

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

In the Matter of)
NE Colorado Cellular, Inc. dba Viaero Wireless,) File No.: EB-FIELDWR-18-00026229
Kersey, CO) NAL/Acct No.: 201932030001
) FRN: 0001607225
)

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: February 8, 2019

Released: February 8, 2019

By the Regional Director, Region Three, Enforcement Bureau:

I. INTRODUCTION

1. We propose a penalty of \$20,000 against NE Colorado Cellular, Inc. dba Viaero Wireless (Viaero), licensee of FCC radio station WQUP435 in Kersey Colorado, for apparently transmitting in the 3650-3700 MHz band with an unregistered, and therefore unauthorized, station.1 Operating an unregistered station in the 3650-3700 MHz band is illegal under Section 301 of the Communications Act of 1934, as amended (Act) and Sections 1.903(a) and 90.1307(a) of the Commission’s rules.2 Such unregistered stations undermine the Commission’s primary mission to manage radio spectrum. This spectrum band is shared by a limited number of DoD radar systems, fixed satellite service earth stations, certain wireless broadband services (authorized under Part 90, subpart Z of the Commission’s rules), and, in the future, the citizens band radio service (Part 60 of the Commission’s rules).3 Because this band operates on a shared basis, knowledge of the location of the registered emitters is essential for frequency coordination. Unregistered stations can undermine successful coordination and cause harmful interference to other licensed stations. Accordingly, Commission action in this area against unregistered operators is essential.

II. BACKGROUND

2. On February 8, 2018, the Commission received a complaint of harmful interference near Kersey, Colorado to licensed and registered base stations operating in the 3650-3700 MHz band. On February 13, 2018, an agent from the Enforcement Bureau’s (Bureau) Denver Field Office (Denver Office) began investigating the complaint. Using direction-finding techniques, the agent determined that the source of the interference was a transmission by Viaero from a communications tower with FCC Antenna Structure Registration #1278898,4 near Kersey, Colorado (Kersey Location). The agent contacted Viaero, which agreed to end the 3650-3700 MHz band transmission from the Kersey Location. The agent confirmed with the complainant that the interference subsequently ceased. The agent also

1 Any entity that is a “Small Business Concern” as defined in the Small Business Act (Pub. L. 85-536, as amended) may avail itself of rights set forth in that Act, including rights set forth in 15 U.S.C. § 657, “Oversight of Regulatory Enforcement,” in addition to other rights set forth herein.

2 47 U.S.C. § 301; 47 CFR §§ 1.903(a), 90.1307(a).

3 See Report to Cong. Pursuant to Section 1008 of the Spectrum Pipeline Act of 2015, as Amended by the Ray Baum's Act of 2018, Report, DA 18-1128, para.3, (WTB Nov. 2,2018); see also 47 CFR Pt. 90, subpart Z, and Pt. 96; 47 CFR § 2.106.

4 ASR #1278898 is registered to Industrial Tower and Wireless, LLC.

consulted the Commission's records and confirmed that Viaero had not registered to operate at or near the Kersey Location.

3. On April 4, 2018, the Bureau's Regional Director for Region Three mailed Viaero a Notice of Violation (NOV) relating to the unregistered operation on February 13, 2018.⁵ The NOV stated that a Commission agent has determined that Viaero was transmitting in the 3650-3700 MHz band from the Kersey Location and that Viaero had not registered to operate at that location.⁶ It also stated that the operation was in violation of Sections 1.903(a) and 90.1307(a) of the Commission's rules.⁷ The NOV ordered Viaero to respond and fully explain each violation, including all relevant surrounding facts and circumstances, make a statement of the specific action(s) taken to correct each violation and preclude recurrence, and include a timeline for completion of any pending corrective action(s).⁸

