UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

09-50683

RADAR SOLUTIONS, LTD. D/B/A
ROCKY MOUNTAIN RADAR, INC.

Plaintiff-Appellant

v.

THE UNITED STATES FEDERAL
COMMUNICATIONS COMMISSION

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

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STATEMENT REGARDING ORAL ARGUMENT

The district court correctly granted summary judgment in favor of the United States on the basis of overwhelming evidence that appellant Rocky Mountain manufactured and sold an unlawful product. We agree with Rocky Mountain that the issue presented in this case does not require oral argument.

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BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION

JURISDICTIONAL STATEMENT

Appellant challenges the district court's judgment in favor of the United States on its counterclaim to enforce a forfeiture assessed against Appellant, Radar Solutions, Ltd., D/B/A Rocky Mountain Radar, Inc., (Rocky Mountain) by the Federal Communications Commission (FCC).[1] The district court had jurisdiction

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[1] The counterclaim was filed by the United States, which is the party-in-interest in proceedings to collect forfeitures pursuant to 47 U.S.C. § 504(a). Thus, although appellant has filed its appeal against the Federal Communications Commission, this brief is being filed on behalf of the FCC and the United States.

over the counterclaim pursuant to 47 U.S.C. § 504(a). Venue was proper pursuant to 47 U.S.C. § 505. Pursuant to 28 U.S.C. § 1291, this Court has jurisdiction over the final judgment of the district court disposing of all claims. Judgment was entered on June 26, 2009 (R557),[2] and the notice of appeal was filed timely on July 24, 2009 (R558).

ISSUE PRESENTED FOR REVIEW

Rocky Mountain manufactures and sells products intended to disable the ability of police radar units to determine the speed of a motor vehicle. In an enforcement proceeding, the FCC determined that two of Rocky Mountain's devices, known as the C450 and the S201, are "intentional radiators" within the meaning of FCC rules. The governing rules prohibit the manufacture or sale of intentional radiators without FCC approval, which Rocky Mountain did not have. As a result of Rocky Mountain's unlawful manufacture and sale of the two devices, the FCC imposed a $25,000 forfeiture on Rocky Mountain. The sole issue presented is whether the district court properly found that the undisputed facts established that the devices at issue are intentional radiators and thus correctly granted summary judgment to the United States enforcing the fine.

[2] "Rxxx" refers to the page number of the record on appeal.

STATEMENT OF THE CASE

The Federal Communications Commission (FCC or Commission) imposed a $25,000 fine on Rocky Mountain for the unlawful sale of unapproved devices. *In Re Rocky Mountain Radar*, 22 FCC Rcd 15174 (2007) (R44).

In response, Rocky Mountain filed suit against the FCC (R9), seeking injunctive relief and damages pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 2671 *et seq*. The United States counterclaimed to enforce the forfeiture, seeking an order that Rocky Mountain pay the stated amount (R41).

On cross-motions for summary judgment and dismissal, the district court dismissed for lack of jurisdiction Rocky Mountain's claims against the government and granted summary judgment in favor of the government on the counterclaim. R523 *et seq*. Rocky Mountain does not appeal the dismissal of its claims against the government. It seeks review only of that part of the judgment granting the government's counterclaim and ordering Rocky Mountain to pay the forfeiture.

STATEMENT OF FACTS

1. Congress enacted the Communications Act in order to "maintain the control of the United States over all the channels of radio transmission," 47 U.S.C. § 301, and it created the FCC to "execute and enforce the provisions" of the Act, 47 U.S.C. § 151. Among the many powers Congress gave to the FCC in order to maintain federal control of the electromagnetic spectrum is the authority to

promulgate regulations "governing the interference potential of devices which in their operation are capable of emitting radio frequency energy ... in sufficient degree to cause harmful interference to radio communications." 47 U.S.C. § 302a(a). The Act also commands that "[n]o person shall willfully or maliciously interfere with or cause interference to any radio communications of any station licensed or authorized by or under [the Communications] Act." 47 U.S.C. § 333. Congress decreed that the FCC's regulations "shall be applicable to the manufacture, import, sale, offer for sale, or shipment of such devices." 47 U.S.C. § 302a(b). *See* Dist. Ct. Op. at 3 (R525).

Pursuant to that statutory authority, the FCC has created a comprehensive set of rules, known as the "Part 15" rules, governing the unlicensed use of devices that can emit radio frequencies, which are called "radiators." 47 C.F.R. Part 15 (2009); *see* 47 C.F.R. § 15.1 ("This part sets out the requirements under which an intentional, unintentional, or incidental radiator may be operated without an individual license."). One of the basic regulatory principles established by Part 15 is that "[o]peration of an intentional, unintentional, or incidental radiator is subject to the conditio[n] that no harmful interference is caused" to another user of radio frequencies. 47 C.F.R. § 15.5(b). With respect to devices that interfere with a radio location service such as police radar, "harmful interference" is defined in

pertinent part to mean "[a]ny emission ... that ... seriously degrades, obstructs or repeatedly interrupts" the service. 47 C.F.R. § 15.3(m).

