

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

In the Matter of)	
)	File No. EB-05-DL-181
Love's Travel Stops and Country Stores, Inc.)	
)	NAL/Acct. No. 200632500001
Oklahoma City, Oklahoma)	
)	FRN 0010520286

FORFEITURE ORDER

Adopted: September 27, 2006

Released: September 29, 2006

By the Regional Director, South Central Region, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order* ("Order"), we issue a monetary forfeiture in the amount of twenty-five thousand dollars (\$25,000) to Love's Travel Stops and Country Stores, Inc. ("Loves") for willful and repeated violation of Section 302(b) of the Communications Act of 1934, as amended ("Act"),¹ and Section 2.803(a) of the Commission's Rules ("Rules").² The noted violation involves Love's offering for sale non-certified Citizens Band ("CB") transceivers.³

II. BACKGROUND

2. On October 15, 2001, and November 13, 2002, Enforcement Bureau field agents visited two Loves' retail outlets in Weatherford and Anna, Texas. At these locations, the stores displayed and offered for sale various models of non-certified CB transceivers marketed as Amateur Radio Service ("ARS") transmitters, including Galaxy models DX33HML and DX99V. The Office of Engineering and Technology of the Commission ("OET") specifically tested Galaxy models DX33HML and DX99V in 2000 and found both models to be non-certified CB transceivers. As a result of these inspections, the Dallas Office of the Enforcement Bureau ("Dallas Office") issued two Citations directly to Loves' corporate headquarters in Oklahoma City, Oklahoma on November 26, 2001 and November 15, 2002. The 2001 Citation specifically cited Loves for offering for sale non-certified CB transmitters, Galaxy models DX33HML and DX99V, while the 2002 Citation cited the Galaxy model DX99V as the non-Certified CB transmitter offered for sale by Loves. These Citations advised Loves of observed violations of the Commission's equipment authorization and marketing rules, specifically, marketing non-certified CB transceivers in violation of Section 302(b) of the Act and Section 2.803(a)(1) of the Rules. The Citations warned Loves that future violations may subject Loves to substantial civil monetary forfeitures for each such violation or each day of a continuing violation,⁴ seizure of equipment through *in rem* forfeiture action, and criminal sanctions including fines and imprisonment.⁵

¹ 47 U.S.C. § 302a(b).

² 47 C.F.R. § 2.803(a).

³ CB radio operation is confined to forty specified channels from 26.965 MHz to 27.405 MHz (carrier frequency).

⁴ See 47 C.F.R. § 1.80(b)(3).

⁵ See 47 U.S.C. §§ 501, 503(b), 510.

3. In response to the 2001 and 2002 Citations, Loves' Director of Risk Management at Loves' corporate headquarters in Oklahoma City, Oklahoma stated that the specific locations listed in the Citations would stop selling the named devices.⁶ In addition to the response from Loves' corporate headquarters, the Dallas Office received a letter on December 4, 2002 from Loves' attorney, which stated "[w]e dispute all of the legal and factual contentions set forth in the citation and ask you to treat this letter as a formal response to the citation."⁷

4. On February 2, 2004 and January 28, 2005, the Commission received complaints that Loves was marketing non-certified CB transceivers. From March 2004 through January 2005, Enforcement Bureau field agents visited 10 Loves' retail outlets at the following locations: Norman, Oklahoma; Oklahoma City, Oklahoma; Calumet, Oklahoma; Ranger, Texas; Buckeye, Arizona; Casa Grande, Arizona; Gila Bend, Arizona; Quartzsite, Arizona; and Coachella, California. At these locations, the stores displayed and offered for sale various models of non-certified CB transceivers marketed as ARS transmitters, including Galaxy models DX33HML and DX99V. OET specifically tested Galaxy models DX33HML and DX99V in 2000 and 2004 and found both models to be non-certified CB transceivers during all tests.

