

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

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| In the Matter of |) | |
| |) | |
| Dakota Central Telecommunications Cooperative |) | File No. EB 07-SE-189 |
| Carrington, North Dakota |) | NAL/Acct. No. 200832100040 |
| |) | FRN # 0003759917 |

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: April 14, 2008

Released: April 16, 2008

By the Chief, Spectrum Enforcement Division, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture (“NAL”), we propose a forfeiture against Dakota Central Telecommunications Cooperative (“Dakota Central”), licensee of a Broadband Radio Service (“BRS”) system and lessee of Educational Broadband Service (“EBS”) frequencies in the Brush Hill, North Dakota area, in the amount of fifteen thousand dollars (\$15,000) for operating on three EBS channels without Commission authorization. Dakota Central acted in apparent willful and repeated violation of Section 301 of the Communications Act of 1934, as amended, (“Act”)¹ and Section 1.903(a) of the Commission’s Rules (“Rules”).²

II. BACKGROUND

2. Dakota Central is a telecommunications cooperative that provides multichannel video programming distribution (“MVPD”) and high-power wireless broadband services over licensed BRS and leased EBS spectrum to customers in rural North Dakota. On April 17, 2007, Dakota Central voluntarily disclosed to the Wireless Telecommunications Bureau (“Wireless Bureau”) that it had been transmitting video programming on EBS channel C2 since approximately 1994, and had been providing broadband access on EBS channels C3 and D3 since 2001, without Commission authority. On April 24, 2007, Dakota Central filed a request for Special Temporary Authority (“STA”) seeking authority to utilize EBS channels C2, C3, and D3 to continue providing its MVPD and broadband services.³

3. The Wireless Bureau subsequently referred this matter to the Enforcement Bureau for investigation and possible enforcement action. On August 23, 2007, the Enforcement Bureau’s Spectrum Enforcement Division issued a letter of inquiry (“LOI”)⁴ to Dakota Central seeking information regarding its operation of the channels.

¹ 47 U.S.C. § 301.

² 47 C.F.R. § 1.903(a).

³ File No. 0003004682 (filed Apr. 24, 2007). To date, the Wireless Bureau has not acted on the pending STA.

⁴ See Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission to Mr. Keith A. Larson, General Manager, Dakota Central Telecommunications Cooperative (August 23, 2007).

4. In its September 21, 2007 response to the LOI,⁵ Dakota Central states that it was unaware of this unauthorized activity until March 2007, when Dakota Central retained counsel to assess its spectrum needs. After reviewing Dakota Central's records, counsel informed Dakota Central that it apparently was operating on three channels (EBS Channels C2, C3 and D3) for which it was not authorized.⁶ Dakota Central admits that it has transmitted video programming on EBS Channel C2 continuously since 1994, and has provided broadband service on EBS Channels C3 and D3 continuously since 2001.⁷ Dakota Central believes that this unauthorized operation was caused by two different employees,⁸ and asserts that, upon learning of this unauthorized activity, it immediately took steps to obtain Commission authority to operate. It met with Wireless Bureau staff to disclose the violation, filed an STA to request authority to operate, filed a request for waiver of certain related Commission's rules,⁹ conducted an audit of its BRS licenses and EBS leases, and took specific steps to ensure future compliance with the Commission's Rules.¹⁰ Dakota Central also claims to have a long history of compliance with the Commission's Rules.¹¹

III. DISCUSSION

5. Section 301 of the Act prohibits the general use or operation of any apparatus for the transmission of energy or communications or signals by a radio except under, and in accordance with, a Commission granted authorization. Section 1.903(a) of the Rules provides, in pertinent part, that stations in the wireless station service must be operated with a valid Commission authorization.

6. Under Section 503(b)(1)(B) of the Act, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.¹² To impose

⁵ See Letter from Stephen E. Coran, Counsel for Dakota Central Telecommunications Cooperative to Katherine Power, Esq., Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission (September 21, 2007) ("LOI response").

⁶ *Id.* at 3.

⁷ *Id.* at 2.

⁸ *Id.* at 2. Dakota Central states that the employee who must have initiated transmission of video programming on EBS channel C2 in 1994 has since been fired for cause. It further states that the provision of broadband service on EBS channels C3 and D3 was initiated in 2001 on the advice of its consulting engineer, who "suggested that there was vacant spectrum that could be used until such time as the Commission lifted the 'freeze' on filing applications for EBS licenses." *Id.* at 2.

⁹ On April 25, 2007, Dakota Central filed a waiver request which proposed a spectrum plan under which the unauthorized operation could be relocated to other spectrum, negating the need for the STA. On May 24, 2007, the Wireless Bureau placed this waiver request on public notice. *Wireless Telecommunications Bureau Seeks Comment on Request by Dakota Central Telecommunications Cooperative for Waiver of the Requirement to Transition to the New BRS/EBS Band Plan and for Special Temporary Authority on Certain EBS Channels in Brush Hill, North Dakota*, Public Notice, 22 FCC Rcd 9371 (Wireless Tel. Bur., Broadband Div. 2007). This waiver request is still pending.