To ensure further against interference, the FCC's regulations require that any "intentional radiator" – defined in 47 C.F.R. § 15.3(o) to mean a device that "generates and emits" radio energy – be licensed or approved by the FCC. 47 C.F.R. §§ 15.1(c), 15.201(b). In the absence of such approval, "no person shall sell ... or offer for sale ... (including advertising for sale ...) any radiofrequency device." 47 C.F.R. § 2.803. *See* 47 U.S.C. § 302a(b) ("[n]o person shall manufacture, import, sell, offer for sale, or ship devices ... which fail to comply with regulations" promulgated by the FCC). *See also* Dist. Ct. Op. at 3-4 (R525-526).

2. Police radar is a use of the radio spectrum authorized and regulated by the FCC as a radiolocation service. *See* 47 C.F.R. §§ 90.101, 90.103. "Police radar works by emitting a radio signal toward a moving car that reflects off the car and is received by the radar unit, which can calculate the speed of the car based on the Doppler Shift in the reflected signal." Dist. Ct. Op. at 4 (R526).

This case is not the first time that Rocky Mountain has run afoul of the FCC's regulations governing intentional radiators used to interfere with police radar. In 1997, the FCC issued a citation to Rocky Mountain advising it that it is illegal to manufacture, market, or sell devices that disrupt the functioning of police

radar. *Rocky Mountain Radar*, 12 FCC Rcd 22453 (1997). The device at issue there, called the "Spirit II," used the incoming radar signal "as a source of RF [*i.e.*, radiofrequency] energy, modulate[d] the signal electronically to generate a different RF signal, and emit[ted] that RF signal to cause interference to police radars." *Id.* at 22455. Addressing not only the specific device before it, but all devices that operate the same way, the Commission concluded that "the Spirit II, and any other similar device, meet the definition of an intentional radiator contained in Section 15.3(o) of the rules." 12 FCC Rcd at 22456. The agency therefore warned Rocky Mountain that "marketing of the Spirit II and any other similar device without FCC equipment authorization is in violation of [47 C.F.R.] sections 15.201(a) and 2.803." *Ibid.* On appeal, the Tenth Circuit affirmed the Commission's finding. That Court determined that the FCC properly found the Spirit II device to be an intentional radiator because it modified the incoming radar signal and emitted that modified signal and thus "generated" radio energy. *Rocky Mountain Radar, Inc. v. FCC*, 158 F.3d 1118, 1124 (10th Cir. 1998); *see* Dist. Ct. Op. at 5-6 (R527-528).

3. Beginning in late 2004, the FCC received information that Rocky Mountain was again selling devices that harmfully interfered with police radar. The information concerned two specific devices: the RMR-C450 and the RMR-S201. The C450 had been certified by the FCC as a radar detector, a type of

device that does not intentionally radiate energy, but the grant of certification did not authorize the unit to be an intentional radiator. Notice of Apparent Liability, 22 FCC Rcd 1334, 1335 ¶2 (Enf. Bur., Spectrum Enf. Div. 2007) (NAL) (R287-288). The S201 does not function as a radar detector and was not certified. Upon request by the agency, Rocky Mountain provided the Commission with samples of the C450 and the S201 units for testing by the agency. Dist. Ct. Op. at 7 (R529).

FCC staff determined that both devices work the same way and contain three electronic elements: an "FM chirp generator," a "mixer diode," and a "dual ridge wave-guide antenna." Post Grant Sample Technical Report (S201) (R320); Post Grant Sample Technical Report (C450) (R309) (collectively "Staff Reports"). An "FM chirp generator" is an electronic component that generates an audio signal of varying frequency that can then be mixed with the incoming radar signal using the mixer diode, another electronic element. Churchman Dep. 23:20-24:7; 25:11-14 (Supp. R4-5, 6).[3] The resulting new signal can then be emitted through the antenna. As Rocky Mountain described the operation of the devices, they receive an incoming police radar signal, "run[] it though the mixer, adding the FM chirp to mix up the signal and using the antenna, reflect back this new signal to the radar gun." Dist. Ct. Op. at 26 (R548). "By definition," the Staff Reports found for each

[3] "Supp. R" refers to the supplemental record materials we are submitting to the Court with a motion to supplement the record filed contemporaneously with this brief.

device, "if an FM chirp generator is mixed with an incoming signal and sent to an antenna, then it is ... an intentional radiator." R309, 320. Staff testing also showed that the devices could disrupt the functioning of police radar units. R311, R321.