5. On January 12, 2005, based on inspections conducted on January 5, 2005, the Los Angeles Office of the Enforcement Bureau ("Los Angeles Office") issued five Citations directly to Loves' retail outlets in Buckeye, Arizona; Gila Bend, Arizona; Quartzsite, Arizona; Coachella, California; and Casa Grande, Arizona. All five of the 2005 Citations specifically cited Loves for offering for sale non-certified CB transmitters, Galaxy models DX33HML and DX99V. Each of these Citations advised Loves of observed violations of the Commission's equipment authorization and marketing rules, specifically, marketing non-certified CB transceivers in violation of Section 302(b) of the Act and Section 2.803(a)(1) of the Rules. The Citations warned Loves that future violations may subject Loves to substantial civil monetary forfeitures for each such violation or each day of a continuing violation,⁸ seizure of equipment through *in rem* forfeiture action, and criminal sanctions including fines and imprisonment.⁹

6. On February 3, 2005, the Los Angeles Office received a response to the five 2005 Citations from Loves' Director of Risk Management dated January 26, 2005, which stated "immediately upon my receipt of your letter, we immediately discontinued the sale of this merchandise at each of the respective locations."¹⁰ Additionally, the Los Angeles Office received a response from Loves' attorney also dated January 26, 2005, stating ". . . all the radios in question are marketed as Amateur radios, a fact conceded in the citation. As sold, the radios operate only on the Amateur bands. As such, the radios are governed by Part 97 of 47 C.F.R., not Part 95. Part 97 does not require type acceptance of Amateur radios."¹¹ On February 28, 2005, the Los Angeles Office responded to Loves' attorney informing him that his assertions were incorrect and that selling non-certified Amateur radios that can be easily modified

⁶ See Letter from Carl Martincich, Director of Risk Management for Loves to Agent Brock, Federal Communications Commission Dallas Field Office (November 27, 2002).

⁷ See Letter from Michael C. Olson, counsel for Loves, to James Wells, District Director, Federal Communications Commission Dallas Field Office (December 2, 2002).

⁸ See 47 C.F.R. § 1.80(b)(3).

⁹ See 47 U.S.C. §§ 501, 503(b), 510.

¹⁰ See Letter from Carl Martincich, Director of Risk Management for Loves to Catherine Deaton, District Director, Federal Communications Commission Los Angeles Field Office (January 26, 2005).

¹¹ See Letter from Michael C. Olson, counsel for Loves, to Catherine Deaton, District Director, Federal Communications Commission Los Angeles Field Office (January 26, 2005).

to operate on CB frequencies violates the Rules.¹²

7. On February 23 and 25, 2005, Enforcement Bureau field agents made two visits to Loves retail stores in Oklahoma where Loves offered for sale non-certified CB transceivers, Galaxy models DX33HML and DX99V.¹³ As noted above, OET had already tested these specific models and determined them both to be dual use Amateur Radio and CB transmitters. Each of the models could be modified to allow transmit capabilities on CB frequencies.

8. On February 9, 2006, the Dallas Office issued a *Notice of Apparent Liability for Forfeiture* to Loves in the amount of twenty-five thousand dollars (\$25,000) for the apparent willful and repeated violation of Section 302(b) of the Act and Section 2.803(a) of the Rules.¹⁴ The Dallas Office increased the proposed forfeiture above the base amount of \$21,000, because “Loves’ continuing violations of the equipment authorization requirements evince a pattern of intentional non-compliance with and apparent disregard for these rules.” On March 9, 2006, Loves submitted a response to the *NAL* requesting cancellation of the proposed forfeiture.

III. DISCUSSION

9. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Act,¹⁵ Section 1.80 of the Rules,¹⁶ 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) (“*Forfeiture Policy Statement*”). In examining Loves’ 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.¹⁷

10. 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.”¹⁸ 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.”¹⁹

11. CB radio transceivers are subject to the equipment authorization procedure known as Certification and must be certified and properly labeled prior to being marketed or sold in the United

¹² See Letter from Catherine Deaton, District Director, Federal Communications Commission Los Angeles Field Office to Michael Olson, counsel for Loves (February 28, 2005).

¹³ See ATTACHMENT for a listing of the Loves stores visited and the models observed.

¹⁴ *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200632500001 (Enf. Bur., Dallas Office, February 9, 2006) (“*NAL*”).

¹⁵ 47 U.S.C. § 503(b).

¹⁶ 47 C.F.R. § 1.80.

¹⁷ 47 U.S.C. § 503(b)(2)(D).

¹⁸ 47 U.S.C. § 302a(b).

¹⁹ 47 C.F.R. § 2.803(a).