¹⁰ LOI response at 4-5. To ensure its future compliance, Dakota Central limited the commencement of operations on any spectrum to one person and posted all BRS licenses and EBS leases at the transmit site so that field personnel would be better aware of authorized channels and operating parameters.

¹¹ *Id.* at 6.

¹² 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1). Section 312(f)(1) and (2) of the Act defines "willful" as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law, and defines "repeated" as "the commission or omission of such act more than once" and if continuous "more than one day." 47 U.S.C. § 312(f)(1) and (2). The legislative history of Section 312(f)(1) and (2) clarifies that the definitions of willful and repeated apply to both Sections 312 and 503(b) of the Act. See H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982). Consistent with the legislative history, the Commission has so interpreted the terms in the Section

such a forfeiture penalty, the Commission must issue a notice of apparent liability and the person against whom such notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.¹³ The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has violated the Act or a Commission rule.¹⁴

7. Dakota Central admits that it has been operating on one of the EBS channels without authority since 1994 and on two of the EBS channels without authority since 2001. As detailed below, we find that Dakota Central apparently willfully and repeatedly violated Section 301 of the Act and Section 1.903(a) of the Rules by operating on three EBS channels without Commission authorization.

8. Section 1.80 of the Rules¹⁵ establishes a base forfeiture amount of \$4,000 for unauthorized use of a frequency. Section 503(b)(2)(C) of the Act, however, authorizes the Commission to assess against an entity that is neither a broadcaster nor a common carrier a maximum forfeiture of \$11,000 for each violation, or each day of a continuing violation, up to a statutory maximum forfeiture of \$97,500 for any single continuing violation.¹⁶ In determining the appropriate forfeiture amount, Section 503(b)(2)(E) of the Act directs the Commission to consider factors, such as “the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”¹⁷

9. Section 503(b)(6) of the Act¹⁸ bars the Commission from proposing a forfeiture for apparent violations that occurred more than one year prior to the date of this NAL, but does not prohibit us from assessing whether Dakota Central’s conduct prior to that time period apparently violated the provisions of the Act and Rules and from considering such conduct in determining the appropriate forfeiture amount for violations that occurred within the one-year statutory period.¹⁹ Therefore, the forfeiture amount proposed herein takes into account the continuing nature of Dakota Central’s apparent violations, but relates to the company’s operation of the three channels within the last year.

503(b) context. *See, e.g., Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991); *National Weather Networks, Inc.*, Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 3922, 3925 (Enf. Bur., Spectrum Enf. Div., 2006).

¹³ *See* 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

¹⁴ *See, e.g., SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591 (2002).

¹⁵ 47 C.F.R. § 1.80.

¹⁶ 47 U.S.C. § 503(b)(2)(C). The Commission twice amended Section 1.80(b)(3) of the Rules, 47 C.F.R. § 1.80(b)(3), to increase the maximum forfeiture amounts, in accordance with the inflation adjustment requirements contained in the Debt Collection Improvement Act of 1996, 28 U.S.C. § 2461. *See Amendment of Section 1.80 of the Commission’s Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, Order, 15 FCC Rcd 18221 (2000) (adjusting the maximum statutory amounts from \$10,000/\$75,000 to \$11,000/\$87,500); *Amendment of Section 1.80 of the Commission’s Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, Order, 19 FCC Rcd 10945 (2004) (adjusting the maximum statutory amounts from \$11,000/\$87,500 to \$11,000/\$97,500); *see also* 47 C.F.R. § 1.80(c).

¹⁷ 47 U.S.C. § 503(b)(2)(E). *See also* 47 C.F.R. § 1.80(b)(4), Note to paragraph (b)(4): Section II. Adjustment Criteria for Section 503 Forfeitures.

¹⁸ 47 U.S.C. § 503(b)(6).

¹⁹ *See, e.g., Globcom, Inc. d/b/a Globcom Global Communications*, Notice of Apparent Liability for Forfeiture and Order, 18 FCC Rcd 19893, 19903 (2003), *forfeiture ordered*, Forfeiture Order, 21 FCC Rcd 4710 (2006); *Roadrunner Transportation, Inc.*, Forfeiture Order, 15 FCC Rcd 9669, 9671-71 (2000); *Bureau D’Electronique Appliquee, Inc.*, Notice of Apparent Liability for Forfeiture, 20 FCC Rcd 3445, 3447-48 (Enf. Bur., Spectrum Enf. Div., 2005), *forfeiture ordered*, 20 FCC Rcd 17893 (Enf. Bur., Spectrum Enf. Div., 2005).

