

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

MEMORANDUM OPINION AND ORDER

Adopted: March 13, 2001

Released: March 15, 2001

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order* (“Order”), we set aside the previously released *Memorandum Opinion and Order* in this matter,¹ deny a Petition for Reconsideration, and affirm the *Forfeiture Order*² issued against Skywave Electronics, Inc. (“Skywave”). We issued the *Forfeiture Order* against Skywave in the amount of seven thousand dollars (\$7,000) for violating Section 302 of the Communications Act of 1934, as amended (“Act”)³ and Section 2.907 of the Commission’s Rules (“Rules”),⁴ by marketing a non-compliant device for use in the FM broadcast band.

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) to Skywave for the referenced violations. Skywave filed a response to the NAL. On December 14, 2000, the Chief, Enforcement Bureau (“Bureau”) released a *Forfeiture Order* issuing a \$7,000 forfeiture to Skywave. On February 26, 2001, the Bureau released a *Memorandum Opinion and Order* dismissing a Petition for Reconsideration (“Petition”) of the *Forfeiture Order*, because the petition was not timely filed. The copy of the Petition in the Bureau’s possession bore a January 18, 2001, date stamp by the Commission’s mailroom. Unbeknownst to the Bureau, Skywave had, in fact, timely filed a Petition for Reconsideration with the Commission. Skywave submits a copy of the Petition bearing the Secretary’s January 16, 2001, date stamp. However, the Bureau did not become aware that the Petition was timely filed until March 1, 2001, when Skywave filed a request that the Bureau set aside its *Memorandum Opinion and Order* and consider the Petition on its merits. Because Skywave actually did file a timely Petition for Reconsideration, we will set aside the *Memorandum Opinion and Order* released on February 26, 2001, and consider the merits of the arguments Skywave raises in its Petition. Accordingly,

¹ *Memorandum Opinion and Order*, DA 01-495, (Enf. Bur., released February 26, 2001) (“MO&O”).

² *Forfeiture Order*, NAL/Acct. No. X3248003 (Enf. Bur., released December 14, 2000).

³ 47 U.S.C. § 302a.

⁴ 47 C.F.R. § 2.907.

Skywave's request to set aside the previous *Memorandum Opinion and Order* in this matter is granted, and we proceed to consider its arguments.

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.⁵ 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 Rules⁶ 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.

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. On May 9, 2000, the Atlanta Office issued a *NAL* in the amount \$7,000 to Skywave for violations of Section 302 of the Act and Section 2.907 of the Commission's Rules. In its response to the *NAL*, Skywave requested waiver or dramatic reduction of the forfeiture but did not deny violating Section 302 of the Act and Section 2.907 of the Commission's Rules.

6. In its *Forfeiture Order*, released December 14, 2000, the Bureau concluded that Skywave violated Section 302 of the Act and Section 2.907 of the Commission's Rules by marketing a non-compliant device for use in the FM broadcast band. These violations involved the sale and distribution of at least 11 FM transmitters that exceeded the power limitations of Skywave's FCC authorization. The *Forfeiture Order* assessed a \$7,000 forfeiture for the violations. The *Forfeiture Order* also found that as the holder of the Authorization, Skywave is responsible for the compliance of its radio frequency devices with the applicable standards.⁷ In addition, the *Forfeiture Order* stated that although Skywave may have taken prompt action to rectify the problems, remedial action to correct a violation, while commendable,

⁵ 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.

⁶ 47 C.F.R. § 15.239.

⁷ See 47 C.F.R. § 2.909.

will generally not nullify a forfeiture penalty.⁸ The *Forfeiture Order* also stated that Skywave's contention that it merely distributes the device does not excuse the offense. Finally, the *Forfeiture Order* concluded that there was no evidence in Skywave's response that would support an inability to pay claim.

7. In its Petition, Skywave argues that we should rescind the forfeiture because of Skywave's financial circumstance.⁹ In support of its inability to pay claim, Skywave submitted copies of its 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. These documents reflect that Skywave had gross revenues of \$128,289 in 1997, \$190,879 in 1998, and \$233,795 in 1999. Skywave also includes a copy of a letter from its bank stating that Skywave's loan matured in June 2000, and that it still owes \$61,689.17 in unpaid principal and \$3,310.49 in post maturity interest. Skywave points out that according to the bank's letter, the amount of the loan "is secured by several mortgages as well as inventory, accounts and equipment." Skywave argues that if its bank "calls the loan" and it cannot pay, "Skywave will go under." Skywave also contends that the facts of the two cases cited in the *Forfeiture Order* are inapposite with respect to the amount of money involved.¹⁰ Skywave complains that the cited case law fails to prove that Skywave, a company that loses money annually, is not entitled to leniency because it cannot afford to pay a forfeiture. If we deem a forfeiture appropriate on the basis of facts unrelated to Skywave's financial circumstance, Skywave asserts, the Bureau should consider reducing the forfeiture amount.