In light of the staff's analysis, the FCC's Spectrum Enforcement Division issued the NAL to Rocky Mountain on January 31, 2007. R287. The Division determined that the C450 and the S201 "by definition" are intentional radiators within the meaning of the FCC's rules because "an incoming signal from police radar is used to create a new signal by the internal circuitry of the [devices], and then is re-transmitted." NAL ¶8 (R290). Indeed, the devices "function in a similar manner to the Spirit II," *ibid.*, that was the subject of the 1997 citation to Rocky Mountain described above, in which the FCC had warned Rocky Mountain that the Spirit II "and any other similar device" was an unlawful intentional radiator, *Rocky Mountain Radar*, 12 FCC Rcd at 22456. By manufacturing and marketing the devices without FCC approval, Rocky Mountain "apparently violated section 302(a) of the [Communications] Act and [47 C.F.R. §] 2.803." NAL ¶9 (R291). The Communications Act provides that violations of the Act or the Commission's rules promulgated pursuant to the Act are punishable by a forfeiture. 47 U.S.C. §§ 501, 502, 503(b)(1)(B). In light of the prior violations, the Bureau proposed a forfeiture of $25,000. R292.

Under the Communications Act, the recipient of a notice of apparent liability may contest the charge against it before the FCC imposes a forfeiture. 47 U.S.C. § 503(b)(4). The Commission never received a response to the NAL, however. Declaration of Kathryn S. Berthot ¶¶4-6 (R325). On August 16, 2007, the Spectrum Enforcement Division accordingly issued a Forfeiture Order directing Rocky Mountain to pay the proposed penalty. *Forfeiture Order*, 22 FCC Rcd 15174 (Enf. Bur., Spectrum Enf. Div. 2007) (R44). Rocky Mountain sought no further administrative review of the matter.

4. Rocky Mountain filed a complaint against the FCC seeking injunctive relief and damages (those matters are not before this Court). The United States filed a counterclaim seeking payment of the forfeiture. The parties cross-moved for summary judgment and dismissal.

The district court denied Rocky Mountain's motion and granted the government's. With respect to Rocky Mountain's claims against the government, the court found that it lacked jurisdiction over those claims on several grounds. Dist. Ct. Op. 12-19 (R534-541). That decision is not on review. With respect to the claims of the United States against Rocky Mountain, the court granted summary judgment in favor of the government.

The "'key question' to determining [Rocky Mountain's] liability" to pay the forfeiture, the court found, was "whether [Rocky Mountain's] products ... are

'intentional radiators' as the term is defined in 47 C.F.R. § 15.3(o)." Dist. Ct. Op. at 25-26 (R547-548). "[T]here is no question of fact regarding the nature and functionality of the RMR-C450 and RMR-S201 devices. ... The evidence regarding these devices is consistent: each device is specifically designed to receive a signal sent from a police radar gun, modify that signal, and then send the signal back to the radar gun in its modified form with the intent to ... make the radar gun unable to calculate the vehicle's speed." *Id.* 26 (R548).

The evidence on which the district court relied included the FCC Staff Reports, a Technical Report submitted by Rocky Mountain, and the FCC's Response to Rocky Mountain's Technical Report. Dist. Ct. Op. at 26 (R548). On the undisputed facts about the operation of the two devices at issue, the district court concluded that "[b]y modifying the signal in such a way as to change the way it interacts with the radar gun, [Rocky Mountain's] devices can properly be said to 'generate' or 'bring into being' a new signal." *Id.* at 31 (R553), citing The American Heritage Dictionary of the English Language (4th ed. 2009). The devices "therefore fall within the unambiguous meaning of the term 'intentional radiator.'" Dist. Ct. Op. at 32 (R554). The court accordingly granted summary judgment in favor of the government.

SUMMARY OF ARGUMENT

Rocky Mountain manufactures and sells devices that are designed to disable police radar units. The undisputed evidence before the district court showed that the devices work by receiving an incoming radar signal, modifying that signal to create a new signal, and then sending the new signal back to the radar unit. That evidence proved that Rocky Mountain's devices "generate" and "emit" radiofrequency radiation and thus are "intentional radiators" as that term is defined by the FCC's rules. Intentional radiators may not be manufactured or sold without FCC permission, which Rocky Mountain did not have (and could not get, given the purpose for its products). The FCC therefore properly imposed a forfeiture on Rocky Mountain, and the district court correctly entered judgment enforcing the forfeiture. Indeed, ten years ago, the Tenth Circuit affirmed the FCC's determination that a nearly identical device was an intentional radiator.

