

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

In the Matter of)	
)	File No. EB-08-SE-819
Midland Radio Corporation)	NAL/Acct. No. 200932100066
)	FRN 0005867551

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: June 23, 2009

Released: June 25, 2009

By the Chief, Spectrum Enforcement Division, Enforcement Bureau:

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture* (“NAL”), we find Midland Radio Corporation. (“Midland”) apparently liable for a forfeiture in the amount of twenty-one thousand dollars (\$21,000) for willful and repeated violation of Section 302(b) of the Communications Act of 1934, as amended (“Act”)¹ and Section 2.803(g) of the Commission’s Rules (“Rules”).² The noted apparent violations involve Midland’s marketing of noncompliant General Mobile Radio Service (“GMRS”) transmitters.

II. BACKGROUND

2. Section 95.183(a)(4) of the Rules³ prohibits GMRS operators from transmitting coded messages and messages with hidden meanings. The Enforcement Bureau’s Spectrum Enforcement Division (“Division”) received information indicating that Midland was marketing GMRS transmitters that have a voice scrambling feature. After its receipt of this information, the Division began an investigation. In pursuance of the investigation, the Division conducted internet research on February 24, 2009, on the website www.midlandradio.com. During the internet research, Division personnel observed that Midland was offering for sale the following GMRS transmitter models described as having a “Voice Privacy Scramble” feature: GXT900VP4 and GXT950VP4.

3. The Division directed a letter of inquiry (“LOI”) to Midland on March 3, 2009.⁴ Midland responded on April 2, 2009.⁵ In its response, Midland states that its scrambling feature “utilizes voice inversion, an encoding/decoding circuit technology that mixes the voice signal with a high frequency tone, resulting in upper and lower sidebands added to the voice signal and tone. One of the sidebands is

¹ 47 U.S.C. § 302a(b).

² 47 C.F.R. § 2.803(g).

³ 47 C.F.R. § 95.183(a)(4).

⁴ Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission to Midland Radio Corporation. (March 3, 2009).

⁵ Letter from Peter Tannenwald and Davina Sashkin, Counsel for Midland Radio Corporation., to Thomas D. Fitz-Gibbon, Esq., Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission (April 3, 2009) (“LOI Response”).

removed when the transmission is sent. In a receiver equipped with the appropriate descrambling capability, the missing sideband is restored, recovering the full voice transmission.”⁶

4. Additionally, Midland’s response indicates that Midland has imported and marketed a large quantity⁷ of the following GMRS transmitter models that have the scrambling feature: GXT900VP4, GXT950VP4, GXT800VP4, GXT808VP3, GXT850VP4B and GXT900VP4K.⁸ The GXT900VP4, GXT900VP4K and GXT950VP4 are apparently certified under the FCC ID MMAGXT950, while the GXT800VP4, GXT808VP3 and GXT850VP4B appear to be certified under the FCC ID MMAGXT850Z. Midland contends the use of its scrambling feature is not prohibited by Section 95.183(a)(4) of the Rules.

III. DISCUSSION

A. Midland Apparently Marketed Noncompliant Devices

5. 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.” Section 2.803(g) provides in pertinent part:

The provisions in paragraphs (b) through (f) of this section do not apply to radio frequency devices that could not be authorized or legally operated under the current rules. Such devices shall not be operated, advertised, displayed, offered for sale or lease, sold or leased, or otherwise marketed absent a license issued under part 5 of this chapter or a special temporary authorization issued by the Commission.

Additionally, Section 95.183(a)(4) of the Rules provides in pertinent part that “[a] station operator must not communicate . . . coded messages or messages with hidden meanings.”

6. Midland admits that it imported and marketed⁹ a large quantity of GMRS transmitters that have a voice scrambling feature but contends that the use of the voice scrambling feature does not violate Section 95.183(a)(4) of the Rules. Specifically, Midland argues that, while its “voice privacy scramble” feature makes voice communications unintelligible to users of radios without this feature, all users of radios that have the scrambling feature can decipher scrambled communications.¹⁰ Additionally, Midland claims its voice scrambling feature does not fit the dictionary definition of a coded message.¹¹ Midland further argues that it made a full disclosure of the scrambling feature when it applied for the certification FCC ID MMAGXT950, that the scrambling feature is available on a wide variety of GMRS

⁶ “Response of Midland Radio Corporation to FCC Letter of Inquiry” (Attachment to LOI Response, hereinafter referred to as “First Attachment”) at 1-2.

