

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

In the Matter of)

CB Shop & More, LLLP)
Loveland, Colorado)

File Number: EB-07-DV-058

NAL/Acct. No.: 200732800008

FRN: 0016797623

FORFEITURE ORDER

Adopted: March 19, 2008

Released: March 21, 2008

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 seven thousand dollars (\$7,000) to CB Shop & More, LLLP ("CB Shop"), in Loveland, Colorado, for willful and repeated violations of Section 302(b) of the Communications Act of 1934, as amended ("Act"),¹ and Section 2.803(a)(1) of the Commission's Rules ("Rules").² On August 28, 2007, the Enforcement Bureau's Denver Office issued a *Notice of Apparent Liability for Forfeiture* ("NAL") to CB Shop after determining that CB Shop offered for sale a non-certified Citizens Band ("CB") transceiver. In this *Order*, we consider CB Shop's argument that the CB transceiver at issue did not require Commission certification.

II. BACKGROUND

2. On November 25, 2002, an agent from the Enforcement Bureau's Denver Office inspected the CB Shop in Loveland, Colorado. The agent observed that the store displayed and offered for sale twelve models of CB transceivers, specifically, one Super Star 121 transceiver, one General Longstreet transceiver, one Connex CX3300HP transceiver, one Connex CX4400HP transceiver, and eight Galaxy transceivers models DX33HML, DX44V, DX55V, DX66V, DX73, DX77HML, DX88HL, and DX99V. A review of the Commission's records revealed that these devices had not received an equipment authorization from the Commission.

3. On November 26, 2002, the FCC Denver Office issued a Citation to CB Shop for violation of Section 302(b) of the Act and Section 2.803(a)(1) of the Commission's Rules by selling non-certified CB transceivers.³ The Citation warned the CB Shop that future violations may subject CB Shop to civil monetary forfeitures not to exceed \$11,000 for each 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)(1).

³ Citation to CB Shop & More, LLLP, released November 26, 2002 ("Citation").

⁴ See 47 C.F.R. § 1.80(b)(3).

⁵ See 47 U.S.C. §§ 501, 503(b), 510.

4. In a response dated December 3, 2002, counsel for CB Shop disputed the Citation, stating that the transceivers listed in the Citation were legal to sell. Counsel for CB Shop further requested that the Denver Office withdraw the Citation within 14 days from December 3, 2002. In a response to the CB Shop, dated December 18, 2002, the Denver Office reaffirmed the violation and warned that the marketing of the non-certified CB transceivers should cease immediately.⁶

5. On January 26, 2007, and March 8, 2007, the Denver Office received complaints alleging that the CB Shop was selling non-certified CB transmitters and modified 10-meter band radios. On March 30, 2007, Denver agents visited the CB Shop. Agents noted that one of the CB transceivers offered for sale was a Galaxy Model DX99V and asked if they could purchase the transceiver. The Denver agents subsequently identified themselves as FCC agents, and proceeded to interview the owner of the CB Shop. The owner acknowledged that he once received a Citation from the FCC, but he thought it was still legal for them to sell the referenced CB transceivers.

6. On August 28, 2007, the Denver Office issued a *NAL* in the amount of \$7,000 to CB Shop.⁷ In the *NAL*, the Denver Office found that CB Shop apparently willfully and repeatedly violated Section 302(b) of the Act,⁸ and Section 2.803(a)(1) of the Rules⁹ by offering for sale a non-certified CB transceiver. CB Shop filed a response on September 17, 2007 ("*Response*"). In its *Response*, CB Shop argues that Galaxy Model DX99V does not require certification by the Commission because it is not a CB transceiver. Consequently, CB Shop argues the forfeiture should be cancelled.¹⁰

III. DISCUSSION

7. The proposed 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*.¹³ In examining the *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.¹⁴

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

⁶ In a response to the Denver Office, dated December 23, 2002, Counsel for CB Shop again disputed the Citation and requested that the Citation be withdrawn by the Denver Office within 14 days.