Rocky Mountain has not shown the existence of a genuine issue of material fact. Its theory is that FCC laboratory testing did not actually measure radiation coming from the devices, and that the applicable regulatory definition requires such a measurement. But the definition of intentional radiator does not require the actual measurement of radiation. Such a reading is not compelled by the language or intent of the regulation, and the FCC has never interpreted the definition that way. The district court thus properly relied on the undisputed testimonial evidence

that Rocky Mountain's devices were designed to and in fact operated as intentional radiators. That evidence was sufficient to sustain the judgment below, which should be affirmed.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment de novo and applies the same standard that governs the district court's consideration of a motion for summary judgment. *Sanders-Burns v. City of Plano*, 578 F.3d 279, 290 (5th Cir. 2009), citing *Riverwood Int'l Corp. v. Employers Ins. of Wausau,* 420 F.3d 378, 382 (5th Cir. 2005). Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no *genuine* issue as to any *material* fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c) (emphases added). "A fact is material only if its resolution would affect the outcome of the action, and an issue is genuine only if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party." *Wiley v. State Farm Fire & Casualty Co.*, ___ F.3d ___ (5th Cir. 2009) (2009 WL 3233528) (quotation marks and citations omitted). The Court "may … affirm a grant of summary judgment on any legal ground raised below, even if it was not the basis for the district court's decision." *Id.*

To the degree that the question in this case turns on the meaning and interpretation of the Communications Act or the FCC's regulations, the Court's review is governed by a standard of deference to the agency. With respect to statutory interpretations, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, ... the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron USA Inc. v. NRDC*, 467 U.S. 837, 842-843 (1984).

With respect to an agency's interpretation of its own regulations, the standard is even more deferential. *Paradissiotis v. Rubin*, 171 F.3d 983, 987 (5th Cir. 1999) (quotation marks and citation omitted). The agency's interpretation is "controlling" unless it is "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quotation marks omitted).

II. THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF THE GOVERNMENT.

A. The Undisputed Facts Showed That Rocky Mountain's Devices Are Intentional Radiators.

The central question in this case is whether the C450 and the S201 are "intentional radiators." If they are, they may not be sold lawfully without FCC approval – which Rocky Mountain did not have – and the district court correctly

entered summary judgment in favor of the government. An "intentional radiator" is a device that "generates" and "emits" radiofrequency radiation. 47 C.F.R. § 15.3(o). The district court correctly found that the undisputed facts of this case show that the C450 and the S201 meet that definition.

There is no dispute between the parties over how the two devices at issue work. Both devices contain electronic circuitry that receives a signal from the incoming police radar, modifies it, and sends it back to the radar unit, with the intent to disrupt the ability of the radar unit to calculate the speed of a vehicle. Rocky Mountain's own Technical Report states, for example, that "the incoming signal originated in the radar gun is mixed with an audio generator and passively reflected back to the radar source." Technical Report for C450 and S210 [sic] at 1 (R338). Rocky Mountain's President similarly testified at deposition that the devices "generate an audio" frequency that is "mix[ed] ... with an incoming [police radar] signal ... and ... reflect[ed] back to the radar gun." Churchman Dep. at 19:5-11 (Supp. R3); *see id.* at 24:1-5 (the incoming radar signal is "presented to a mixer diode. The FM chirp is also on the mixer diode, so the two mix together. And so when the signal reflects back out the antenna, then it does have the FM chirp added to the radar signal.") (Supp. R5). Rocky Mountain's website similarly states that the two devices contain "3 elements: an FM chirp generator, a mixer diode, and a dual ridge wave-guide antenna. When the scrambler is hit by a signal

it runs it through the mixer, adding the FM chirp to mix up the signal and using the antenna, reflect back this new signal to the radar gun." *See* Response of the FCC to Plaintiff's Technical Report at 3 ¶10 (R344, 346). The director of the FCC's Engineering Laboratory likewise stated that the C450 and the S201 "contain circuitry that receives an incoming police radar signal, mixes that signal with noise, and transmits the signal back to the police radar through an antenna." FCC Technical Response at 3 ¶9 (R346).

By themselves, those undisputed facts fully support the district court's conclusion that the C450 and the S201 fit the regulatory definition of an "intentional radiator." As set forth above, a device is an intentional radiator if it "generates" and "emits" radio signals. The C450 and the S201 both plainly "generate" a signal by manipulating the incoming police radar signal and creating a new signal, which previously did not exist. The term "generate" is not defined in the Commission's rules, but ordinary dictionary definitions – undisputed by Rocky Mountain – show that "generate" means "to create," or "to cause to be," or "to bring into existence." *See, e.g.*, District Ct. Op. at 31 (R553); *see also Webster's Third New International Dictionary* (1963) at 945.

