

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

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| In the Matter of) Gambler's CB & Ham Radio Sales & Service) Pinconning, Michigan) |)))))) | File Number: EB-05-DT-131 NAL/Acct. No: 200632360001 FRN 0014 2684 94 |
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FORFEITURE ORDER

Adopted: December 19, 2006

Released: December 21, 2006

By the Regional Director, Northeast Region, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order* ("Order"), we issue a monetary forfeiture in the amount of seven thousand dollars (\$7,000) to Gambler's CB & Ham Radio Sales & Service ("Gambler") for willfully and repeatedly violating Section 302(b) of the Communications Act of 1934, as amended ("Act"),¹ and Section 2.803(a)(1) of the Commission's Rules (the "Rules")², by offering for sale non-certified Citizens Band ("CB") transceivers.

II. BACKGROUND

2. On April 5, 2004, the FCC Enforcement Bureau's Detroit Field Office ("Detroit Office") received information that Gambler was marketing illegal, non-FCC certified devices. Agents from the Detroit Office visited Gambler in Pinconning, Michigan on April 9, 2004, and observed that Gambler displayed and offered for sale non-certified CB transceivers marketed as Amateur Radio Service ("ARS") transmitters, including Galaxy models DX33HML and DX66V, which the Commission's Office of Engineering and Technology ("OET") previously had tested and determined to be non-certified CB transceivers. As a result of the inspection, the Detroit Office issued Gambler a Citation on April 13, 2004, for marketing non-certified CB transceivers in violation of Section 302(b) of the Act and Section 2.803(a)(1) of the Rules.³ The Citation specifically cited Galaxy models DX33HML and DX66V and warned Gambler that future violations may subject Gambler to substantial civil monetary forfeitures for each violation or each day of a continuing violation, seizure of equipment through *in rem* forfeiture action, and criminal sanctions including fines and imprisonment.

¹ 47 U.S.C. § 302(b).

² 47 C.F.R. § 2.803 (a)(1).

³ See Citation issued to Gambler's C.B. & Ham Radio Sales and Services, Citation No. C20043236004, released April 13, 2004 ("Citation"). The Detroit Office also cited Gambler for selling CB linear amplifiers, in violation of Sections 2.803(a) and 2.815(b) of the Rules. During subsequent visits to Gambler's store, FCC agents did not observe linear amplifiers being offered for sale.

3. On April 30, 2004, the Detroit Office received a response from Gambler's attorney, which stated that "all of the radios in question are marketed as Amateur radios . . . and [a]s sold, operate only on the Amateur bands . . . [and] as such, these radios are governed by Part 97 . . . , [which] does not require type acceptance of Amateur radios."⁴ The letter further stated that "[w]e expect that your office will withdraw the notice of citation within 14 days from the date of this letter." The Detroit Office received a second letter from Gambler's attorney on May 10, 2004, stating that because "[w]e have not heard anything from your office in response to our letter of April 22, 2004. . . we assume you agree with our position that the radios in question are legal and that the FCC is withdrawing the citation."⁵

4. On May 17, 2004, the Detroit Office sent a letter to Gambler's attorney addressing the response to the Citation.⁶ The letter advised Gambler that the devices referred to in the Citation are intended for use on CB as well as ARS frequencies because they have built-in design features which facilitate their operation on CB frequencies by the exercise of simple, end-user accessible modifications to the devices. Accordingly, the letter advised, such devices are considered CB transmitters pursuant to Section 95.603(c) of the Rules, irrespective of any labeling purporting the devices to be "Amateur Radio Transceivers." Gambler's attorney sent a third letter, dated May 22, 2004, stating his continued disagreement with the position set forth in the Citation.⁷

5. In response to a complaint that Gambler continued to sell non-FCC certified CB transceivers, an agent from the Detroit Office visited Gambler's store on April 13, 2005 and found that the store displayed and offered for sale non-certified CB transceivers, including Galaxy Models DX-33HML and DX44V. OET previously had tested these models and determined them to be non-certified CB transceivers.

6. On March 31, 2006, the Detroit Office issued a Notice of Apparent Liability of Forfeiture to Gambler for apparently willfully and repeatedly violating Section 302(b) of the Act and Section 2.803(a)(1) of the Rules by offering for sale non-certified CB transceivers.⁸ As discussed more fully below, Gambler filed a response to the *NAL*, seeking cancellation of the proposed forfeiture.⁹

III. DISCUSSION

7. The forfeiture amount proposed in this case was assessed in accordance with Section 503(b) of the Communications Act of 1934, as amended ("Act"),¹⁰ Section 1.80 of the Rules,¹¹ and the *Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*.¹² In assessing forfeitures, Section 503(b)(2)(D) of the Act requires that we take

⁴ See Letter from Michael C. Olson, Counsel for Gambler's, to James A. Bridgewater, District Director, Federal Communications Commission, dated April 26, 2004.

⁵ See Letter from Michael C. Olson, Counsel for Gambler's, to James A. Bridgewater, District Director, Federal Communications Commission, dated May 7, 2004.