⁷ Midland requested confidential treatment of portions of its LOI response, including the exact number of GMRS devices imported and the dates of importation. Accordingly, this information is discussed in an Appendix, which we are treating as confidential at this time. The request for confidentiality remains pending.

⁸ *Id.* at 2.

⁹ Marketing, as defined in 47 C.F.R. § 2.803(e)(4), “includes sale or lease, or offering for sale or lease, including advertising for sale or lease, or importation, shipment, or distribution for the purpose of selling or leasing or offering for sale or lease.”

¹⁰ LOI Response at 2.

¹¹ *Id.* at 2.

devices marketed by its competitors and that it must offer a similar feature to remain competitive.¹² Finally, Midland asserts that during 2006 it discussed the permissibility of GMRS voice scrambling with a member of the Commission's Wireless Telecommunications Bureau staff; that during this discussion it pointed out that a number of competing GMRS products had the voice scrambling feature; and that, because no enforcement action was taken and one of these products remained certified, it was "justified in assuming" that "the Commission had decided not to require the products to come off the market."¹³

7. Midland's arguments are unconvincing. It was not justified in its assumption that the Commission decided not to require the removal from the market of GMRS devices with voice scrambling. In 2007, the Commission staff publicly interpreted its rules to advise that voice scrambling constitutes coded messaging and, therefore, is not allowed for GMRS devices.¹⁴ Additionally, in 2004 the former Public Safety and Critical Infrastructure Division of the Wireless Telecommunications Bureau granted Garmin International, Inc. ("Garmin") a waiver of Section 95.183(a)(4) of the Rules to permit the manufacture and marketing of GMRS devices capable of transmitting and receiving Global Position System (GPS) location information.¹⁵ In the absence of a waiver, the transmission of GPS location information over the radios marketed by Garmin would have been prohibited by Section 95.183(a)(4) of the Rules.¹⁶ Although Midland's voice scrambling technology differs from Garmin's technology, it has an analogous effect – the transmission of messages that are undecipherable to many GMRS users. In both circumstances, the undecipherable messages are coded messages within the meaning of Section 95.183(a)(4) of the Rules.

8. A device equipped with a prohibited capability must be classified as noncompliant notwithstanding any approval by a Telecommunication Certification Body (TCB).¹⁷ We find that the GMRS devices authorized by the equipment authorizations FCC ID MMAGXT950 and FCC ID MMAGXT850Z are noncompliant with the requirements of Section 95.183(a)(4) of the Rules.

9. Midland requests that, if the Commission decides that voice scrambling is prohibited in GMRS devices, this should be done "prospectively, with time allowed to update product design and to dispose of existing inventories."¹⁸ We will not rule prospectively. Section 95.183(a)(4) of the Rules has been previously construed to prohibit voice scrambling in the GMRS.

¹² *Id.* at 2-4.

¹³ *Id.* at 3.

¹⁴ Office of Engineering and Technology KDB Publication number 791760 at www.fcc.gov/labhelp.

¹⁵ *Garmin International, Inc., Request for Waiver of Sections 95.29(f), 95.119(a)(1), 95.181(a), 95.13(a)(4) and 95.631(a) and (f) of the Commission's Rules to Authorize the Manufacture, Sale and Use of GPS Transmission Enhanced GMRS Units*, Order, 20 FCC Rcd. 982 (WTB, Public Safety and Critical Infrastructure Division 2004) (waiver granted); *waiver extended*, Order, 21 FCC Rcd. 15072 (WTB, Public Safety and Critical Infrastructure Division 2006); *waiver extended*, Order, 23 FCC Rcd 18325 (WTB, Public Safety and Critical Infrastructure Division 2008).

¹⁶ Since GPS location information cannot be deciphered by GMRS users who don't have the necessary equipment, it is considered to be a coded message.