After they generate the signal, the C450 and the S201 then "emit" the signal by sending it through an antenna back toward the police radar. "Emit" means "to give or send out ... energy," *American Heritage Dictionary of the English*

Language (3rd ed. 1992) at 603; *accord Webster's Third New International Dictionary* at 742, and "that dictionary definition is consistent with the way in which the FCC has used that term." Response of the FCC to Plaintiff's Technical Report at 4 ¶12 (R347-348). *See also* NAL ¶8 ("if a device mixes an FM chirp generator with an incoming signal and sends the resultant signal to an antenna, then by definition it is an intentional radiator as described in Section 15.3(o) of the Rules") (R290); Staff Reports at 3 ("by definition if an FM chirp generator is mixed with an incoming signal and sent to an antenna, then it is ... an intentional radiator") (R309, 320). The district court's application of the law to the undisputed facts was clearly correct and is not challenged by Rocky Mountain.

The Tenth Circuit had reached a nearly identical conclusion ten years earlier. On similar evidence regarding a virtually identical device – also manufactured and sold by Rocky Mountain – the FCC had issued Rocky Mountain a citation warning against the sale of the device at issue "and any other similar device" as unlawful intentional radiators. *Rocky Mountain Radar*, 12 FCC Rcd at 22456. The Tenth Circuit affirmed that warning, concluding that the device was an intentional radiator. *Rocky Mountain Radar*, 158 F.3d at 1124. The device at issue in that case, like the two devices here, was designed to receive the incoming radar signal, modify it, and send it back to the radar gun through an antenna. 158 F.3d at 1120-1121. The device before the Tenth Circuit also consisted of "a mixer diode

inside a wave guide cavity with ridged antenna and matching screw." *Rocky Mountain Radar*, 12 FCC Rcd 22453, 22456 ¶7 (1997), and there was evidence that the device "mixes the radar signal 'with either white noise or an FM chirp signal,' then transmits back a 'composite signal.'" 158 F.3d at 1120 (citations omitted). Here, the C450 and the S201 each contain a mixer diode, a dual ridge wave-guide antenna, and an FM chirp generator – almost exactly the same electronic elements, used for the same purpose. In light of their components and functions, "there is no ultimate technical distinction between the radar jamming units that were before the Commission and the Tenth Circuit in 1997-1998 and the ones that are before this Court now." FCC Technical Response at 3 ¶11 (R346); *see also* NAL ¶8 (the C450 and the S201 "function in a similar manner" to the earlier-assessed device) (R290).[4]

It is worth noting that the C450 and S201 were manufactured and sold with the specific intent of causing "harmful interference" to police radar. Indeed, in its brief before this Court, Rocky Mountain describes itself as the manufacturer and seller of "radar scrambling devices." Br. 3. As pertinent here, the Commission has defined harmful interference to mean "[a]ny emission ... that ... seriously

[4] Rocky Mountain claims in passing that there is a question of fact whether the device before the Tenth Circuit and the one before this Court are equivalent (Br. 21), but it provides no explanation of any material difference between the devices. The undisputed evidence before the district court was that the devices were functionally identical. FCC Technical Response at 3 ¶11 (R346); *see* NAL ¶8 (R290).

degrades, obstructs or repeatedly interrupts a radiocommunications service." 47 C.F.R. § 15.3(m). It is a basic principle of FCC regulation that "[o]peration of an intentional, unintentional, or incidental radiator is subject to the conditio[n] that no harmful interference is caused" to another use of radio frequencies. 47 C.F.R. § 15.5(b). In light of that principle, the FCC had issued a Public Notice in 1996 warning that devices intended to interfere with police radar were unlawful to manufacture or sell. *Public Notice*, 17 FCC Rcd 17268 (Wireless Telecommunications Bureau 1996) (R114).[5]

Thus, although the district court's judgment would be sound even in the absence of an intent to cause harmful interference, the C450 and S201 are inherently unlawful by their very nature and design.[6]

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[5] Rocky Mountain attempts to distinguish the 1996 Public Notice on the ground that there are questions of fact whether its devices were "transmitters" that jammed any radar signal within the meaning of the Public Notice. Br. 21. But the undisputed evidence showed that this was precisely what the devices were designed to do. To the degree Rocky Mountain is arguing that the district court erroneously relied on the Public Notice, the claim fails because the Public Notice played little role in the lower court's reasoning, and the Notice is not necessary to sustain the district court's judgment.

[6] The Commission also found in the NAL that the C450 unit was an unlawful intentional radiator for two additional and independent reasons. First, the FCC's laboratory testing showed that the device "produces a radiated emission in the restricted frequency band at 11.23 GHz in violation of Section 15.205 of the Rules." NAL ¶10 (R291); *see* Staff Report for C450 at 10 FCC Laboratory Report (R316). Second, that emission "substantially exceeds the radiated emission limits for intentional radiators specified in Section 15.209 of the rules." NAL ¶10 (R291). Either of those grounds would have been an adequate basis on which to

B. Rocky Mountain Has Identified No Genuine Issue Of Material Fact.

Notwithstanding the conclusive evidence that its devices are intentional radiators, Rocky Mountain claims that issues of fact remain on the question. Its theory is that the definition of intentional radiator required the government to submit proof that it actually measured radiation being emitted by the devices, but the government did not submit such proof, and thus the matter remains an open question of fact. Br. 18-20. The theory fails, however, because the regulatory definition requires no such proof. It therefore was reasonable for the district court to rely on the undisputed evidence discussed above that the devices were designed to function and indeed did function as intentional radiators.

