindsight," that the Contest, which had an unusual way of selecting the winner, was not a simple one. Trial Transcript at 1478-79 (Pechota Testimony).

²²⁹ Pechota MSA, Exh. C, Weed Deposition at 204-208.

²³⁰ LOI Response, LOI Geary Declaration at 2.

²³¹ Trial Transcript at 479, playing Field Deposition.

²³² Trial Transcript at 2931, playing Donlevie Deposition.

²³³ Trial Transcript at 2931-32, playing Masi Deposition.

70. Similarly, Entercom did not research or otherwise make an objective determination on whether the Contest complied with its Contest Guidelines.²³⁴ Regarding the decision-making process, Pechota testified that “. . . there was never a concern that it was a contest that was anything more than a morning show contest. They had done a lot of things where they had people in the studio, even done things where people showed up in the morning. We weren’t even aware that they were coming in. So it—you know it never crossed my mind that it was anything that was going to be harmful . . .”²³⁵ She further testified, “not one person ever had a thought that there was a reason for this to be a problem.”²³⁶ She also testified that she also “usually went with a gut feeling” in making decisions on contest safety, in this case drawing on her life experience that you could drink lots of water and not get sick or die.²³⁷ Thus, the record raises questions of whether Entercom increased possible harm to the public by either: (1) erroneously relying on unclear guidance or (2) misinterpreting or disregarding licensee policies.

71. The facts on record indicate certain systemic problems regarding Entercom’s training and contest review and oversight processes. For example, Pechota testified that virtually every time she had consulted with Masi on a Station matter, Masi advised her that she was overwhelmed with inquiries received from other stations. To Pechota, Masi always seemed to be in a hurry, and she testified that others at the Sacramento stations also found it hard to go through legal.²³⁸ Masi’s portfolio included handling inquiries from about 30 stations in six markets on a wide variety of legal matters, which routinely required her to work 60-70 hours per week, often including nights and weekends.²³⁹ When Pechota complained to Geary about her difficulties with Masi, Geary told her to “continue to do the best we could to get what we needed from her.”²⁴⁰ Pechota testified, “I don’t know that that was something he could make happen.”²⁴¹ Masi, in turn, would routinely tell Pechota to just use her best judgment

²³⁴ Trial Transcript at 2903-04, playing Donlevie Deposition; *see also* Trial Transcript at 1514-1518 (Pechota Testimony).

²³⁵ Trial Transcript at 1353 (Pechota Testimony).

²³⁶ Trial Transcript at 1363 (Pechota Testimony).

²³⁷ Trial Transcript at 1373, 1507 (Pechota Testimony). “I was a person who drank quite a bit of water all the time. I had been told by doctors for many years, you need to drink more water . . . So I drank a lot of water throughout the day.” Trial Transcript at 1489 (Pechota Testimony). Pechota testified further that, although contestant safety was a consideration, researching contest risks was not her sole responsibility. “Steve Weed, the [Show], anybody could have, but not one person ever had a thought that this was a reason for there to be a problem.” Trial Transcript at 1363 (Pechota Testimony).

²³⁸ Trial Transcript at 1420-24 (Pechota Testimony).

²³⁹ According to Masi’s testimony, in 2007, she was responsible for handling the legal work for about 30 Entercom stations in six markets, including Sacramento. Masi Deposition at 283-84. In addition to the vetting of contests, Masi was responsible, with regard to those stations and markets, for legal work involving acquisitions, such as of a new station; due diligence; closings and purchase and sale agreements; drafting employment agreements; reviewing, revising and drafting operational agreements for software, copy machines; evaluating content of on-air programs; reviewing contents of syndicated shows; and providing general legal advice on a variety of subjects; advice regarding collections; bankruptcy; tower lease negotiations; drafting studio lease agreements; other agreements with third parties; subcarriers who use station signals; general business and radio specific contract work; obligations under contracts; evaluating employment contract provisions; evaluating ideas for on-air programming; evaluating applicability of different laws, different jurisdictions; and clarifying previously provided legal guidance. She stated that many of these requests for legal assistance were time-sensitive. Masi Deposition at 127-131. With these responsibilities, Masi testified that she was “very busy,” typically working 60-70 hours a week, with her typical day starting at 7:30-8:30 a.m., working until 6 or 6:30 p.m. Masi Deposition at 133-34, 318. After going home and making dinner for her son, she would work a few more hours at home, also working a few hours over the weekend. Masi Deposition at 318.