⁶ See Letter from James A. Bridgewater, District Director, Detroit Office, to Michael C. Olson, dated May 17, 2004.

⁷ See Letter from Michael C. Olson, Counsel for Gamblers, to James A. Bridgewater, District Director, Federal Communications Commission, dated May 22, 2004.

⁸ Gambler's CB & Ham Radio Sales & Service, Notice of Apparent Liability for Forfeiture, NAL/Act. No. 200632360001 (Enf. Bur., Detroit Office, March 31, 2006) ("*NAL*").

⁹ See Petition to Cancel Proposed Forfeiture (Filed May 1, 2006).

¹⁰ 47 U.S.C. § 503(b).

¹¹ 47 C.F.R. § 1.80.

¹² 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*").

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 such other matters as justice may require.¹³

8. Section 302(b) of the Act provides that “[n]o person shall manufacture, import, sell, offer for sale, or ship devices or home electronic equipment and systems, or use devices, which fail to comply with regulations promulgated pursuant to this section.”¹⁴ Section 2.803(a) of the Rules provides that: “Except as provided elsewhere in this section, no person shall sell or lease, or offer for sale or lease (including advertising for sale or lease), or import, ship, or distribute for the purpose of selling or leasing or offering for sale or lease, any radio frequency device . . . unless such device has been authorized by the Commission. . . .”¹⁵

9. CB radio transceivers are subject to the equipment certification process and must be certified and properly labeled prior to being marketed or sold in the United States.¹⁶ Unlike CB radio transceivers, radio transmitting equipment that transmits solely on ARS frequencies is not subject to equipment authorization requirements prior to manufacture or marketing. However, some radio transmitters that transmit in a portion of the 10-meter band of the ARS (28.000 to 29.700 MHz) are equipped with rotary, toggle, or pushbutton switches mounted externally on the unit, which allow operation in the CB bands after completion of minor and trivial internal modifications to the equipment. To address these radios, the Commission adopted changes to the CB type acceptance requirements by defining a “CB Transmitter” as “a transmitter that operates or is intended to operate at a station authorized in the CB.”¹⁷ Section 95.655(a) of the Rules also states that no transmitter will be certificated for use in the CB service if it is equipped with a frequency capability not listed in Section 95.625 of the Rules (CB transmitter channel frequencies).¹⁸ Further, the Commission’s Office of General Counsel (“OGC”) released a letter on the importation and marketing of ARS transmitters, which clarified that transmitters that “have a built-in capacity to operate on CB frequencies and can easily be altered to activate that capacity, such as by moving or removing a jumper plug or cutting a single wire” fall within the definition of “CB transmitter” under Section 95.603(c) of the Rules and therefore require certification prior to marketing or importation.¹⁹

10. We reject Gambler’s claim in its response to the *NAL* that the Galaxy transceivers that it offered for sale do not need to be certified because they do not constitute “CB transmitters,” as defined in Section 95.603(a) of the Rules. Gambler states that the Galaxy transceivers at issue are manufactured solely for operation on the ARS 10 meter bands. Gambler further states that it did not intend for the Galaxy transceivers to be used as CB transceivers, as evidenced by the notices posted in the vicinity of its display case stating that an Amateur license is required for use of the Amateur equipment and that the transceivers are intended for use as Amateur transceivers. The *OGC Letter*, however, as discussed above and in the *NAL*, clarified that ARS transmitters that can be easily altered to operate on CB transmitter channel frequencies fall within the definition of “CB transmitter” under Section 95.603(c) of the Rules.²⁰

¹³ 47 U.S.C. § 503(b)(2)(D).

¹⁴ 47 U.S.C. § 302(b).

¹⁵ 47 C.F.R. § 2.803(a).

¹⁶ See 47 C.F.R. §§ 2.907, 2.927(a).

¹⁷ 47 C.F.R. § 95.603(c). See *Pilot Travel Centers*, 19 FCC Rcd 23113, 23114 (2004).

¹⁸ 47 C.F.R. § 95.655(a).

¹⁹ Letter from Christopher Wright, General Counsel, FCC to John Wood, Chief Intellectual Property Rights, US Customs Service, 14 FCC Rcd 7797 (OGC 1999) (“*OGC Letter*”).

²⁰ 14 FCC Rcd 7797.

Moreover, consistent with the Rules and the *OGC Letter*, OET evaluated the Galaxy models at issue here and determined they were non-certified CB transceivers. Gambler provides no evidence to show that the Galaxy models it offered for sale were not easily modified. In addition, although Gambler claims it did not intend for the transceivers to be used as CB transceivers, the Commission never has stated that the intent to operate in the CB bands can be determined through the actions of a seller of an ARS transceiver. We therefore find that the subject Galaxy models are CB transmitters pursuant to Section 95.603(c), regardless of the signs Gambler placed near the point of purchase.