States.²⁰ 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), just above the CB band (26.965 to 27.405 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. In an order, the Commission adopted changes to its Rules regarding 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.”²¹ 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).²² OET has 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.²³

12. On November 26, 2001 and November 15, 2002, the Dallas Office issued Citations to Loves’ corporate headquarters for offering for sale non-certified CB transmitters, Galaxy models DX33HML and DX99V. Although Loves’ Director of Risk Management responded to the Citations that Loves’ would cease selling the models at the locations in question, in an additional response to the 2002 Citation, Loves’ attorney disputed that it violated the Rules and claimed that it was legal to sell ARS radios that were not FCC certified. In its response to the *NAL*, Loves claims that, because the Dallas Office failed to respond, it assumed the Dallas Office agreed with its response to the 2002 Citation dated December 2, 2002.²⁴ Similarly, Loves’ attorney claims that it assumed the Los Angeles Office agreed with its positions because the Los Angeles Office failed to respond to its March 15, 2005 letter, which reiterated the assertions made in its response to one of the January 12, 2005 Citations. We find it unreasonable for Loves to have concluded that the Dallas and Los Angeles Offices agreed with its positions. The Field Offices at no time stated orally or in writing that it agreed with Loves’ attorney’s positions. To the contrary, the only written correspondence from the Field Offices - the 2001, 2002, and 2005 Citations and the letter dated February 28, 2005 - unambiguously stated that Loves violated Section 302(b) of the Act and 2.803(a) of the Rules. Loves’ conclusion that the Field Offices agreed with it seems irrational. Indeed we find it incredulous that Loves’ attorney believed that the Commission agreed with its positions after the Los Angeles Office specifically wrote in a letter dated February 28, 2005 that its assertions were incorrect. We conclude that seven Citations were more than sufficient to provide Loves actual notice that marketing this equipment is unlawful and that continued violations could make Loves liable for severe sanctions.

²⁰ See 47 C.F.R. §§ 2.907, 2.927(a).

²¹ 47 C.F.R. § 95.603(c) [FCC 88-256], amended changing “type acceptance” to “certification” [FCC 98-58]. See also *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) (“*Public Notice*”).

²² 47 C.F.R. § 95.655(a).

²³ See *Public Notice*. See also Letter from Christopher Wright, General Counsel, FCC to John Atwood, Chief Intellectual Property Rights, US Customs Service, 14 FCC Red 7797 (OGC, 1999) (“*OGC Letter*”) (noting that ARS transmitters that “have a built-in capability to operate on CB frequencies and can easily be altered to activate that capability, such as by moving or removing a jumper plug or cutting a single wire” fall within the definition of “CB transmitter”).

²⁴ Loves makes the same argument with respect to the Citation sent to the retail location in Gila Bend, AZ. Loves is incorrect, however, that the Los Angeles Office failed to respond to its response to the January 12, 2005 Citation. The Los Angeles Office responded to Loves’ attorney that his assertions were incorrect in a letter dated and mailed on February 28, 2005. In response to the Los Angeles Office’s letter dated February 28, 2005, Loves’ attorney sent a letter dated March 15, 2005, which reiterated its original assertions.

13. In its response to the *NAL*, Loves does not deny that it offered for sale Galaxy models DX33HML and DX99V. Loves alleges, however, that it did not violate the Rules. Loves states that the Galaxy transceivers in question, as manufactured, operate solely on Amateur Radio Service (“ARS”) bands and, therefore, do not require FCC certification. Loves argues that the Rules only require certification of transmitters that operate or are intended to operate at a station authorized in the CB and that it did not intend to sell these models for operation on the CB bands. It claims that each transceiver comes packaged with a warning that it is illegal to transmit on the equipment without the appropriate Amateur license. It asserts that the CB Rules say nothing about the certification of Amateur transceivers that can be easily modified to operate on CB frequencies and that the Commission cannot add a requirement covering such transceivers, without first complying with the Administrative Procedures Act. It also argues that the Commission failed to define what “easily modifiable” means and that such language is unconstitutionally vague. It also states that whether modifications are easy to implement depend upon the individual’s skills and experience. Finally, it claims that almost all ARS radios may be modified to operate on CB frequencies and, thus, the Commission effectively subjected all ARS radios to certification.