²⁴⁰ Trial Transcript at 1424 (Pechota Testimony).

²⁴¹ Trial Transcript at 1424-25 (Pechota Testimony).

regarding contests,²⁴² and, as described above, Pechota testified that she accordingly “trusted my gut” in her analysis of the Contest.²⁴³

72. More significantly, Entercom’s contest review and oversight processes resulted in no single individual having clear responsibility for compliance with contest policy, thus allowing each person involved with the Contest to disclaim personal responsibility. For example, although Masi testified that she had prepared the email with the company’s Contest Guidelines and had conducted one-time training sessions on those contest policies for station managers and promotions directors, she specifically denied that part of her job was to ensure compliance with those policies, lacking disciplinary authority over station employees.²⁴⁴ Indeed, Masi conceded that the company had no procedures in place to ensure that the station managers and program directors complied with the Contest Guidelines, and that she had not instructed and trained market managers that they had responsibility to supervise such station staff to ensure compliance.²⁴⁵ Masi indicated that compliance at each Entercom station was the task of the station’s promotions director, as supervised by the station manager, with the market manager having ultimate responsibility.²⁴⁶ Thus, at the Station, she understood that the implementation of the Contest Guidelines would be the responsibility of Pechota, as supervised by Weed, as ultimately supervised by Geary, all of whom received Masi’s August 31, 2006, e-mail and attached Contest Guidelines. Geary, however, did not implement compliance safeguards or supervise Weed and Pechota when it came to contests: he believed that that task would be carried out by Entercom’s legal department, in Boston (i.e., Masi).²⁴⁷

73. Moreover, although Masi testified that she had an unwritten requirement that all contests involving “body contact” or “ingestion” required the presence at the contest of medical personnel,²⁴⁸ Field, Pechota, Baghaei, and Geary each testified that they were unaware of this rule²⁴⁹ which, as Masi acknowledged, appears nowhere in the Contest Guidelines.²⁵⁰ This lack of communication between Entercom legal and Station staff could have contributed to the fact that medical personnel, who could have administered care to Ms. Strange and the other suffering contestants, were not present at the Contest. Other Station personnel critical to the execution of the Guidelines, such as the Hosts or Baghaei, who was responsible for drafting the required Station promotional announcements containing all material contest terms, received no training regarding Entercom contest requirements, from Masi or anyone else.²⁵¹

74. The record also reflects that Station personnel familiar with Entercom’s corporate contest policies did not supervise the operation of the Contest itself. On the morning of the Contest, Geary

²⁴² Trial Transcript at 1506-07, 1427-29 (Pechota Testimony).

²⁴³ Trial Transcript at 1405 (Pechota Testimony).

²⁴⁴ Trial Transcript at 1746, playing Masi Deposition at 27; LOI Response, Masi Declaration. The Power Point is provided as Exhibit O to the Pechota MSA.

²⁴⁵ Trial Transcript at 2885-86, playing Masi Deposition. Masi also acknowledged that Entercom Corp. had no record-keeping procedures to either memorialize the various contest proposals that she had received from stations or the advice that she had provided in response to their inquiries. Trial Transcript at 1746, playing Masi Deposition at 276-78, 322.

²⁴⁶ Trial Transcript at 1746, playing Masi Deposition at 100-104, 147-151.

²⁴⁷ Trial Transcript at 2058-59 (Geary Testimony).

²⁴⁸ Trial Transcript at 1991-92 quoting Masi Deposition (Geary Testimony).

²⁴⁹ Trial Transcript at 766 (Maney Testimony), 1426, 1520 (Pechota Testimony), 1113-14 (Baghaei Testimony), 1989-93 (Geary Testimony); Court’s Rulings on Defendant’s Objections to Deposition Testimony of David Field Designated by Plaintiffs, filed with the Court on Sept. 21, 2009 (“Field Deposition”) at 50-51.