Rocky Mountain's reading of section 15.3(o) as requiring evidence of the measurement of actual emissions is inconsistent with the purpose and language of the regulation and with the manner in which the FCC has read the definition. On its face, the definition says nothing about the actual measurement of radiation from a device. Rather, the relevant language is "generates and emits," which refers to the *functionality* of a device, not to a laboratory test. As discussed, Rocky Mountain admits that the device is designed to and in fact does generate and emit radiofrequency energy and thus functions as an intentional radiator. Moreover, the

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fine Rocky Mountain with regard to the C450, and both are undisputed on the record of this case.

underlying statute authorizes the FCC to regulate "the interference *potential* of devices which in their operation are *capable* of emitting radio frequency energy ... in sufficient degree to cause harmful interference to radio communications." 47 U.S.C. § 302a(a) (emphases added). The statute is concerned with the *possibility* that a device will cause interference, not merely that it can be measured to do so. A regulation implementing such a far reaching statute is most sensibly read to effectuate the underlying statutory purposes. The Tenth Circuit thus recognized the broad protective "purpose of the regulations ... to regulate and *minimize* interference between users of the electromagnetic spectrum." *Rocky Mountain Radar*, 158 F.3d at 1124 (emphasis added). Nor has the FCC required actual measurement before it deemed a device to be an intentional radiator. Rather, in its 1996 Public Notice and in the earlier proceeding involving Rocky Mountain, the FCC declared radar-defeating devices to be unlawful based only on their functionality. Rocky Mountain offers no good reason why the Commission's reading of the definition is "plainly erroneous." *Auer*, 519 U.S. at 461.

The Commission therefore was not required to measure the emitted radiation from the devices before it could conclude that they are intentional radiators, nor was the district court required to have such evidence before it in order to enforce the Commission's order. Rather, on a proper reading of the definition of intentional radiator, evidence of function is sufficient by itself to support a finding

that the C450 and the S201 are intentional radiators. The lack of an actual measurement of radiation reported in the Staff Reports does not demonstrate the existence of a genuine issue of material fact.

Moreover, contrary to Rocky Mountain's arguments (Br. 12-17), the Staff Reports support the district court's judgment. The "tuning fork" test, for example, demonstrates that both the C450 and the S201 interfered with the proper functioning of a police radar unit. As the district court found (and Rocky Mountain does not dispute), a tuning fork is used as a standard method of ensuring that a radar unit is properly calibrated. Dist. Ct. Op. 27 (R549). When the FCC performed the test while the two devices were turned off, the radar unit calibrated properly. When the FCC performed the test on the same unit while the devices were turned on, the radar unit did not calibrate properly. *Ibid.*; C450 Staff Report at 5 (R311); S201 Staff Report at 4 (R321). Contrary to Rocky Mountain's bald and unsupported assertion, that evidence supports the conclusion that the devices in fact generated and emitted a signal that interfered with the performance of the radar detector. In other words, the tuning fork test indicates the detection of a radiated emission. Given the design and function of the two devices, the test shows that they act as they were designed to – as intentional radiators.

Rocky Mountain's reliance on the "anechoic chamber" test (Br. 16-17) proves nothing. In that test, the devices are turned on inside of a box that measures

any emitted radiation. With respect to the S201, it is not surprising that the test showed no emission because the device works by altering an incoming radar signal and sending it back in a new form whereas the test measured radiofrequency emitted by the unit when it was not being hit by police radar. With respect to the C450, the anechoic chamber test showed that the unit in fact generated and emitted radio energy at a frequency at which it is unlawful to do so (R316), which by itself would be an adequate ground to uphold the forfeiture. *See* note 5, *supra*.[7]

The district court thus properly concluded that the definition of intentional radiator applies to devices that contain components designed to act as an intentional radiator and to produce unlawful emissions intended to interfere with authorized law enforcement activities. *See Rocky Mountain*, 158 F.3d at 1124. Rocky Mountain provides no reason why the Court should overlook the undisputed

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[7] Rocky Mountain also asserts that the road test demonstrates "that the RMR-C450 and RMR-S210 [sic] have no effect on the proper functioning of the police radar." Br. 15. Rocky Mountain failed, however, to address the road test data before the district court, *see* Plaintiff's Response to Defendant's Motion to Dismiss and/or, in the Alternative, Motion for Summary Judgment at 11-12 (R423, 436-437). It may not do so now. *See McIntosh v. Partridge*, 540 F.3d 315, 325 (5th Cir. 2008) ("failure to raise this issue below waives the issue on appeal"). In any event, even if the road test data show that Rocky Mountain's products do not work very well, the data do not undermine the overwhelming evidence that they are intentional radiators.

evidence that the C450 and the S201 were designed to operate, and in fact operate, as intentional radiators.