4. On April 20, 2018, the Commission received a response to the NOV from Viaero.⁹ In its response, Viaero admitted that its engineers had transmitted from the Kersey Location in the 3650-3700 MHz frequency band without first registering a station at that site.¹⁰ Viaero stated that "on or about February 12, 2018, Viaero's operations team, working on the incorrect assumption that the Kersey Location had already been registered, conducted periodic testing at the Kersey Location that continued through February 13, 2018."¹¹ It also states that it failed coordinate with other licensees prior to this testing.¹² Further, Viaero stated that on March 29, 2018, it registered the Kersey Location and that it would commence operations only after it completed frequency coordination with other licensees to ensure that no harmful interference would happen in the future.¹³ Commission records show that Viaero registered the Kersey Location on that date.¹⁴

III. DISCUSSION

5. We find that Viaero apparently willfully and repeatedly violated Section 301 of the Act, and Sections 1.903(a) and 90.1307(a) of the Commission's rules. Section 301 of the Act states that no person shall use or operate any apparatus for the transmission of energy or communications or signals by radio within the United States beyond the terms, conditions, and periods of the license granted by the Commission.¹⁵ Section 1.903(a) states that "Stations in the Wireless Radio Services must be used and operated only in accordance with the rules applicable to their particular service as set forth in this title and with a valid authorization granted by the Commission."¹⁶ Section 90.1307 of the Commission's rules

⁵ *NE Colo. Cellular, Inc. dba Viaero Wireless*, Notice of Violation (Los Angeles Regional Office, Apr. 4, 2018), <https://transition.fcc.gov/eb/Orders/2018/DOC-350067A1.html>.

⁶ *See id.* at 1.

⁷ *See id.* at 1-2.

⁸ *See id.* at 2.

⁹ *See* Letter from David A. Lafuria and Todd Slamowitz, counsel for NE Colorado Cellular, Inc. dba Viaero Wireless, to Los Angeles Regional Office, FCC (received Apr. 20, 2018) (on file in EB-FIELDWR-18-00026229) (NOV Response).

¹⁰ *See id.* at 2.

¹¹ *Id.*

¹² *See id.* at 1-2.

¹³ *See id.* at 2-3.

¹⁴ *See* Universal Licensing System, License Call Sign WQUP435, ULS Application File Nos. 0008154666, 0008154673, and 0008154682.

¹⁵ 47 U.S.C. § 301.

¹⁶ 47 CFR § 1.903(a).

states that in the 3650-3700 MHz band “[a] licensee cannot operate a fixed or base station before registering it under its license”¹⁷ The Commission previously granted licenses in the 3650-3700 MHz band on a non-exclusive nationwide basis.¹⁸ Once an entity obtained a such a license, it is required to register individual fixed and base stations before operation.¹⁹ A licensee has no authority to operate a fixed or base station in this band before registering it under its license.²⁰ Further, Viaero’s nationwide license for Station WQUP435 states that it “does not authorize any operation of a fixed or base station that is not posted by the FCC as a registered fixed or base station.”²¹

6. As stated above, Viaero admitted to transmitting in the 3650-3700 MHz frequency band for two days (February 12, 2018 and February 13, 2018) at the Kersey Location without first registering its stations.²² An FCC agent also confirmed that unregistered operation occurred on February 13, 2018. Viaero also admitted that it failed to coordinate with other licensees before operation as required by our rules.²³ Moreover, Viaero stated that the site was not registered until over a month after the unauthorized transmission.²⁴ Thus, Viaero apparently violated Section 301 of the Act and Sections 1.903(a) and 90.1307(a) of the Commission’s rules on February 12 and 13, 2018.

7. Section 503(b) of the Communications Act of 1934, as amended (Act) authorizes the Commission to impose a forfeiture against any person that “willfully or repeatedly fail[s] to comply with any of the provisions of [the Act] or of any rule, regulation, or order issued by the Commission.”²⁵ Here, Section 503(b)(2)(D) of the Act authorizes us to assess a forfeiture of up to \$20,134 for each day of a continuing violation, up to a statutory maximum of \$151,005 for a single act or failure to act.²⁶ In exercising our forfeiture authority, we must consider 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.”²⁷ In addition, the Commission has established forfeiture guidelines; they establish base penalties for certain violations and identify criteria that we consider when determining the appropriate penalty in any given case.²⁸ Under these guidelines, we may

¹⁷ 47 C.F.R. § 90.1307.