⁷ *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200732800008 (Enf. Bur., Western Region, Denver Office, released August 28, 2007).

⁸ 47 U.S.C. § 302a(b).

⁹ 47 C.F.R. § 2.803(a)(1).

¹⁰ As part of its *Response*, CB Shop includes an undated letter from a testing lab concerning the frequencies on which a "radio similar to the Galaxy DX99V" operates. *Response* at Exhibit 1. CB shop states that the report from the testing lab "shows that the radio does not require FCC Certification' or 'Type Acceptance.'" Because the report does not include the Galaxy Model DX99V, we find that it has no relevance to the case before us.

¹¹ 47 U.S.C. § 503(b).

¹² 47 C.F.R. § 1.80.

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

¹⁴ 47 U.S.C. § 503(b)(2)(E).

comply with regulations promulgated pursuant to this section.”¹⁵ Section 2.803(a)(1) of the Rules provides that “[e]xcept 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 in the case of a device subject to certification such device has been authorized by the Commission”¹⁶

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.¹⁷ Unlike CB radio transceivers, radio transmitting equipment that transmits solely on Amateur Radio Service (“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.”¹⁸ 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).¹⁹ Also, 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.²⁰ Additionally, the Commission’s Office of Engineering and Technology (“OET”) evaluated Galaxy Model DX99V here and determined that it could easily be altered for use as a CB transceiver.²¹

10. CB Shop argues that the Galaxy DX99V transceiver does not require Commission certification (type acceptance) because it is not a CB transceiver. CB Shop states that the Galaxy DX99V is manufactured to operate solely on the 10 meter amateur band, and its intent in selling the Galaxy DX99V was that the transceivers be used only as amateur equipment.²² Consequently, CB Shop argues that Section 95.603 of the Rules defines a CB transmitter as “a transmitter that operates or is intended to operate at a station authorized in the CB,” therefore, the Galaxy DX99V, as manufactured by Galaxy and as marketed by CB Shop is not a CB transceiver, as defined by the Commission’s Rules. We disagree. CB

¹⁵ 47 U.S.C. § 302a(b).

¹⁶ 47 C.F.R. § 2.803(a)(1).

¹⁷ See 47 C.F.R. §§ 2.907, 2.927(a).

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

¹⁹ 47 C.F.R. § 95.655(a).

²⁰ 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”). See also, *Ramko Distributors, Inc.*, 22 FCC Rcd 7161 (2007).

²¹ *Pilot Travel Centers*, 19 FCC Rcd at 23119. See also, *TravelCenters of America*, 21 FCC Rcd 6978 (EB Western Region 2006).

²² To support this claim of intent, CB Shop includes in its Response an affidavit from its owner stating that the “Subject Radios are intended by CB Shop & More, LLLP to only be used as Amateur Radios. Before selling any radio, the customer is required to acknowledge that the radio is a 10 meter radio with no CB frequencies.” *Response - Declaration of Paul Tate* at 1 – 2.

Shop fails to consider the *OGC Letter*, also discussed above and in the *NAL*, which clarified that ARS transmitters that can easily be altered to operate on CB transmitter channel frequencies fall within the definition of “CB transmitter” under Section 95.603(c) of the Rules.²³ Consistent with Sections 95.603(c) and the *OGC Letter*, and as stated in the *NAL*, OET evaluated the Galaxy Model DX99V and determined that it was a non-certified CB transceiver.²⁴ CB Shops provides no evidence to show that the Galaxy Model DX99V it offered for sale was not easily modified. Therefore, we find that Galaxy Model DX99V is a CB transmitter pursuant to Section 95.603(c), regardless of CB Shop’s now stated intent regarding the sale of the Galaxy Model DX99V.