¹⁷ See 47 C.F.R. § 2.939(a)(2), which authorizes the Commission to revoke an equipment authorization if it is determined that the equipment does not conform to the pertinent technical requirements.

¹⁸ *Id.* at 4.

10. We, accordingly, find that Midland apparently marketed noncompliant radio frequency devices, in willful¹⁹ and repeated²⁰ violation of Section 302(b) of the Act and Section 2.803(g) of the Rules.

B. Proposed Forfeiture

11. Section 503(b) of the Act²¹ authorizes the Commission to assess a forfeiture for each willful or repeated violation of the Act or of any rule, regulation, or order issued by the Commission under the Act. In exercising such authority, we are required to 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 such other matters as justice may require.”²²

12. Section 503(b)(6) of the Act²³ bars the Commission from proposing a forfeiture for violations that occurred more than a year prior to the issuance of an *NAL*. Section 503(b)(6) does not, however, bar the Commission from assessing whether Midland’s conduct prior to that time period apparently violated the provisions of the Act and Rules and from considering such conduct in determining the appropriate forfeiture amount for violations that occurred within the one-year statutory period.²⁴ Thus, while we may consider the fact that Midland’s conduct has continued over a period that began during 2007, the forfeiture amount we propose herein relates only to Midland’s’s apparent violations that have occurred within the past year.

13. Under the *Forfeiture Policy Statement*²⁵ and Section 1.80 of the Rules,²⁶ the base forfeiture amount for the marketing of unauthorized equipment is \$7,000. Midland apparently marketed

¹⁹ 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.*, Memorandum Opinion and Order, 6 FCC Rcd 4387 (1991).

²⁰ Section 312(f)(2) of the Act provides that “[t]he term ‘repeated’, ... 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). See, e.g., *Callais Cablevision, Inc., Grand Isle, Louisiana*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362 ¶ 10 (2001) (“*Callais Cablevision*”) (issuing a Notice of Apparent Liability for, *inter alia*, a cable television operator’s repeated signal leakage).

²¹ 47 U.S.C. § 503(b).

²² 47 U.S.C. § 503(b)(2)(E).

²³ 47 U.S.C. § 503(b)(6).

²⁴ See 47 U.S.C. § 503(b)(2)(D), 47 C.F.R. § 1.80(b)(4); see also *Behringer USA, Inc.*, Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 1820, 1825 (2006), *forfeiture ordered*, Forfeiture Order, 22 FCC Rcd. 1051 (2007) (forfeiture paid); *Globcom, Inc. d/b/a Globcom Global Communications*, Notice of Apparent Liability for Forfeiture, 18 FCC Rcd 19893, 19903 (2003), *forfeiture ordered*, Forfeiture Order, 21 FCC Rcd 4710 (2006); *Roadrunner Transportation, Inc.*, Forfeiture Order, 15 FCC Rcd 9669, 9671-71 (2000); *Cate Communications Corp.*, Memorandum Opinion and Order, 60 RR 2d 1386, 1388 (1986); *Eastern Broadcasting Corp.*, Memorandum Opinion and Order, 10 FCC 2d 37 (1967), *recon. den.*, 11 FCC 2d 193 (1967); *Bureau D’Electronique Appliquee, Inc.*, Notice of Apparent Liability for Forfeiture, 20 FCC Rcd 3445, 3447-48 (Enf. Bur., Spectrum Enf. Div. 2005), *forfeiture ordered*, Forfeiture Order, 20 FCC Rcd 17893 (Enf. Bur., Spectrum Enf. Div. 2005).

²⁵ *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087, 17113 (1997) (“*Forfeiture Policy Statement*”), *recon. denied*, 15 FCC Rcd 303 (1999).