¹⁸ 47 CFR § 90.1307(a) (“The 3650-3700 MHz band is licensed on the basis of non-exclusive nationwide licenses.”). The Commission subsequently adopted rules licensing the Citizens Broadband Radio Service, and grandfathered the licenses previously granted in the 3650-3700 MHz band. *See* 47 CFR § 90.1338.

¹⁹ 47 CFR § 90.1307(a) (“Non-exclusive nationwide licenses will serve as a prerequisite for registering individual fixed and base stations. A licensee cannot operate a fixed or base station before registering it under its license. . .”).

²⁰ *Id.*; *see World Data PR Inc.*, WTB File Nos., 0003959230, *et. al.*, Memorandum Opinion and Order, 26 FCC Rcd 2360-61 at ¶ 2 (“The Commission adopted specific measures to address the potential for interference between and among non-exclusive licenses that may otherwise result from a shared, area-wide licensing regime. . . [A]ll applicants and licensees must cooperate in the selection and use of frequencies in the 3650 MHz band. A licensee in this spectrum band is not authorized to operate a fixed or base station under its nationwide license until registering that station in the Commission’s Universal Licensing System (ULS). To facilitate the required cooperation and sharing, all registration data is available publicly, online, in ULS. . . . A registration is not complete until it is in ‘Accepted’ status and the nationwide license is updated on ULS.” (internal footnotes omitted)).

²¹ *See* Universal Licensing System, License Call Sign WQUP435.

²² *See supra* para. 4.

²³ *See* NOV Response at 2; *see also* 47 CFR § 90.1319(d).

²⁴ *See* NOV Response at 2.

²⁵ 47 U.S.C. § 503(b).

²⁶ *See* 47 U.S.C. § 503(b)(2)(D); 47 CFR §§ 1.80(b)(7), (9); *see also Jay Peralta, Corona, New York*, Notice of Apparent Liability for Forfeiture, 32 FCC Rcd 3246, 3250 n.30 (2017) (discussing inflation adjustments to the forfeitures specified in Section 503(b)(2)(D)); *Amendment of Section 1.80(b) of the Commission’s Rules Adjustment*

adjust a forfeiture upward for violations that are egregious, intentional, or repeated, or that cause substantial harm or generate substantial economic gain for the violator.²⁹

8. Section 1.80(b) of the Commission's rules sets a base forfeiture of \$10,000 for operation without an instrument of authorization for each violation or each day of a continuing violation.³⁰ Through its investigation discussed above, the Bureau has determined that Viaero transmitted in the 3650-3700 MHz frequency band on two days (February 12, 2018 and February 13, 2018) at the Kersey Location without authorization in apparent violation of Section 301 of the Act, and Sections 1.903(a) and 90.1307(a) of the Commission's rules. In light of these apparent findings, we propose a base forfeiture of \$10,000 for each day of the apparent violation of Section 301 of the Act and Sections 1.903(a) and 90.1307(a) of the Commission's rules, resulting in an aggregate base forfeiture of \$20,000.³¹ We have discretion, however, to depart from these guidelines, taking into account the particular facts of each individual case.³² Given the totality of the circumstances, and consistent with the *Forfeiture Policy Statement*, however, we conclude that no upward or downward adjustment is warranted. After applying the *Forfeiture Policy Statement*, Section 1.80 of the Rules, and the statutory factors, we therefore propose a total monetary forfeiture of \$20,000 for which Viaero is apparently liable.

IV. CONCLUSION

9. We have determined that Viaero apparently willfully and repeatedly operated from an unregistered site in violation of Section 301 of the Act and Sections 1.903(a) and 90.1307(a) of the Commission's rules. As such, Viaero is apparently liable for a forfeiture of \$20,000.

V. ORDERING CLAUSES

10. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act³³ and Sections 1.80 of the Rules,³⁴ NE Colorado Cellular, Inc. dba Viaero Wireless is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A FORFEITURE** in the amount of Twenty Thousand Dollars

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of Civil Monetary Penalties to Reflect Inflation, Order, DA 18-1272, at <https://docs.fcc.gov/public/attachments/DA-18-1272A1.pdf> (EB 2018).