²⁵⁰ Trial Transcript at 1991-92 quoting Masi Deposition (Geary Testimony).

²⁵¹ Trial Transcript at 1081-82 (Baghaei Testimony); 2138 (Geary Testimony).

arrived at the Station at around 7:00 a.m. and went straight to his office, only entering the Contest area at around 9 a.m. to tell Carter to “keep the noise down” in response to complaints from sales staff.²⁵² He did not listen to the Show that day²⁵³ or inquire what was occurring during his visit to the Contest area, instead returning to his office.²⁵⁴ Weed arrived at the Station a couple of hours after the Contest had started.²⁵⁵ He did not speak with Pechota to find out who was supervising the event.²⁵⁶ Pechota, likewise, did not listen to the broadcast on her way into work (or earlier in the week) and was not present while the Contest was being conducted.²⁵⁷ Her only engagement with the contestants was when she entered the kitchen area a couple of hours into the Contest to ask them to “keep it down.”²⁵⁸ She did not talk to any of the Show staff to inquire how the Contest was proceeding, and returned to her desk to turn to other work.²⁵⁹ This left the Hosts, who had not received training in Entercom’s contest policies, to conduct the Contest unsupervised.²⁶⁰ On January 16, 2007, the first business day after the Contest, Geary, who was absent during the Contest area except for his brief appearance to complain about the noise, fired all of the Hosts and seven other Entercom employees, including Weed, Pechota, and Baghaei.²⁶¹

75. It is axiomatic that a licensee is directly responsible for compliance with the Commission’s Rules and its statutory mandate to operate in the public interest. If a violation of the public trust occurs, the licensee is accountable and cannot evade responsibility by attributing the misconduct to a Station employee (or by disciplining or firing the employees involved).²⁶² A licensee must provide appropriate supervision of its employees, including clearly informing them of its policies and taking appropriate steps to implement those policies.²⁶³ The Commission has held that “[w]here the licensee’s control is inadequate and the resulting misconduct is sufficiently serious, the penalty of nonrenewal is obviously justified.”²⁶⁴ Specifically, a licensee will be held responsible if misconduct results from a

²⁵² Trial Transcript at 2026, 2036 (Geary Testimony).

²⁵³ Trial Transcript at 1946 (Geary Testimony).

²⁵⁴ Trial Transcript at 2029-30 (Geary Testimony), 1297-98 (Michel Testimony) (Geary “peeked his head in and was talking to Carter and told us we needed to be quiet...because they were having a meeting next door and they couldn’t hear...”). Entercom Promotions Assistant Michel testified that, after this exchange, she didn’t see Geary asking any questions about what was going on. *Id.*

²⁵⁵ Trial Transcript at 1376 (Pechota Testimony). Pechota felt that Weed had delegated responsibility over the Contest to the Show. *Id.*

²⁵⁶ Pechota MSA, Exh. C (Deposition of Steve Weed) at 85, 99.

²⁵⁷ Trial Transcript at 1331, 1381, 1432 (Pechota Testimony). Geary also testified that he did not listen to the Show on the day of the Contest. Trial Transcript at 1946.

²⁵⁸ Trial Transcript at 1377 (Pechota Testimony).

²⁵⁹ Trial Transcript at 1376-77 (Pechota Testimony).

²⁶⁰ Pechota testified that, with the absence of Weed, “he delegated things to [the Hosts]. I was not their supervisor.” Trial Transcript at 1327-28 (Pechota Testimony).

²⁶¹ LOI Response at 2, LOI Response, Geary Declaration (“LOI Geary Declaration”) at 1.

²⁶² *WMJX, Inc.*, Decision, 85 FCC 2d 251, 266-67 (1981) (“*WMJX*”).

²⁶³ *WMJX*, 85 FCC 2d at 268; *see also Eleven Ten Broad. Corp.*, Decision, 32 FCC 706, 708 (1962) (“Retention of effective control by a licensee of the station’s management and operation is a fundamental obligation of the licensee, and a licensee’s lack of familiarity with station operation and management may reflect an indifference tantamount to lack of control.”).

