

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

In the Matter of

Skywave Electronics, Inc.
Rockford, Illinois

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**File No. EB-00-AT-289
NAL/Acct. No. X3248003**

FORFEITURE ORDER

Adopted: December 12, 2000

Released: December 14, 2000

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Forfeiture Order (“Order”), we issue a monetary forfeiture in the amount of seven thousand dollars (\$7,000) against Skywave Electronics, Inc. (“Skywave”) for violating Section 302 of the Communications Act of 1934, as amended (“Act”)¹ and Section 2.907 of the Commission’s Rules (“Rules”),² by marketing a non-compliant device for use in the FM broadcast band. The noted violations involve the sale and distribution of at least 11 FM transmitters that exceeded the power limitations of Skywave’s FCC authorization.

2. On May 9, 2000, the District Director of the Atlanta, Georgia Field Office issued a *Notice of Apparent Liability for Forfeiture* (“NAL”) in the amount of seven thousand dollars (\$7,000).³ Skywave filed a response on May 18, 2000.

II. BACKGROUND

3. Skywave holds a Grant of Equipment Authorization (“Authorization”) for the manufacture and distribution of a low-power transmitter device, the SKY-2000 Digital FM Transmitter.⁴ On August 6, 1999, an agent in the Commission’s Denver Field Office investigated a complaint of an illegal FM broadcast station. In the course of that investigation, the agent found that the station was using Skywave’s SKY-2000 digital FM transmitter. Field strength measurements taken during the investigation showed that the SKY-2000 was operating at 29 times the permitted level authorized by Section 15.239 of the Rules⁵ for a non-licensed low-powered transmitter. Subsequently, the Commission’s Office of Engineering and Technology (“OET”) requested and obtained two sample transmitters from Skywave to be evaluated for compliance with its Authorization, and found that one of the units failed to conform to the emission requirements of the Authorization. OET issued a citation to Skywave on October 5, 1999 for marketing a non-compliant device.

¹ 47 U.S.C. § 302.

² 47 C.F.R. § 2.907.

³ *Notice of Apparent Liability for Forfeiture*, NAL/No. X3248003 (Enf. Bur., Atlanta Office, released May 9, 2000).

⁴ FCC Identifier NX3SKY2000. The grant was originally issued on August 18, 1998, and was updated to reflect a modification of the device on July 13, 1999.

⁵ 47 C.F.R. § 15.239.

4. On September 28, 1999, agents from the Commission's Atlanta Field Office began an investigation into the marketing of Skywave low power FM transmitters, following local news reports featuring the transmitters. Agents found several non-compliant SKY-2000 FM transmitters distributed by Skywave in operation throughout the Atlanta metropolitan area. During a telephone conversation that same day, the president of Skywave advised an agent of the Atlanta Field Office that all units shipped from Skywave after July 13, 1999 were in compliance with the revised Authorization issued July 13, 1999. However, FCC agents obtained evidence that several non-compliant units were shipped after July 13, 1999.

5. In its response to the *NAL*, Skywave acknowledges its non-compliance. It asserts that the company sought to rectify the problems promptly after receiving notification that certain units were non-compliant by notifying dealers and recalling old units for testing and retrofitting to bring them into compliance. Skywave contends that it did not understand all that was expected of it as the certification holder for the product, but that it has acquired greater knowledge of the Commission's rules as a result of this incident. Skywave asserts that it is the international distributor for, and not the manufacturer of, the SKY-2000 transmitter, and that it did not willfully and repeatedly distribute the product knowing that it was over powered. It concedes that it may have erred by informing the Atlanta Field Office that only compliant SKY-2000 units were shipped after July 13, 1999, but notes that the sale date for a transmitter does not always reflect the date the merchandise was shipped from Skywave, as the products are sold through dealers. Skywave also seeks a waiver or dramatic reduction of the forfeiture due to its assertions regarding its financial circumstances, its understanding of the rules, and its efforts to correct the problem. In support of its inability to pay claim, Skywave has submitted copies of its income tax returns for 1997, 1998 and 1999, as well as an income statement and balance sheet for 1998 and profit and loss statement for 1999.