10. Consistent with precedent,²⁰ we find that Dakota Central's unauthorized use of the three channels constitutes separate and continuing violations, warranting the assessment of separate base forfeiture amounts. Having weighed the statutory factors enumerated above, we find that the circumstances presented warrant an upward adjustment of the aggregate base forfeiture amount of \$12,000 (\$4,000 for each of the three unauthorized channels used).²¹

11. Specifically, the record establishes that Dakota Central has transmitted video programming on EBS Channel C2 continuously since 1994, and has operated broadband service on EBS Channels C3 and D3 continuously since 2001. Given that Dakota Central's apparent violation spanned a significant period, we find it appropriate to upwardly adjust the \$4,000 base forfeiture amount to \$6,000 for each of Channels C3 and D3, and \$8,000 for Channel C2, resulting in an aggregate proposed forfeiture in the amount of \$20,000²² for Dakota Central's willful and repeated violations of Section 301 of the Act and Section 1.903(a) of the Rules.

12. Finally, we find, however, that a downward adjustment of the proposed forfeiture from \$20,000 to \$15,000 is warranted.²³ Specifically, we find the downward adjustment to be appropriate based on Dakota Central's voluntary disclosures of the violations to Commission staff *prior* to any Commission inquiry or initiation of enforcement action,²⁴ and because, outside of the subject violations, Dakota Central has a prior history of compliance.²⁵

IV. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act and Sections 0.111, 0.311 and 1.80 of the Rules,²⁶ Dakota Central Telecommunications Cooperative **IS** hereby **NOTIFIED** of its **APPARENT LIABILITY FOR A FORFEITURE** in the amount of fifteen thousand dollars (\$15,000) for willfully and repeatedly violating Section 301 of the Act and Section 1.903(a) of the Rules.

14. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Rules, within thirty days of the release date of this Notice of Apparent Liability for Forfeiture, Dakota Central

²⁰ See *Global Radio, Inc.*, Notice of Apparent Liability for Forfeiture, NAL/Acct. No. 200332940003 (Enf. Bur., San Diego Office, released March 8, 2003), *forfeiture ordered*, 19 FCC Rcd 18575 (Enf. Bur. 2004) (finding the operation on three unauthorized frequencies constitutes three separate violations).

²¹ See *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17112 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) (noting that the we "retain the discretion to issue a higher or lower forfeiture" than the base forfeiture amounts set forth in our Rules and our Forfeiture Guidelines).

²² See *Domtar Industries, Inc.*, Notice of Apparent Liability for Forfeiture, 21 FCC Rcd. 13811 (Enf. Bur., Spectrum Enf. Div., 2006) (proposing an upward adjustment for operation of a Private Land Mobile Radio system without any Commission authorization for more than five years).

²³ See 47 C.F.R. § 1.80(b)(4), Note to paragraph (b)(4): Section II. Adjustment Criteria for Section 503 Forfeitures.

²⁴ See *Petracom of Texarkana, LLC*, Forfeiture Order, 19 FCC Rcd 8096, 8097-8098 (Enf. Bur., 2004) (reducing a forfeiture based on the licensee's voluntarily disclosure to Commission staff of the violations prior to inspection by field agent); *Journal Broadcasting Corp.*, Notice of Apparent Liability for Forfeiture, 20 FCC Rcd 18211, 18214 (Enf. Bur., Spectrum Enf. Div., 2005) (reducing a proposed forfeiture based on the licensee's voluntary disclosure of the violation to Commission staff prior to Commission inquiry).

²⁵ See *Sutro Corporation*, Memorandum Opinion and Order, 19 FCC Rcd 15274 (2004); *Blountstown Communications, Inc.*, Memorandum Opinion and Order, 22 FCC Rcd 1097 (Enf. Bur. 2007) (both reducing a forfeiture based on the licensee's past history of compliance).

²⁶ 47 C.F.R. §§ 0.111, 0.311, 1.80.

Telecommunications Cooperative **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

15. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Account Number and FRN Number referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters “FORF” in block number 24A (payment type code). Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures.²⁷

16. The response, if any, must be mailed to the Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554, ATTN: Enforcement Bureau – Spectrum Enforcement Division, and must include the NAL/Acct. No. referenced in the caption.

17. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting; or (3) some other reliable and objective documentation that accurately reflects the petitioner’s current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.²⁸

18. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture shall be sent by first class mail and certified mail return receipt requested to Dakota Central’s counsel, Stephen E. Coran, Esq., 1615 L Street, N.W., Suite 1325, Washington DC 20036.

FEDERAL COMMUNICATIONS COMMISSION

Kathryn S. Berthot
Chief, Spectrum Enforcement Division
Enforcement Bureau

²⁷ See 47 C.F.R. § 1.1914.

²⁸ *Id.*