²⁶⁴ *Walton Broadcasting*, Decision, 78 FCC 2d 857, 867-70 (1980) (“*Walton*”) (“If reasonable controls are in effect, and wrongdoing occurs, the licensee is liable for the misconduct but cannot be found lacking in due diligence, and thus, should not lose its license. However, if reasonable controls are lacking, or if no reasonable effort has been expended to insure that control is maintained over the operation of the station . . . the licensee should not have a

(continued....)

licensee's failure to "transmit and to emphasize the substance of its policies to its station manager, its failure to insure that the manager understood its policies, its failure to check to see if he transmitted the information to on-the-air personnel, and its failure to understand and inculcate the most elementary principle of public trusteeship."²⁶⁵

76. Here, although the Hosts unquestionably exercised poor judgment during the course of the Contest, the record suggests that they had not been adequately trained or supervised by Entercom, the licensee, with respect to contests. Geary testified at the Trial that, with six Entercom stations to manage, he was too busy to directly oversee KDND contests and thus delegated that responsibility to Weed and Pechota: "I do not have day-to-day involvement with contests or promotions at Entercom... including those at KDND... As a general matter, I do not become involved in the planning, approval, monitoring or execution of the contests, and contests are not submitted to me for review."²⁶⁶ Geary left the supervision of Weed and Pechota entirely up to Entercom's legal department and did not include supervising contests in their performance reviews.²⁶⁷ He did not find out about the Contest until after Jennifer Strange had died.²⁶⁸

77. In turn, Pechota testified at Trial that the Hosts often ran contests without any notice to her, much less her approval, or made snap decisions that left her without enough time to perform her responsibilities, such as vetting the contests with the Entercom legal department.²⁶⁹ These difficulties were exacerbated by her responsibilities as promotions director not only of the Station, but also of Entercom's other Sacramento stations, which involved handling a substantial number of matters other than contests, which she said constituted only a small part of her duties.²⁷⁰ As she testified, "I was very busy."²⁷¹ Moreover, before and during the Contest, Pechota did not research the potential safety risks raised by the Contest, testifying that she had not been specifically trained to research contest risks.²⁷² She and Weed each stated that they had also never received any training about what to do if a contestant became sick or injured.²⁷³

78. Pechota testified at Trial that she understood the purposes of the Written Contest Terms to be two-fold: (i) for the benefit of the Show to follow in running the Contest and (ii) for the contestants, to know the terms for the Contest in which they were participating.²⁷⁴ As mentioned, however, after

(Continued from previous page) _____
reduced penalty merely because it had no prior warning, when reasonable controls or supervision would have discovered or prevented the misconduct.").

²⁶⁵ *Walton*, 78 FCC 2d at 870.

²⁶⁶ MSA Geary Declaration at 1; Trial Transcript at 2114-15 (Geary Testimony).

²⁶⁷ Trial Transcript at 2059-60 (Geary Testimony).

²⁶⁸ LOI Response at 10.

²⁶⁹ Trial Transcript at 1354 (Pechota Testimony).

²⁷⁰ Trial Transcript at 1497 (Pechota Testimony). Pechota's other responsibilities included working with the various stations' sales departments (which accounted for most of her days), managing the events like the big concerts that the stations ran, including ticket giveaways, attending to what was going to happen on-site the day of the event, and making sure that the promoters had whatever they needed for the artists performing. *Id.* at 1498-99.

²⁷¹ Trial Transcript at 1339 (Pechota Testimony).

²⁷² Trial Transcript at 1363, 1374-75 (Pechota Testimony).

²⁷³ Pechota MSA, Exh. C, Weed Deposition at 63; Trial Transcript at 2882-83 (Plaintiff's Closing Arguments), playing a portion of Weed Deposition.

²⁷⁴ Trial Transcript at 1370-71; 1397-98 (Pechota Testimony) ("The rules were on my desk . . . I don't remember exactly where they were and—I mean Steve and I really had no concern that this was a contest that was, you know, needing anything more than the general contest rules.").