RMR claims in passing that the FCC's interpretation of Rule 15.3(o) "provides no guidance whatsoever about what conduct is prohibited" because "every moving object in the universe" modulates and reflects RF energy. Br. 22. All moving objects do not, however, contain electronic circuitry designed to generate and emit radio signals with the intent of interfering with a federally authorized communications service. *See* Dist. Ct. Op. at 31 (R553).

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the district court.

Respectfully submitted,

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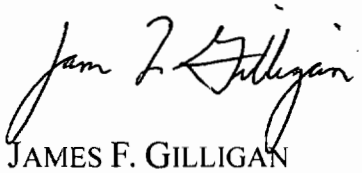

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November 19, 2009

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RADAR SOLUTIONS, LTD. D/B/A Rocky Mountain Radar, Inc.	)	
PLAINTIFF-APPELLANT	)	
v.	)	
THE UNITED STATES FEDERAL Communications Commission	)	09-50683
Defendant-Appellee	)	

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5529 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in Times New Roman 14 point typeface.

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November 19, 2009

STATUTES AND REGULATIONS

Contents:

47 U.S.C. § 302a

United States Code Annotated
Title 47. Telegraphs, Telephones, and Radiotelegraphs
Chapter 5. Wire or Radio Communication
Subchapter III. Special Provisions Relating to Radio
Part I. General Provisions

§ 302a. Devices which interfere with radio reception

(a) Regulations

The Commission may, consistent with the public interest, convenience, and necessity, make reasonable regulations (1) governing the interference potential of devices which in their operation are capable of emitting radio frequency energy by radiation, conduction, or other means in sufficient degree to cause harmful interference to radio communications; and (2) establishing minimum performance standards for home electronic equipment and systems to reduce their susceptibility to interference from radio frequency energy. Such regulations shall be applicable to the manufacture, import, sale, offer for sale, or shipment of such devices and home electronic equipment and systems, and to the use of such devices.

(b) Restrictions

No 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.

* * * * *

47 C.F.R. § 2.803

Code of Federal Regulations
Title 47. Telecommunication
Chapter I. Federal Communications Commission
Subchapter A. General
Part 2. Frequency Allocations and Radio Treaty Matters; General Rules and Regulations
Subpart I. Marketing of Radio-Frequency Devices

§ 2.803 Marketing of radio frequency devices prior to equipment authorization.

(a) 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:

(1) In the case of a device subject to certification, such device has been authorized by the Commission in accordance with the rules in this chapter and is properly identified and labelled as required by § 2.925 and other relevant sections in this chapter; or

(2) In the case of a device that is not required to have a grant of equipment authorization issued by the Commission, but which must comply with the specified technical standards prior to use, such device also complies with all applicable administrative (including verification of the equipment or authorization under a Declaration of Conformity, where required), technical, labelling and identification requirements specified in this chapter.

(b) The provisions of paragraph (a) of this section do not prohibit conditional sales contracts between manufacturers and wholesalers or retailers where delivery is contingent upon compliance with the applicable equipment authorization and technical requirements, nor do they prohibit agreements between such parties to produce new products, manufactured in accordance with designated specifications.

47 C.F.R. § 2.803 (cont'd)

(c) Notwithstanding the provisions of paragraphs (a), (b), (d) and (f) of this section, a radio frequency device may be advertised or displayed, e.g., at a trade show or exhibition, prior to equipment authorization or, for devices not subject to the equipment authorization requirements, prior to a determination of compliance with the applicable technical requirements provided that the advertising contains, and the display is accompanied by, a conspicuous notice worded as follows:

This device has not been authorized as required by the rules of the Federal Communications Commission. This device is not, and may not be, offered for sale or lease, or sold or leased, until authorization is obtained.

(1) If the product being displayed is a prototype of a product that has been properly authorized and the prototype, itself, is not authorized due to differences between the prototype and the authorized product, the following disclaimer notice may be used in lieu of the notice stated in paragraph (c) introductory text of this section:

Prototype. Not for sale.

(2) Except as provided elsewhere in this chapter, devices displayed under the provisions of paragraphs (c) introductory text, and (c)(1) of this section may not be activated or operated.

