

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

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| In the Matter of |) | |
| |) | |
| Hodson Broadcasting |) | File Number: EB-08-DV-0216 |
| |) | |
| Permittee of KHOD(FM) |) | NAL/Acct. Nos.: 200932800001 |
| Des Moines, New Mexico |) | 200932800004 |
| Facility ID # 165982 |) | |
| |) | FRN: 0004297180 |

FORFEITURE ORDER

Adopted: November 10, 2009

Released: November 13, 2009

By the Regional Director, Western Region, Enforcement Bureau:

I. INTRODUCTION

1. In this Forfeiture Order (“*Order*”), we issue a monetary forfeiture in the amount of twenty thousand (\$20,000) to Hodson Broadcasting (“Hodson”), permittee of station KHOD(FM) in Des Moines, New Mexico, for willful and repeated violation of Section 73.1620 of the Commission's Rules (“Rules”).¹ On November 17, 2008, the Enforcement Bureau’s Denver Office issued a Notice of Apparent Liability for Forfeiture (“*2008 NAL*”) to Hodson in the amount of \$10,000 after determining that Hodson apparently willfully and repeatedly operated KHOD(FM) at variance from its authorization. On April 21, 2009, the Denver Office issued a second Notice of Apparent Liability for Forfeiture (“*2009 NAL*”) to Hodson in the amount of \$10,000 for continuing to operate KHOD(FM) at variance from its authorization. In this *Order*, we consider Hodson’s arguments that it has filed applications and requests for special temporary authority (“STA”) to legitimize its operation; that it should be treated as a small business concern; and that it lacks the ability to pay the proposed forfeiture amounts.

II. BACKGROUND

2. On June 28, 2006, the Commission granted Hodson a construction permit, authorizing the construction of a new Channel 287, Class C FM station serving Des Moines, New Mexico, with an antenna height of radiation center above ground of 14 meters on an antenna structure with an overall height above ground of 32 meters, and effective radiated power of 82 kW.² The construction permit expired on June 28, 2009. On February 9, 2009, prior to the expiration of its construction permit, Hodson filed an application to modify the construction permit by moving the station approximately 34 miles from its permitted location and changing the community of license of the station from Des Moines, New Mexico, to Raton, New Mexico.³ The modification application also proposed to change the station from Class C to Class A, change the antenna height of radiation center above ground from 14 meters on an

¹ 47 C.F.R. § 73.1620.

² See File No. BNPB-20060309ADA, granted June 28, 2006.

³ See File No. BMOH-20090209ABC, dismissed June 18, 2009.

antenna structure with an overall height above ground of 32 meters to an antenna height of radiation center above ground of 12 meters with an overall height of 12.2 meters above ground level, and decrease the station's power from 82 kW to 2 kW. The modification application was dismissed on June 18, 2009.⁴ No other modification applications were filed and no authorization for program test authority or operational authority has ever been issued by the FCC for KHOD(FM).

3. On June 24, 2008, in response to multiple complaints, a Denver Office agent investigated KHOD(FM)'s operation. The agent observed that the station was in operation and was being operated from a location in Raton, New Mexico, approximately 34 miles northwest of its authorized location in Des Moines, New Mexico.⁵

4. On June 25, 2008, the Denver agent inspected KHOD(FM) and observed that the station continued to operate from the Raton, New Mexico, studio/transmitter site. The inspection revealed, among other matters, that KHOD(FM) had no STA or waiver to operate on-air, or to operate from its current location. The agent interviewed the owner of Hodson Broadcasting. Hodson acknowledged that the KHOD(FM) signal in Raton, New Mexico, does not reach the KHOD(FM) construction permit's community of license of Des Moines, New Mexico. The agent warned Hodson concerning the unauthorized operation but Hodson insisted that KHOD(FM) must stay on the air to serve Raton, New Mexico.

5. On July 1, 2008, the Denver agent contacted Hodson and inquired about KHOD(FM)'s on air status. Hodson stated KHOD(FM) was still on the air and the Denver agent verbally warned Hodson about continued KHOD(FM) operation.

6. On October 7, 2008, and October 9, 2008, the Denver Office received telephone complaints concerning interference to home electronic entertainment equipment ("HEEE") from nearby businesses. The complainants alleged that the interference started on October 6, 2008, and that KHOD(FM) could be heard across the entire FM band.