Pechota had completed the Written Contest Terms, the record reflects that she did not give them to anyone until after the Contest had taken place.²⁷⁵ Without access to the Written Contest Terms, Baghaei was unable to include the material terms in any promotional announcements, and the Hosts lacked any written guidance for conducting the Contest: “the mechanics of how the contest was going to run had been [verbally] decided on and agreed by the group, and that’s what they were supposed to proceed with.”²⁷⁶ This was not an unusual situation: Pechota acknowledged that she had never given the Show copies of other contest terms that she had prepared in the past, either: “I never handed them copies of rules for any contest that I recall. I mean, I don’t know why they would even look at them, really, but no.”²⁷⁷ Likewise, no copies were provided to listeners or to contestants at the Station on the day of the Contest or made available on the Station website.²⁷⁸ Pechota said she had no idea if the Station had aired the material contest terms: “This doesn’t have anything to do with me... I draft the rules, but I don’t draft the promos and I don’t schedule the promos.”²⁷⁹ Finally, as detailed earlier, Entercom management personnel were apparently not physically present or otherwise actively involved during the course of the Contest. Therefore, the 18 contestants were left in the hands of the Hosts and other Show personnel, including Maney, whom Pechota believed had in the past shown “bad judgment on a lot of things,” with “childish ideas.”²⁸⁰ Unlike the absent Weed, Pechota and Geary, the Hosts and Show personnel were not familiar with the Entercom Contest Guidelines²⁸¹ and did not have copies of the Written Contest Terms to follow.²⁸²

79. Geary, Weed, and Pechota’s detachment from the Contest operations raises a serious question as to whether Entercom simply abdicated supervision of the Show’s contest activities in light of the Show’s high ratings and resulting contribution to the licensee’s financial bottom line.²⁸³ The record suggests that contest safety was extremely low in Entercom’s priorities for its staff, and that the employees who were nominally charged with responsibility for contest oversight were overburdened with other responsibilities that deflected them from overseeing contests and, in fact, did not exercise oversight.

²⁷⁵ Trial Transcript at 1396 (Pechota Testimony).

²⁷⁶ Trial Transcript at 1329-30. According to Maney, it was “normal” procedure for the Hosts to not receive contest rules prior to the running of a contest. Trial Transcript at 757 (Maney Testimony).

²⁷⁷ Trial Transcript at 1379 (Pechota Testimony). Inzerillo also testified that he had participated in other contests where there were no written rules. Trial Transcript at 936 (Inzerillo Testimony).

²⁷⁸ Trial Transcript at 1380 (Pechota Testimony).

²⁷⁹ Trial Transcript at 1389 (Pechota Testimony).

²⁸⁰ Trial Transcript at 1328-29, 1348 (Pechota Testimony) (“I always had a concern about Maney and his judgment.”). Pechota had complained about her difficulties in working with the Hosts to both Weed and Geary on multiple occasions, on how she had to repeatedly “save the day” when they yet again failed to provide her sufficient notice of their decision to run a contest or promotion so that she could follow company procedures in a timely manner (Trial Transcript at 1354 (Pechota Testimony)), but the situation did not improve (*id.* at 1339), as evidenced by the Hosts’ notification to her that they were going to run the Contest only a week before the planned air date. This made it impossible for her to meet the Entercom requirement that written rules for non-simple contests be submitted to Entercom legal for vetting at least a week before any on-air promotion occurred. LOI Response, Exh. N. at 2. These difficulties, combined with Pechota’s inexplicable failure to distribute the Written Contest Terms that she ultimately prepared and her, Weed’s and Geary’s failure to supervise or even tune into the Show on the day of the Contest, raise the question of whether Entercom simply chose to abandon any attempt at supervision of the Hosts regarding contests aired on their top-rated Show.

²⁸¹ Trial Transcript at 720-740 (Maney Testimony).

²⁸² Trial Transcript at 850 (Maney Testimony), 936 (Inzerillo Testimony).

²⁸³ Trial Transcript at 1076 (Baghaei Testimony), 2028 (Geary Testimony) (“[The Hosts] were the most important part of the radio station in terms of the different day parts.”).