²⁶ 47 C.F.R. § 1.80.

two distinct models of GMRS transmitters that were equipped with the voice scrambling feature: the model certified under FCC ID MMAGXT950 (designated by Midland as models GXT900VP4, GXT900VP4K and GXT950VP4) and the model certified under FCC ID MMAGXT850Z (designated by Midland as models GXT800VP4, GXT808VP3 and GXT850VP4B). We find that the base forfeiture amount of \$7,000 is apparently warranted for each of these two models for total of \$14,000.²⁷ Based on the record before us, and having considered the statutory factors enumerated above, we believe that an upward adjustment of the \$14,000 base forfeiture amount is warranted here. First, we believe that an upward adjustment is warranted in view of the substantial number of non-compliant devices Midland imported, sold and distributed in the United States and the fact that the violations continued over a significant period.²⁸ Further, we take into account Midland's ability to pay a forfeiture in determining the appropriate forfeiture amount. As the Commission made clear in the *Forfeiture Policy Statement*, large or highly profitable entities, such as Midland²⁹ could expect forfeitures higher than those reflected in the base amounts.³⁰ Accordingly, applying the *Forfeiture Policy Statement* and statutory factors to the instant case, we conclude that Midland is apparently liable for a monetary forfeiture of \$21,000.

IV. ORDERING CLAUSES

14. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act, and Sections 0.111, 0.311 and 1.80 of the Rules,³¹ Midland, **IS NOTIFIED** of its **APPARENT LIABILITY FOR A FORFEITURE** in the amount of twenty-one thousand dollars (\$21,000) for marketing noncompliant GMRS transmitters, in willful and repeated violation of Section 302(a) of the Act and Section 2.803(g) of the Rules.

15. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Rules, within thirty days of the release date of this Notice of Apparent Liability for Forfeiture, Midland **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

²⁷ See e.g., *Samson Technologies, Inc.*, Notice of Apparent Liability for forfeiture, 19 FCC Rcd 4221, 4225 (2004); Consent Decree, 19 FCC Rcd 24542 (2004).

²⁸ See, e.g., *San Jose Navigation, Inc.*, 21 FCC Rcd 2873, 2876 (2006) (upwardly adjusting a proposed forfeiture based on the volume of non-compliant devices distributed, and the three-year span in which such devices were marketed), *forfeiture ordered*, Forfeiture Order, 22 FCC Rcd 1040 (2007); *Bureau D'Electronique Appliquee*, 20 FCC Rcd at 3448 (2005) (upwardly adjusting a proposed forfeiture based on the volume of unauthorized devices distributed, and the five-year span in which such devices were marketed), *forfeiture ordered*, Forfeiture Order, 20 FCC Rcd 17893 (2005).

²⁹ Midland's estimated annual revenues are \$9,900,000. Company profile, Manta.com.

³⁰ Specifically, the Commission stated:

[O]n the other end of the spectrum of potential violations, we recognize that for large or highly profitable communication entities, the base forfeiture amounts ... are generally low. In this regard, we are mindful that, as Congress has stated, for a forfeiture to be an effective deterrent against these entities, the forfeiture must be issued at a high level For this reason, we caution all entities and individuals that, independent from the uniform base forfeiture amounts ..., we intend to take into account the subsequent violator's ability to pay in determining the amount of a forfeiture to guarantee that forfeitures issued against large or highly profitable entities are not considered merely an affordable cost of doing business. Such large or highly profitable entities should expect in this regard that the forfeiture amount set out in a Notice of Apparent Liability against them may in many cases be above, or even well above, the relevant base amount.

Forfeiture Policy Statement, 12 FCC Rcd at 17099-100.

³¹ 47 C.F.R. § 0.111, 0.311 and 1.80.

16. 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. Midland will also send electronic notification on the date said payment is made to Thomas.Fitz-Gibbon@fcc.gov.

17. The response, if any, must be mailed to the Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554, ATTN: Enforcement Bureau – Spectrum Enforcement Division, and must include the NAL/Acct. No. referenced in the caption.

18. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices; or (3) some other reliable and objective documentation that accurately reflects the petitioner’s current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

19. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture shall be sent by first class mail and certified mail return receipt requested to Midland Radio Corporation, 5900 Parretta Drive, Kansas City, MO 64120, and to its attorneys, Peter Tannenwald and Davina Sashkin, Fletcher, Heald & Hildreth, PLC, 1300 North 17th Street, 11th Floor, Arlington, VA22209.

FEDERAL COMMUNICATIONS COMMISSION

Kathryn S. Berthot
Chief, Spectrum Enforcement Division
Enforcement Bureau