7. On November 17, 2008, after determining that the KHOD(FM)'s construction permit was in "Off Air" status, and that no STA, waivers, or authorization, had been granted to Hodson to operate KHOD(FM), the Denver Office issued a *NAL* in the amount of \$10,000 to Hodson.⁶ In the 2008 *NAL*, the Denver Office found that Hodson apparently willfully and repeatedly violated Section 73.1620 of the Rules⁷ by operating KHOD(FM) at variance from its authorization. Hodson filed a response on December 19, 2008, arguing that it has filed applications and STA requests to legitimize its operation; that it should be treated as a small business concern; and that it lacks the ability to pay the proposed forfeiture amounts.

8. On December 10, 2008, a Denver agent again investigated KHOD(FM)'s operation. The agent observed that the station was in operation and was being operated from a location in Raton, New

⁴ Hodson filed a petition for reconsideration of the modification application dismissal on July 13, 2009.

⁵ The agent also noted that the station was being operated with a power level, antenna height, and antenna structure at variance from its construction permit. Specifically, KHOD(FM) operated with less than Class C FM facilities by operating with less than 20 watts transmitter power output, an ERP less than 82 kW, and operated from a building rooftop versus the authorized antenna structure.

⁶ *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200932800001 (Enf. Bur., Western Region, Denver Office, released November 17, 2008).

⁷ 47 C.F.R. § 73.1620.

Mexico, approximately 34 miles northwest of its authorized location in Des Moines, New Mexico.⁸

9. On December 11, 2008, the Denver agent inspected KHOD(FM) and observed that the station continued to operate from the Raton, New Mexico, studio/transmitter site. The inspection revealed that, among other matters, KHOD (FM) had no STA/waiver to operate on-air, or to operate from its current location, and transmitted spurious signals on approximately 103.8 MHz and 106.7 MHz at -38 to -42 dB below KHOD's fundamental frequency of 105.3 MHz. The agent interviewed the owner, an employee and a contractor of Hodson Broadcasting. Hodson acknowledged that the KHOD(FM) signal in Raton, New Mexico, did not reach Des Moines, New Mexico, the community of license for the KHOD(FM) construction permit. The agent warned Hodson concerning the unauthorized operation. Hodson voluntarily shut down the transmitter and stated that he would attempt to obtain a STA from the Commission to resume operation. On December 29, 2008, Hodson filed an STA request with the Commission.⁹ That request was denied on April 17, 2009.

10. Reports received by the Denver Office revealed that KHOD(FM) continued to operate on or about January 2, 2009, through February 4, 2009, and again from February 18, 2009, through March 20, 2009.

11. On April 21, 2009, the Denver Office issued a *NAL* in the amount of \$10,000 to Hodson.¹⁰ In the *2009 NAL*, the Denver Office found that Hodson apparently willfully and repeatedly violated Section 73.1620 of the Rules¹¹ by operating KHOD(FM) at variance from its authorization. Hodson filed a response on May 20, 2009, reiterating its arguments that it has filed applications and STA requests to legitimize its operation; that it should be treated as a small business concern; and that it lacks the ability to pay the proposed forfeiture amounts.

12. On October 3, 2009, investigation by agents from the Denver Office revealed that Hodson continued to operate KHOD(FM) in Raton, New Mexico, at variance with the terms of its construction permit and Section 73.1620 of the Rules.

III. DISCUSSION

13. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Act,¹² Section 1.80 of the Rules,¹³ and *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*.¹⁴ In examining the

⁸ The agent also noted that the station was being operated with a power level, antenna height, and antenna structure at variance from its construction permit BNPH-20060309ADA. Specifically, KHOD(FM) operated with less than Class C FM facilities by operating with less than 20 watts transmitter power output, and operated from a building rooftop versus the authorized antenna structure.

⁹ See File No. BSTA-20081229ACK, denied April 17, 2009. Hodson filed a petition for reconsideration of the STA request denial on May 19, 2009.

¹⁰ *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200932800004 (Enf. Bur., Western Region, Denver Office, released April 21, 2009).

¹¹ 47 C.F.R. § 73.1620.

¹² 47 U.S.C. § 503(b).

¹³ 47 C.F.R. § 1.80.

¹⁴ 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999).