80. Finally, after the Contest, Entercom failed to inform other participants of the risks of water intoxication so that they could seek medical attention. The record indicates that this decision may have originated with corporate officers advising Geary not to call other contestants but instead to seek legal counsel. As discussed above in the context of Station management, the decision not to warn the other contestants to allow them to seek potentially critical medical treatment was arguably callous and irresponsible, whatever the perceived legal risks of doing so. Therefore, whether or not it was relying on the judgment of the parent company's corporate executives in making the decision not to alert other contestants, Entercom appears to have been derelict in its duty to the public in this regard as well.

81. For all these reasons, the record suggests that Entercom may have abdicated its responsibility to ensure contest safety by deferring to an organizational environment that: (1) promoted station reliance on remote and overburdened corporate managers; (2) failed to adequately train and supervise front-line employees; (3) failed to assign clear responsibility to any individual for ensuring compliance with contest policies; and (4) prioritized minimizing legal liability over listener health and safety. Possible deficiencies in that corporate system do not excuse any failure on the part of Entercom, as licensee of KDND, to have operated the Station in the public interest. For these reasons as well, we designate a hearing issue to determine whether Entercom conducted adequate training and exercised appropriate supervision over the contest-related activities of KDND personnel, including, in particular, the Contest.

IV. REFERRAL TO THE ADMINISTRATIVE LAW JUDGE

82. Negligently causing the death of a member of the Station's listening audience, as the jury found of Entercom at the Trial, appears to be *prima facie* contrary to the public interest. Accordingly, we are unable to make the finding required by Section 309(k)(1)(A). We therefore designate Entercom's license renewal Applications for hearing in order to develop a more complete record and provide Entercom with an opportunity to raise additional facts and circumstances, including those not related to the Contest, that may be relevant to our public interest determination. In addition, we specify that the hearing proceeding will commence no later than the first business day after the nine-month anniversary of the release of this Order. We further expect that the Presiding Judge and the parties will move through this case expeditiously and that, upon conclusion of the hearing, the Presiding Judge will make all reasonable efforts to issue his Initial Decision on an expedited basis.

V. ORDERING CLAUSES

83. Accordingly, **IT IS ORDERED** that, pursuant to Section 309(e) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(e), Applications for Renewal of License for KDND(FM), File Nos. BRH-20130730ANM and BRH-20050728AUU, are **DESIGNATED FOR HEARING** in a proceeding before an Administrative Law Judge in Washington, D.C. to be commenced no later than the first business day after the nine-month anniversary of the release of this Order, upon the following issues:

- (a) To determine whether Entercom designed and conducted a contest that was inherently dangerous;
- (b) To determine whether Entercom increased the danger to the contestants in the "Hold Your Wee for a Wii" contest by changing the contest terms;
- (c) To determine whether Entercom was aware of the potential dangers of the "Hold Your Wee for a Wii" contest and water intoxication;
- (d) To determine whether Entercom failed to protect the contestants of the "Hold Your Wee for a Wii" contest from its potential dangers;
- (e) To determine whether Entercom failed to warn the contestants of the "Hold Your Wee for a Wii" contest of the contest's potential dangers;
- (f) To determine whether Entercom prioritized entertainment value over the welfare of contestants of the "Hold Your Wee for a Wii" contest;

(g) To determine whether Entercom failed to properly train and exercise appropriate supervision of Station KDND(FM) staff and the “Hold Your Wee for a Wii” contest to ensure the safety of the contestants;

(h) To determine, in light of the evidence adduced under the foregoing issues and the totality of circumstances, whether Entercom License, LLC operated Station KDND(FM) in the public interest during the most recent license term; and

(i) To determine, in light of the evidence adduced under the foregoing issues and the totality of circumstances, whether Entercom’s Applications for Renewal of License for KDND(FM), File Nos. BRH-20130730ANM and BRH-20050728AUU, should be granted.

84. **IT IS FURTHER ORDERED** that, irrespective of the resolution of the foregoing issues, the Petition to Deny filed by Irene M. Stolz, on November 1, 2005, **IS DISMISSED AS MOOT IN PART AND DENIED IN PART**;

85. **IT IS FURTHER ORDERED** that the Petition to Deny filed by Media Action Center and Sue Wilson on October 31, 2013, and the Petition to Deny filed by Edward R. Stolz II on November 1, 2013, considered as an informal objection, **ARE GRANTED IN PART**, to the extent that they seek designation for hearing of the subject Entercom license renewal applications on issues (a) through (g) above, **AND ARE OTHERWISE DENIED**;

86. **IT IS FURTHER ORDERED** that the Informal Objection filed by Roger D. Smith on October 22, 2013, **IS GRANTED**.

87. **IT IS FURTHER ORDERED** that the Chief, Enforcement Bureau, shall be made a party to this proceeding without the need to file a written appearance.

88. **IT IS FURTHER ORDERED** that Media Action Center and Sue Wilson shall be made parties to this hearing in their capacity as a petitioner to the captioned applications:

89. **IT IS FURTHER ORDERED** that pursuant to Section 309(e) of the Act²⁸⁴ and Section 1.221(c) of the Commission’s Rules,²⁸⁵ to avail itself of the opportunity to be heard and to present evidence at a hearing in this proceeding, Entercom, in person or by its attorneys, **SHALL FILE** with the Commission, within 20 calendar days of the release of this Order, a written appearance stating that it will appear at the hearing and present evidence on the issues specified above.

90. **IT IS FURTHER ORDERED** that, pursuant to Section 1.221(c) of the Commission’s Rules,²⁸⁶ if Entercom fails to file a timely written appearance, or has not filed prior to the expiration of that time a petition to dismiss the captioned Applications without prejudice, or a petition to accept, for good cause shown, such written appearance beyond expiration of said 20 calendar days, the Applications shall be dismissed with prejudice for failure to prosecute.

91. **IT IS FURTHER ORDERED** that to avail themselves of the opportunity to be heard and the right to present evidence at a hearing in these proceedings, pursuant to Section 1.221(e) of the Commission’s Rules,²⁸⁷ Media Action Center and Sue Wilson, **SHALL FILE** within 20 calendar days of the release of this Order, a written appearance stating their intention to appear at the hearing and present evidence on the issues specified above. Any entity or person so named above who fails to file this written statement within the time specified, shall, unless good cause for such failure is shown, forfeit its hearing rights.

²⁸⁴ 47 U.S.C. § 309(e).

²⁸⁵ 47 C.F.R. § 1.221(c).

²⁸⁶ *Id.*

²⁸⁷ 47 C.F.R. § 1.221(e).

92. **IT IS FURTHER ORDERED**, in accordance with Section 309(e) of the Communications Act of 1934, as amended,²⁸⁸ the burden of proceeding with the introduction of evidence and the burden of proof, with respect to all issues designated herein, shall be upon Entercom.

93. **IT IS FURTHER ORDERED**, that Entercom herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended,²⁸⁹ and Section 73.3594 of the Commission's Rules,²⁹⁰ GIVE NOTICE of the hearing within the time and in the manner prescribed in such Rule, and SHALL ADVISE the Commission of the publication of such notice as required by Section 73.3594(g) of the Commission's Rules.²⁹¹

94. **IT IS FURTHER ORDERED** that copies of this document shall be sent *via* Certified Mail, Return Receipt Requested, and by regular first class mail to the following:

Carrie A. Ward, Esq.
Entercom License, LLC
401 City Avenue, Suite 809
Bala Cynwyd, PA 65483

Dennis P. Corbett, Esq.
Lerman Senter PLLC
2000 K Street, NW, Suite 600
Washington, DC 20006-1809

Media Action Center and Sue Wilson
18125 Tyler Road
Fiddletown, CA 95629

Edward R. Stolz, II
c/o Dennis J. Kelly, Esq.
Law Office of Dennis J. Kelly
P. O. Box 41177
Washington, DC 20018

Roger D. Smith
6755 Wells Avenue
Loomis, CA 95650

95. **IT IS FURTHER ORDERED** that a copy of this document, or a summary thereof, shall be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²⁸⁸ 47 U.S.C. § 309(e).

²⁸⁹ 47 U.S.C. § 311(a)(2).

²⁹⁰ 47 C.F.R. § 73.3594.

²⁹¹ 47 C.F.R. § 73.3594(g).