(d) Notwithstanding the provisions of paragraph (a) of this section, the offer for sale solely to business, commercial, industrial, scientific or medical users (but not an offer for sale to other parties or to end users located in a residential environment) of a radio frequency device that is in the conceptual, developmental, design or pre-production stage is permitted prior to equipment authorization or, for devices not subject to the equipment authorization requirements, prior to a determination of compliance with the applicable technical requirements provided that the prospective buyer is advised in writing at the time of the offer for sale that the equipment is subject to the FCC rules and that the equipment will comply with the

47 C.F.R. § 2.803 (cont'd)

appropriate rules before delivery to the buyer or to centers of distribution. If a product is marketed in compliance with the provisions of this paragraph, the product does not need to be labelled with the statement in paragraph (c) of this section.

(e)(1) Notwithstanding the provisions of paragraph (a) of this section, prior to equipment authorization or determination of compliance with the applicable technical requirements any radio frequency device may be operated, but not marketed, for the following purposes and under the following conditions:

(i) Compliance testing;

(ii) Demonstrations at a trade show provided the notice contained in paragraph (c) of this section is displayed in a conspicuous location on, or immediately adjacent to, the device;

(iii) Demonstrations at an exhibition conducted at a business, commercial, industrial, scientific, or medical location, but excluding locations in a residential environment, provided the notice contained in paragraphs (c) or (d) of this section, as appropriate, is displayed in a conspicuous location on, or immediately adjacent to, the device;

(iv) Evaluation of product performance and determination of customer acceptability, provided such operation takes place at the manufacturer's facilities during developmental, design, or pre-production states; or

(v) Evaluation of product performance and determination of customer acceptability where customer acceptability of a radio frequency device cannot be determined at the manufacturer's facilities because of size or unique capability of the device, provided the device is operated at a business, commercial, industrial, scientific, or medical user's site, but not at a residential site, during the development, design or pre-production

47 C.F.R. § 2.803 (cont'd)

stages. A product operated under this provision shall be labelled, in a conspicuous location, with the notice in paragraph (c) of this section.

(2) For the purpose of paragraphs (e)(1)(iv) and (e)(1)(v) of this section, the term "manufacturer's facilities" includes the facilities of the party responsible for compliance with the regulations and the manufacturer's premises, as well as the facilities of other entities working under the authorization of the responsible party in connection with the development and manufacture, but not marketing, of the equipment.

(3) The provisions of paragraphs (e)(1)(i), (e)(1)(ii), (e)(1)(iii), (e)(1)(iv), and (e)(1)(v) of this section do not eliminate any requirements for station licenses for products that normally require a license to operate, as specified elsewhere in this chapter.

(i) Manufacturers should note that station licenses are not required for some products, e.g., products operating under part 15 of this chapter and certain products operating under part 95 of this chapter.

(ii) Instead of obtaining a special temporary authorization or an experimental license, a manufacturer may operate its product for demonstration or evaluation purposes under the authority of a local FCC licensed service provider. However, the licensee must grant permission to the manufacturer to operate in this manner. Further, the licensee continues to remain responsible for complying with all of the operating conditions and requirements associated with its license.

(4) Marketing, as used in this section, 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.

(5) Products operating under the provisions of this paragraph (e) shall not be recognized to have any vested or recognizable right to continued use

47 C.F.R. § 2.803 (cont'd)

of any frequency. Operation is subject to the conditions that no harmful interference is caused and that any interference received must be accepted. Operation shall be required to cease upon notification by a Commission representative that the device is causing harmful interference and shall not resume until the condition causing the harmful interference is corrected.

(f) For radio frequency devices subject to verification and sold solely to business, commercial, industrial, scientific, and medical users (excluding products sold to other parties or for operation in a residential environment), parties responsible for verification of the devices shall have the option of ensuring compliance with the applicable technical specifications of this chapter at each end user's location after installation, provided that the purchase or lease agreement includes a proviso that such a determination of compliance be made and is the responsibility of the party responsible for verification of the equipment. If the purchase or lease agreement contains this proviso and the responsible party has the product measured to ensure compliance at the end user's location, the product does not need to be labelled with the statement in paragraph (c) of this section.

(g) The provisions in paragraphs (b) through (f) of this section apply only to devices that are designed to comply with, and to the best of the responsible party's knowledge will, upon testing, comply with all applicable requirements in this chapter. 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.

(h) The provisions in subpart K of this part continue to apply to imported radio frequency devices.

47 C.F.R. § 15.3

Code of Federal Regulations
Title 47. Telecommunication
Chapter I. Federal Communications Commission
Subchapter A. General
Part 15. Radio Frequency Devices
Subpart A. General

§ 15.3 Definitions.

* * * * *

(m) Harmful interference. Any emission, radiation or induction that endangers the functioning of a radio navigation service or of other safety services or seriously degrades, obstructs or repeatedly interrupts a radiocommunications service operating in accordance with this chapter.

* * * * *

(o) Intentional radiator. A device that intentionally generates and emits radio frequency energy by radiation or induction.

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