III. DISCUSSION

8. As the *NAL* explicitly states, the forfeiture amount in this case was assessed in accordance with Section 503(b) of the Act,¹¹ Section 1.80 of the Rules,¹² and *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) ("*Policy Statement*"). 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.¹³

⁸ See *Station KGVL, Inc.*, 42 FCC 2d 258, 259 (1993).

⁹ Skywave acknowledges that in its response to the *NAL* issued in this proceeding, it included documentation to support its inability to pay claim, and requested that we keep its financial information confidential. Specifically, it argues that the *Forfeiture Order* did not adequately address its argument on this issue. For this reason, Skywave now withdraws its prior request for confidentiality of its financial information, and urges the Bureau to revisit its financial documents, and to reconsider whether a forfeiture is appropriate in light of Skywave's financial condition.

¹⁰ *The Hinton Telephone Co. of Hinton, Oklahoma*, 8 FCC Rcd 5176 (1993) ("*Hinton*"); *PJB Communications of Virginia, Inc.*, 7 FCC Rcd 2088 (1992) ("*PJB*").

¹¹ 47 U.S.C. § 503(b)(2)(D).

¹² 47 C.F.R. § 1.80.

¹³ 47 U.S.C. § 503(b)(2)(D).

9. Skywave's arguments do not justify rescission or reduction of the forfeiture amount on the basis of financial losses. When a licensee has presented no other persuasive evidence that payment of a forfeiture would cause financial difficulty, the presence of financial loss does not by itself necessarily establish a licensee's inability to pay a forfeiture.¹⁴ Skywave presents a copy of a letter from its bank regarding an outstanding loan, and states that it will "go under" if its bank "calls the loan". However, Skywave does not indicate that its bank has already seized its assets. Thus, although Skywave claims that it cannot afford to pay the forfeiture, it has provided no persuasive information other than financial losses to support this claim.

10. We disagree with Skywave's contention that the two cases cited in the *Forfeiture Order*, *Hinton* and *PJB*, are inapposite. The *Forfeiture Order* did not cite the cases to compare the underlying facts of those cases to the facts herein. The *Forfeiture Order* cited the cases for the proposition that financial losses alone do not establish that a business cannot pay a forfeiture where its gross revenues are sufficiently great.

11. We have examined Skywave's petition for reconsideration pursuant to the statutory factors set forth above, and in conjunction with the *Policy Statement* as well. As a result of our reconsideration, we conclude that Skywave has failed to provide a sufficient justification for reduction of the forfeiture amount.

IV. ORDERING CLAUSES

12. **Accordingly, IT IS ORDERED** that, the *Memorandum Opinion and Order*, DA 01-495, (Enf. Bur., released February 26, 2001), **IS SET ASIDE**

13. **IT IS FURTHER ORDERED** that, pursuant to Sections 1.106 of the Rules, Skywave's Petition for Reconsideration of the *Forfeiture Order* (NAL/Acct. No. X3248003) released December 14, 2000, **IS DENIED**.

14. **IT IS FURTHER ORDERED** that, pursuant to Section 503(b) of the Act¹⁵ and Section 1.80(f) of the Rules,¹⁶ Skywave Electronics, Inc., shall, within 30 days of the release of this *Memorandum Opinion and Order*, pay the amount of \$7,000 for violating Section 302 of the Communications Act of 1934, as amended ("Act")¹⁷ and Section 2.907 of the Commission's Rules. If the forfeiture is not paid within the specified period, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.¹⁸ Payment may be made by credit card through the Commission's Chief,

¹⁴ See *Independent Communications, Inc.*, 14 FCC Rcd 9605, 9610 (1999).

¹⁵ 47 U.S.C. § 503(b)

¹⁶ 47 C.F.R. § 1.80(f)

¹⁷ 47 U.S.C. § 302a.

¹⁸ 47 U.S.C. § 504(a).

Revenue and Receivables Operations Group at (202) 418-1995 or 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. 915OR0003. 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. 20554.¹⁹

15. **IT IS FURTHER ORDERED** that, a copy of this *Memorandum Opinion and Order* shall be sent by certified mail, return receipt requested, to counsel for Skywave Electronics, Inc., Lewis H. Goldman, Esq., Law Offices, Lewis Goldman, P.C., Plaza Suite 9, 4141 North Henderson Road, Arlington, Virginia, 22203, and to Skwyave Electronics, Inc., 1205 N. Horace Avenue, Rockford, Illinois 61101.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

¹⁹ See 47 C.F.R. § 1.1914.