Response, Section 503(b) of the Act requires that the Commission take into account the nature, circumstances, extent and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.¹⁵

14. In its responses, Hodson details its efforts and difficulties in attempting to secure a construction permit and to construct KHOD(FM), including its filing of an allocation petition, participating in competitive bid auctions, dealing with engineering and siting issues, and the filing of the modification application and STA request. Despite the long and varied explanations contained in Hodson's responses, Hodson has provided no evidence that it has any authority to actually operate KHOD(FM) and has not produced any authorization conferring authority on Hodson to operate KHOD(FM) at variance from its construction permit

15. Section 73.1620 of the Commission's rules provides, in pertinent part, that program tests may be conducted by permittees, upon completion of construction, so long as the Commission is notified of the program tests and a license application is filed within 10 days thereafter.¹⁶ However, a special operating condition/ restriction was placed on the KHOD(FM) construction permit which states "[t]he automatic program test provisions of Section 73.1620 of the Commission's rules do not apply in this case. A formal request for program test authority must be filed in conjunction with FCC Form 302-FM, application for license, before program tests will be authorized."¹⁷ Moreover, the facilities tested must have been constructed in accordance with the terms of the construction permit and the technical provisions of the application in order to avert air navigation hazards and avoid interference to other broadcast stations.¹⁸ Otherwise, the station is subject to revocation of license or permit, or imposition of a forfeiture.¹⁹ Review of the Commission's databases reveals that at no time since the grant of the KHOD(FM) construction permit in 2006, has Hodson been given program test authority, or any authority to operate KHOD(FM).

16. Hodson also attempts to justify its operation of KHOD(FM) by arguing that the operation was actually "equipment tests" pursuant to Section 73.1610 of the Rules which states that "[d]uring the process of construction of a new broadcast station, the permittee, after notifying the FCC in Washington, D.C. may, without further authority from the FCC, conduct equipment tests for the purpose of making such adjustments as may be necessary to assure compliance with the terms of the construction permit, the technical provisions of the application therefore, the rules and regulation and the applicable engineering standards."²⁰ We find that Hodson is incorrect in this assertion. Section 73.1610(a) allows equipment tests to "assure compliance with the terms of the construction permit." Hodson has not constructed KHOD(FM) to conform with the terms of the construction permit. Hodson has constructed KHOD(FM) 34 miles away from its permitted site, at a lower height above ground level and with a lower effective radiated power, in an attempt to cover a different community of license than the one assigned to KHOD(FM) in its construction permit. We therefore find that Section 73.1610(a) did not confer any authority on Hodson to operate KHOD(FM) at variance with its construction permit.

¹⁵ 47 U.S.C. § 503(b)(2)(E).

¹⁶ 47 C.F.R. § 73.1620.

¹⁷ KHOD(FM) Construction Permit, granted June 28, 2006.

¹⁸ 47 C.F.R. § 73.1620; 47 U.S.C. § 319(c).

¹⁹ See 47 U.S.C. §§ 312(a)(2), 319(c), and 503(b)(1)(A) (forfeiture appropriate for willful or repeated failure to comply substantially with the terms and conditions of any permit or other authorization issued by the Commission).

²⁰ 47 C.F.R. § 73.1610(a).

17. Hodson did file a modification application and STA request aimed at obtaining approval to operate with the facilities Hodson constructed for KHOD, both of which have been dismissed or denied. In any event, neither the filing of a modification application²¹ nor STA request,²² nor the filing of a petition for reconsideration conferred any operational authority on Hodson to operate KHOD(FM).²³

18. Hodson also questions the amount of the forfeitures proposed against it. We find no error in the amounts proposed by the Denver Office. In the past, the amount of \$10,000 has been proposed against a broadcast station permittee for operating at variance from its construction permit when the permittee had constructed a station at a lower power and a lower antenna height than authorized.²⁴ Hodson not only constructed KHOD(FM) at a lower power and lower antenna height, but also at a location 34 miles away from its authorized site. Hodson also argues that it should be treated as a small business in accordance with Section 223 of the Small Business Regulatory Fairness Act of 1996 (“SBFRA”),²⁵ and Section 603 of the Regulatory Flexibility Act (“RFA”).²⁶ We find that Hodson has been afforded the analysis required pursuant to the Commission’s Rules and precedent.²⁷ In both the 2008 NAL and the 2009 NAL, the Denver Office stated that it applied *Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, (“*Forfeiture Policy Statement*”) as well as Section 1.80 of the Commission’s Rules,²⁸ to the facts in each NAL before determining the appropriate forfeiture amount to propose. The Commission has previously held that its policies, as detailed in the *Forfeiture Policy Statement*, comply with Section 223 of the SBRFA.²⁹ In addition, when enacting the *Forfeiture Policy Statement*, the Commission detailed its

²¹ See 47 C.F.R. § 73.1690(b) (providing that modifications, such as those made by Hodson to its operation, may be made only after the grant of a construction permit by the Commission). See also *Pacifica Broadcasting Company*, 18 FCC Rcd 22347 (EB 2003).

²² See 47 C.F.R. § 73.1635 (providing that special temporary authority must be sought to permit the operation of a broadcast facility for a limited period at variance from its authorization, and that authority must be received prior to the commencement of such operation).

²³ See *A-O Broadcasting Corporation*, 23 FCC Rcd 603, 615 (2008) (the filing of a petition for reconsideration of the dismissal of license-to-cover and license renewal applications had no impact on the effectiveness of those actions); see also 47 C.F.R. § 1.106(n) (the filing of a petition for reconsideration shall not excuse any person from complying with or obeying any decision, order or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof).

²⁴ See *Lauren A. Colby, Esq.*, 21 FCC Rcd 1248 (2006).

²⁵ Pub.L.No. 104-121, § 223, 110 Stat at 862.

²⁶ 5 U.S.C. § 603.

²⁷ In a footnote in each of its responses, Hodson invokes Section 257 of the Act, 47 U.S.C. § 257, and argues that the proposed forfeitures constitute “yet another market entry barrier” for KHOD(FM). We find no merit to this assertion and note that in the Commission’s most recent report to Congress, required by Section 257(c) of the Act, the Commission stated that forfeitures are assessed in accordance with Section 503(b) of the Act, Section 1.80 of the Rules, and the *Forfeiture Policy Statement* which includes an analysis, as necessary, as required by Section 223 of SBFRA. *In the Matter of Section 257 Triennial Report to Congress*, 22 FCC Rcd 21132, 21189 (2007).

²⁸ *Forfeiture Policy Statement*, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80.

²⁹ *Forfeiture Policy Statement*, 12 FCC Rcd at 17109.

compliance with the RFA, specifically Section 603 of the RFA.³⁰

19. Hodson argues that it lacks the ability to pay the two proposed \$10,000 forfeitures and submits three years of tax records to support its claim. We have reviewed Hodson's records and its responses. We note that Hodson's tax records, standing alone, may arguably support its asserted inability to pay argument. While inability to pay a forfeiture is one of the downward criteria we must consider pursuant to the *Forfeiture Policy Statement* and Section 1.80, there are multiple upward criteria we must also consider, including, among others, intentional violation and repeated or continuous violation. The further investigation by the Denver Office revealed that as of October 3, 2009, Hodson continued to operate KHOD(FM) in Raton, New Mexico. Hodson's intentional violation of the rules in constructing KHOD(FM) at variance from its construction permit, as well as Hodson's continuous and intentional operation of the station at variance from its construction permit, outweigh any evidence of its inability to pay the forfeitures. Applying the *Forfeiture Policy Statement* and Section 1.80 to the instant cases, we find that no reduction is warranted. We therefore decline to decrease the forfeiture amounts and we order Hodson to file a report with the Denver Office detailing its compliance with its construction permit and this *Order* within 30 days of the date of this *Order*.

20. We have examined the responses to the 2008 NAL and 2009 NAL pursuant to the statutory factors above, and in conjunction with the *Forfeiture Policy Statement* and Section 1.80 of the Rules. As a result of our review, we conclude that Hodson willfully and repeatedly violated Section 73.1620 of the Rules.³¹ Considering the entire record and the factors listed above, we find that Hodson is liable for a \$20,000 forfeiture.

IV. ORDERING CLAUSES

21. **ACCORDINGLY, IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended ("Act"), and Sections 0.111, 0.311 and 1.80(f)(4) of the Commission's Rules, Hodson Broadcasting, **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of \$20,000 for willfully and repeatedly violating Section 73.1620 of the Rules.³²

22. **IT IS FURTHERED ORDERED THAT**, within 30 days of the release of this *Order*, Hodson Broadcasting file with the District Director, Denver Office, the report required in paragraph 19 above.

23. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within 30 days of the release of this *Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.³³ 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

³⁰ *Forfeiture Policy Statement*, 12 FCC Rcd at 17119, Appendix C.

³¹ 47 C.F.R. § 73.1620.

³² 47 U.S.C. § 503(b), 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4), 73.1620.

³³ 47 U.S.C. § 504(a).

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. Hodson Broadcasting shall also send electronic notification on the date said payment is made to WR-Response@fcc.gov.

24. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class Mail and Certified Mail Return Receipt Requested to Hodson Broadcasting at its address of record.

FEDERAL COMMUNICATIONS COMMISSION

Rebecca L. Dorch
Regional Director, Western Region
Enforcement Bureau