11. We are not persuaded by Gambler's claim that we cannot enforce Section 95.603(c) of the Rules because the Commission's actions with regard defining "CB transmitters" violated the Administrative Procedure Act ("APA"). Gambler claims that Section 95.603(c) of the Rules does not specifically require certification of amateur equipment that is easily modifiable to operate in the CB band and that the addition of such a requirement through issuance of a public notice violated the APA.²¹ Gambler does not argue that the Commission's adoption of Section 95.603(c) or the subsequent clarification in the *OGC Letter* violated the APA. In assessing Gambler's liability in the *NAL*, however, we relied on the *OGC Letter* and its interpretation of Section 95.603(c), as well as OET's specific determination concerning the Galaxy models at issue here; we did not rely on the public notice cited by Gambler. It is entirely appropriate to rely on the interpretation of Section 95.603(c) in the *OGC Letter*, which was published in the FCC Record. Section 0.445(e) of the Rules provides that interpretations designed to have general applicability and legal effect that are published in the FCC Record "may be relied upon, used or cited as precedent by the Commission" in any manner.²² We therefore find no merit to Gambler's request for cancellation of the forfeiture on this basis.

12. We likewise find no merit in Gambler's claim, for which it relies on an e-mail from a Commission staffer, that whether a transceiver can be "easily modified" is one of degree and that such a standard is so vague as to be unconstitutional. First, the Commission has consistently held that regulatees are responsible for compliance with the Commission's Rules and that they should not rely on informal opinions from Commission staff.²³ Second, the *OGC Letter* explains the concept of "easily modified" as including moving or removing a jumper plug or cutting a single wire.²⁴ Third, for years prior to the issuance of the *NAL*, Gambler had actual notice that the Galaxy transceivers it was offering for sale were considered to be "easily modified" and, therefore, non-certified CB transceivers. Gambler received a Citation on April 13, 2004, explaining that if it continued to offer these transceivers for sale, it would be subject to civil monetary forfeitures. After its attorney questioned the Citation, it received a follow-up notice from the Detroit Office, on May 17, 2004, warning that it should no longer offer for sale the Galaxy transceivers at issue. Despite these notices and warnings, Gambler continued to sell the non-certified CB transceivers.

²¹ The public notice to which Gambler's refers was released by OET in 1996 and clarified that ARS transceivers designed "such that they can easily be modified by the users to extend the operating frequency range into the frequency bands" of the CB are CB transmitters because they are intended to operate on the CB bands. See *Extended Coverage High Frequency Transceivers*, Public Notice 62882, 1996 WL 242469, available at <<http://www.fcc.gov/Bureaus/Engineering_Technology/Public_Notices/1996/pnet6023.txt>> (OET, rel. May 13, 1996).

²² 47 C.F.R. § 0.445(e). See *HighTech CB Shop*, Memorandum Opinion and Order, DA 05-3125, 2005 WL 3274371 (rel. December 2, 2005).

²³ *Hinton Telephone Company*, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 11625, 11637 (1995); see also *Texas Media Group, Inc.*, Memorandum Opinion and Order, 5 FCC Rcd 2851, 2852 (1990) *aff'd sub nom. Malkan FM Associates v. FCC*, 935 F.2d 1313 (D.C. Cir. 1991) ("It is the obligation of interested parties to ascertain facts from official Commission records and files and not rely on statements or informal opinions by the staff.").

²⁴ *OGC Letter*, 14 FCC Rcd 7797.

13. We have examined Gambler's response to the NAL pursuant to the statutory factors above and in conjunction with the Policy Statement. As a result of our review, and based on the record before us, we conclude that Gambler willfully and repeatedly violating Section 302(b) of the Act and Sections 2.803(a)(1) of the Rules by offering for sale non-certified CB transceivers. Considering the entire record and the factors listed above, we find that neither reduction nor cancellation of the proposed \$7,000 forfeiture is warranted.

IV. ORDERING CLAUSES

14. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended,²⁵ and Sections 0.111, 0.311 and 1.80(f)(4) of the Rules,²⁶ Gambler's CB & Ham Radio Sales & Service **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of seven thousand dollars (\$7,000) for willful and repeated violation of Section 302(b) of the Act and Section 2.803(a)(1) of the Rules.

15. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within thirty (30) days of the release of this *Order*. If the forfeiture is not paid within the period specified, that case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.²⁷ 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/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 358340, Pittsburgh, PA 15251-8340. Payment by overnight mail may be sent to Mellon Bank /LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, PA 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106. Requests for full payment under an installment plan should be sent to: Associate Managing Director, Financial Operations, 445 12th Street, S.W., Room 1A625, Washington, D.C. 20554.²⁸

16. **IT IS FURTHER ORDERED** that a copy of this *Forfeiture Order* shall be sent by Certified Mail, Return Receipt Requested, and regular mail, to Gambler's CB & Ham Radio Sales & Service at its address of record and its counsel of record, Michael C. Olson.

FEDERAL COMMUNICATIONS COMMISSION

Russell Monie, Jr.
Regional Director, Northeast Region
Enforcement Bureau

²⁵ 47 U.S.C. § 503(b).

²⁶ 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).

²⁷ 47 U. S. C. § 504(a).

²⁸ See 47 C.F.R. § 1.1914.