11. CB Shop also argues that over ten years ago, OET issued a public notice, “trying to expand the definition of a Citizen Band transmitter to transceivers capable of being ‘easily modified’ to work on the Citizen Band service.”²⁵ CB Shop contends, however, that this was an amendment to the CB Rules, that the Commission cannot amend the Rules by merely putting out a public notice, and that its attempt to do so violates the APA and due process. In assessing CB Shop’s liability in the *NAL*, the Denver Office relied on the *OGC Letter* and its interpretation of Section 95.603(c), as well as OET’s specific determination concerning Galaxy Model DX99V, and did not rely on the public notice cited to by CB Shop. We note that CB Shop does not argue that the enactment of Section 95.603(c) violated the APA nor does CB Shop object to the clarification offered by the *OGC Letter*.²⁶ Therefore, we find no merit to this argument either.

12. CB Shop further states that whether a transceiver can be “easily modified” is one of degree and cites to an email from a Commission staffer. We disagree. 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.²⁷ Additionally, “[w]hen the staff advice is contrary to the Commission’s rules, the Commission may still enforce its rules despite any reliance by the public.”²⁸ Second, the *OGC Letter* explains the concept of “easily modified” as including moving or removing a jumper plug or cutting a single wire.²⁹ Third, CB Shop was on notice that the Galaxy transceivers it was offering for sale were considered to be “easily modified,” and therefore, non-certified CB transceivers for years prior to the issuance of the *NAL*. It received a Citation on November 26, 2002, 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 Denver Office, on December 18, 2002, warning that it should no longer offer for sale the Galaxy transceiver at issue. Despite these notices and warnings, CB Shop continued to sell the non-certified CB transceivers.

13. We have examined the *Response* to the *NAL* pursuant to the statutory factors above, and

²³ 14 FCC Rcd 7797.

²⁴ *NAL* at para. 8, and para 9, n.18. See also *Pilot Travel Centers*, 19 FCC Rcd at 23119; *TravelCenters of America*, 21 FCC Rcd at 6981.

²⁵ *Response* at 2 - 3.

²⁶ The *OGC Letter* was published in the FCC Record, and therefore “may be relied upon, used or cited as precedent by the Commission or private parties in any manner.” 47 C.F.R. § 0.445(e). See *TravelCenters of America*, 21 FCC Rcd at 6981. See also, *HighTech CB Shop*, 20 FCC Rcd 19269, 192671 (EB 2005).

²⁷ *Texas Media Group, Inc.* 5 FCC Rcd 2851, 2852 (1990) *aff’d sub nom Malkan FM Associates v. FCC*, 935 F.2d 1313 (D.C. Cir. 1991).

²⁸ *Hinton Telephone Company*, 10 FCC Rcd 11625, 11637 (1995). See also, *Malkan FM Associates v. FCC*, 935 F.2d 1313 (D.C. Cir 1991); *Schweiker v. Hansen*, 450 U.S. 785, 790 (1981) (petitioner's reliance on erroneous staff advice does not estop agency from requiring compliance with valid regulation).

²⁹ 14 FCC Rcd 7797.

in conjunction with the *Forfeiture Policy Statement*. As a result of our review, we conclude that CB Shop willfully and repeatedly violated Section 302(b) of the Act, and Section 2.803(a)(1) of the Rules. 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 (“Act”), and Sections 0.111, 0.311 and 1.80(f)(4) of the Commission’s Rules, CB Shop & More, LLLP, **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of \$7,000 for willfully and repeatedly violating Section 302(b) of the Act, and Section 2.803(a)(1) of the Rules.³⁰

15. 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.³¹ 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 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.

16. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class Mail and Certified Mail Return Receipt Requested to CB Shop & More, LLLP, at its address of record, and its counsel of record, Michael C. Olson, Esquire.

FEDERAL COMMUNICATIONS COMMISSION

Rebecca L. Dorch
Regional Director, Western Region
Enforcement Bureau

³⁰ 47 U.S.C. §§ 302a(b), 503(b), 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4), 2.803(a)(1).

³¹ 47 U.S.C. § 504(a).