14. We reject Loves’ arguments. Section 95.603(c) of the Rules states that a CB transmitter is a “transmitter that operates or is intended to operate at a station authorized in the CB” and that such transmitters must be certificated.²⁵ The Office of General Counsel (“OGC”) subsequently clarified that ARS transmitters that “have a built-in capability to operate on CB frequencies and can easily be altered to activate that capability, such as by moving or removing a jumper plug or cutting a single wire” are intended for use in the CB frequencies as well as the amateur service and fall within the definition of “CB transmitter.”²⁶ Thus, the Commission clarified an existing Rule that was adopted pursuant to a Notice and Comment Rulemaking and did not change its Rules merely by making a policy change, as Loves alleges. This Rule and the Commission’s subsequent interpretation of the Rule make clear that a device manufactured to operate on ARS frequencies and labeled an ARS transmitter may nevertheless be a CB transmitter.²⁷ The Commission also provided a clear example of what it meant by easily alterable, *i.e.*, moving or removing a jumper plug or cutting a single wire. This example does not require extensive technical knowledge and could be accomplished by an average non-technical person if given simple instructions. Moreover, the *OGC Letter* was published in the FCC Record. Pursuant to Section 0.445(e) of the Rules, 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.²⁸ Although the Commission has clarified that a transmitter intended to operate in the CB band includes ARS transmitters that can be easily modified to operate on CB frequencies, the Commission has never stated that intent to operate in the CB bands can be determined through the actions of a seller of an ARS transceiver. Moreover, our Rules prohibit the sale or lease or offering for sale or lease of non-certified CB transmitters and do not prohibit the purchase of such devices. Therefore, it is irrelevant whether inserts were placed in the transmitter packaging that the transmitters in question require an Amateur license, or that other ARS transmitters might qualify as CB transmitters. The Galaxy DX33HML and DX99V radios have been tested by the OET and found to be CB transmitters, because they have built-in capability to operate on CB frequencies and can be easily altered to activate that capability. Loves had actual knowledge that the Galaxy DX33HML and DX99V radios had been tested by OET and found to be CB transmitters prior to February 2005.

²⁵47 C.F.R. § 95.603(c).

²⁶See *OGC Letter*. See also *Public Notice* (clarifying 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).

²⁷ See also *Hightech CB Shop*, Memorandum Opinion and Order, 20 FCC Rcd 19,269 (Enf. Bur. 2005), *Pilot Travel Centers, LLC*, Order, 21 FCC Rcd 5308 (2006).

²⁸47 C.F.R. § 0.445(e).

15. Based on the evidence before us, we find that Loves willfully²⁹ and repeatedly³⁰ violated Section 302(b) of the Act and Section 2.803(a) of the Rules by offering for sale non-certified CB transmitters on three instances³¹ -- two on February 23, 2005, and one on February 25, 2005.

16. We have examined Loves' response to the *NAL* pursuant to the statutory factors above, and in conjunction with the *Forfeiture Policy Statement*. As a result of our review, we find no basis for cancellation or reduction of the \$25,000 forfeiture proposed for this violation.

IV. ORDERING CLAUSES

17. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.311 and 1.80(f)(4) of the Commission's Rules, Loves Travel Stops and Country Stores, Inc. **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of twenty-five thousand dollars (\$25,000) for willfully and repeatedly violating Section 302(b) of the Act and 2.803(a) of the Rules.

18. 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.³² 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. 20554.³³

²⁹ Section 312(f)(1) of the Act, 47 U.S.C. § 312(f)(1), which applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that "[t]he term 'willful,' ... means the 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" See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

³⁰ The 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 or, if such commission or omission is continuous, for more than one day." 47 U.S.C. § 312(f)(2).

³¹ Although Loves offered for sale non-certified CB transmitters on days prior to February 23, 2005, the Commission is barred from enforcing those violations by the statute of limitations contained in Section 503(b)(6) of the Act.

³² 47 U.S.C. § 504(a).

³³ See 47 C.F.R. § 1.1914.

19. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class and Certified Mail Return Receipt Requested to Loves at its record of address and to its attorney, Michael C. Olson, 4400 MacArthur Boulevard, Suite 23C, Newport Beach, California 92660.

FEDERAL COMMUNICATIONS COMMISSION

Dennis P. Carlton
Regional Director, South Central Region
Enforcement Bureau

ATTACHMENT

1. February 23, 2005, Loves center #213, Tomkawa, Oklahoma. Non-certified CB transceiver Galaxy models DX33HML displayed and offered for sale.
2. February 23, 2005, Loves center #213, Tomkawa, Oklahoma. Non-certified CB transceiver Galaxy models DX99V displayed and offered for sale.
3. February 25, 2005, Loves center #202, Pauls Valley, Oklahoma. Non-certified CB transceiver Galaxy models DX33HML displayed and offered for sale.