²⁷ 47 U.S.C. § 503(b)(2)(E).

²⁸ 47 CFR § 1.80(b)(8), Note § II (articulating criteria for upward adjustments (egregious misconduct, ability to pay/relative disincentive, intentional violation, substantial harm, prior violations of any FCC requirements, substantial economic gain, and repeated or continuous violation) and downward adjustments (minor violation, good faith or voluntary disclosure, history of overall compliance, and inability to pay)).

²⁹ *Id.*

³⁰ 47 CFR § 1.80(b). In a 2013 case also based on operation prior to registration in the 3650-3700 MHz band, the Bureau applied a \$4,000 base forfeiture, characterizing the type of violation as construction or operation at an unauthorized location. *See Robert Schmidt DBA Rsisp*, 28 FCC Rcd 1082, 1084, para. 9 (EB 2013). However, based on the Commission's rules and the terms Viaero's license, this type of violation is more accurately characterized as operation without an instrument of authorization for the service, which has a \$10,000 base forfeiture. This is also consistent with other Commission precedent. *See, e.g., Vearl Pennington, Morehead, Ky. & Michael Williamson, Morehead, Ky.*, Forfeiture Order, FCC 19-2, at para. 18. (Jan. 29, 2019), available at <https://docs.fcc.gov/public/attachments/FCC-19-2A1.pdf> (*Pennington-Williamson Forfeiture Order*).

³¹ *See Pennington-Williamson Forfeiture Order*, FCC 19-2, at para. 18 (applying the penalty for unauthorized operation based on each day of a continuing violation).

³² *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17098-99, para. 22 (1997) (noting that "[a]lthough we have adopted the base forfeiture amounts as guidelines to provide a measure of predictability to the forfeiture process, we retain our discretion to depart from the guidelines and issue forfeitures on a case-by-case basis, under our general forfeiture authority contained in Section 503 of the Act") (*Forfeiture Policy Statement*), *recons. denied*, Memorandum Opinion and Order, 15 FCC Rcd 303 (1999).

(\$20,000) for willful and repeated violations of Sections 1.903(a) and 90.1307(a) of the Commission's rules.³⁵

11. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Rules,³⁶ within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture, NE Colorado Cellular, Inc. dba Viaero Wireless **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture consistent with paragraph 13 below.

12. Payment of the forfeiture must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account Number and FRN referenced above. NE Colorado Cellular, Inc. dba Viaero Wireless shall send electronic notification of payment to Janet F. Moran at janet.moran@fcc.gov, with copy to field@fcc.gov on the date said payment is made. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.³⁷ When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters "FORF" in block number 24A (payment type code). Below are additional instructions that should be followed based on the form of payment selected:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

13. Any request for making full payment over time under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 445 12th Street, SW, Room 1-A625, Washington, DC 20554.³⁸ Questions regarding payment procedures should be directed to the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

14. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant

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³³ 47 U.S.C. § 503(b).

³⁴ 47 CFR § 1.80.

³⁵ 47 CFR §§ 1.903(a), 90.1307(a).

³⁶ 47 CFR § 1.80.

³⁷ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

³⁸ See 47 CFR § 1.1914.

to Sections 1.16 and 1.80(f)(3) of the Rules.³⁹ The written statement must be mailed to the Office of the Secretary, Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554, ATTN: Enforcement Bureau – Office of the Field Director, and must include the NAL/Account Number referenced in the caption. The statement must also be e-mailed to David Marks at david.marks@fcc.gov with a copy to field@fcc.gov.

15. 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.

16. **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 NE Colorado Cellular, Inc. dba Viaero Wireless at its address of record.

FEDERAL COMMUNICATIONS COMMISSION

Lark Hadley
Regional Director, Region Three
Enforcement Bureau

³⁹ 47 CFR §§ 1.16, 1.80(f)(3).