III. DISCUSSION

6. Both the Act and the Rules prohibit the sale or offer for sale of radio frequency devices, as well as the shipment or distribution for the purpose of selling such devices, unless the device has first been properly authorized, identified and labeled in accordance with the Commission's Rules.⁶ The Authorization was an equipment certification, which is based on representations and test data submitted by the company, and attaches to all units subsequently marketed by the grantee which are identical to the sample tested.⁷ Although Skywave had obtained an authorization for and labeled its transmitters as required under the Rules, at least 11 of the transmitters actually distributed by the company in the greater Atlanta area did not conform to the terms of the Authorization. Skywave's assertion that it did not fully understand its obligations as the holder of the Authorization will not excuse this violation. As the holder of the Authorization, it is responsible for the compliance of its radio frequency devices with the applicable standards. *See* 47 C.F.R. § 2.909. Further, although Skywave may have taken prompt action to rectify the problems, remedial action to correct a violation, while commendable, will generally not nullify a forfeiture penalty. *See Station KGVL, Inc.*, 42 FCC 2d 258, 259 (1993).

7. Skywave's contention that it merely distributes the device does not excuse the offense. The violation at issue is the sale and distribution of FM transmitters that did not comply with the terms of Skywave's Authorization, despite proper FCC identification and labeling. As noted in the *NAL*, these violations were willful and repeated under the Act because they were not caused by accident or mistake, and because more than one non-compliant unit was sold and distributed by Skywave.⁸

⁶ 47 U.S.C. § 302(b) and 47 C.F.R. § 2.803(a)(1).

⁷ *See* 47 C.F.R. § 2.907.

⁸ Section 312(f)(1) of the Act, 47 U.S.C. § 312(f)(1), which also applies to Section 503(b) of the Act, provides: "the term 'willful,' when used with reference to the commission or omission of any act, means the

8. The Commission has previously held that a licensee's gross income is generally the best indicator of its ability to pay a forfeiture. Although net losses may be relevant in some cases, if gross revenues are sufficiently great, the fact that a business is operating at a loss does not by itself mean that it cannot afford to pay a forfeiture.⁹ In support of its claim of inability to pay, Skywave has submitted financial data for 1997 through 1999, and has requested that we keep its financial information confidential. After reviewing the financial data submitted, we find no evidence in Skywave's response that would support a reduction of the forfeiture amount.

IV. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED THAT**, pursuant to Section 503(b) of the Act,¹⁰ and Sections 0.111, 0.311 and 1.80(f)(4) of the Rules,¹¹ Skywave Electronics, Inc., **IS LIABLE FOR A MONETARY FORFEITURE** in the amount \$7,000 for violating the provisions of Section 302 of the Act and Section 2.907 of the Rules, which require radio frequency devices to be properly authorized, identified, and labeled in accordance with the Commission's Rules prior to their sale, offer for sale, shipment, or distribution for sale, and provide that all products distributed pursuant to Commission certification be identical to the sample upon which the grant of certification was based.

10. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Commission's Rules¹² 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.¹³ Payment shall be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should note the NAL/Acct. No. referenced above. Requests for full payment under an installment plan should be sent to: Chief, Credit and Debt Management Center, 445 12th Street, S.W., Washington, D.C. 20554.¹⁴

conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States." See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991). Section 312(f)(1) of the Act further provides that "[t]he term 'repeated,' when used with reference to the commission or omission of any act, means the commission or omission of such act more than once"

⁹ See *PJB Communications of Virginia, Inc.*, 7 FCC Rcd 2088, 2088-89 (1992) (\$8,000 forfeiture not excessive where gross income was \$395,469; and net loss information submitted reflected only expected losses). See also *The Hinton Telephone Co. of Hinton, Oklahoma*, 8 FCC Rcd 5176, 5177 (1993) (\$5,000 forfeiture not excessive where gross revenues were over \$2 million, despite negative net income of \$46,000).

¹⁰ 47 U.S.C. § 503(b).

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

¹² 47 C.F.R. § 1.80.

¹³ 47 U.S.C. § 504(a).

¹⁴ See 47 C.F.R. § 1.1914.

11. **IT IS FURTHER ORDERED** that a copy of this Order shall be sent by Certified Mail Return Receipt Requested to Skywave Electronics, Inc. at 1205 N. Horace Avenue, Rockford, Illinois 61101.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau