

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

In the Matter of	)	
	)	File No. EB-01-TS-040
ACR Electronics, Inc.	)	NAL/Acct. No. 200532100004
Fort Lauderdale, Miami	)	FRN No. 0008044232

**FORFEITURE ORDER**

**Adopted: March 21, 2006**

**Released: March 23, 2006**

By the Commission:

**I. INTRODUCTION**

1. By this Forfeiture Order (“Order”), we find that ACR Electronics, Inc. (“ACR”) marketed intentional radiating equipment prior to obtaining Commission certification in willful and repeated violation of the equipment marketing requirements of Section 302(b) of the Communications Act of 1934, as amended (“Act”)<sup>1</sup> and Section 2.803(a) of the Commission’s Rules (“Rules”).<sup>2</sup> For these violations, we impose a monetary forfeiture in the amount of sixty five thousand dollars (\$65,000).

**II. BACKGROUND**

2. Section 302(b) of the Act provides that “[n]o person shall manufacture, import, sell, offer for sale, or ship devices of home electronic equipment and systems, or use devices, which fail to comply with regulations promulgated pursuant to this section.” Section 2.803(a) of the Commission’s implementing regulations prohibits manufacturers from selling, leasing, or offering for sale or lease (including advertising for sale or lease) radio devices subject to certification, unless the Commission certifies that such devices are compliant with applicable equipment technical standards.<sup>3</sup> Additionally, Section 15.201(b) of the Commission’s implementing regulations requires manufacturers to obtain certification “prior to marketing” intentional radiating devices.<sup>4</sup> An exception to the above equipment marketing restrictions, however, allows manufacturers to display and advertise devices that are in the

<sup>1</sup> 47 U.S.C. § 302a(b).

<sup>2</sup> 47 C.F.R. § 2.803(a).

<sup>3</sup> Specifically, Section 2.803(a) provides, in pertinent part:

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 ... [i]n 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 labeled as required by § 2.925 and other relevant sections in this chapter [emphasis added].

<sup>4</sup> 47 C.F.R. § 15.201(b). Section 15.3(o) of the Rules, 47 C.F.R. § 15.3(o), defines an intentional radiating device as a “device that intentionally generated and emits radio frequency energy by radiation or induction.”

development, design or pre-production stages *prior* to certification, *provided* their displays are accompanied by and their advertisements contain a conspicuously placed notice, which states:

This device has not been authorized 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.<sup>5</sup>

The exception to the equipment marketing restrictions is designed to afford manufacturers greater flexibility in marketing their developing products,<sup>6</sup> while preserving the Commission's long-standing requirement that trade show displays and advertisements be accompanied by a conspicuous notice alerting potential business customers and consumers that the devices have not been authorized by the Commission and may not be offered for sale or lease, or sold or leased, until such authorization is obtained.<sup>7</sup>

3. The Notice of Apparent Liability for Forfeiture ("NAL") proposed a \$75,000 forfeiture against ACR for its apparent willful and repeated violations of the above equipment marketing restrictions.<sup>8</sup> As discussed herein, we find, as the underlying NAL found, that ACR unlawfully marketed its personal location beacon 406 GPS PLB-200 ("PLB-200"),<sup>9</sup> an intentional radiating device,<sup>10</sup> to the industry and the general public before it obtained certification and *without* the conspicuous disclaimer notice required by Section 2.803(c) of the Rules ("required disclaimer notice").

4. Specifically, the NAL found that ACR marketed the PLB-200 to the industry prior to obtaining certification, by displaying mock-up models of the PLB-200 at two industry trade shows, distributing related promotional materials before and during the trade shows, and making power point presentations to select business customers. The NAL found that ACR did not include any disclaimer

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<sup>5</sup> 47 C.F.R. § 2.803(c) (excepting trade show displays of equipment, prior to authorization, from Section 2.803(a)'s general prohibition provided such displays are accompanied by the requisite warning notice). *See also Revision of Part 2 of the Commission's Rules Relating to the Marketing and Authorization of Radio Frequency Devices*, 12 FCC Rcd 4533, 4536-37 ¶ 6 (1997), *recon. granted in part*, 13 FCC Rcd 12928 (1998) ("1997 Equipment Marketing Order") (stating that trade show displays and advertisements must be "accompanied by a conspicuous notice warning that the product has not been authorized and may not be sold or leased until such authorization is obtained"); *Interpretation and Amendment of Part 2, Section 2.803 of the Commission's Rules Relating to the Marketing (Advertising) of Radio Frequency Devices*, 62 FCC 2d 728, 729 ¶ 8 (1976) ("1976 Equipment Advertising Order") (interpreting the trade show exception to include and permit advertisements of equipment, prior to authorization, provided such advertisements are accompanied by the requisite disclaimer notice); *Interpretation and Amendment of Part 2, Section 2.803 of the Commission's Rules Relating to the Marketing of Radio Frequency Devices*, 58 FCC 2d 784 (1976) ("1976 Trade Show Order") (adopting the trade show exception to the general prohibition against the marketing of devices prior to Commission authorization).

<sup>6</sup> *See 1997 Equipment Marketing Order*, 12 FCC Rcd at 4533 ¶ 1, 4545 ¶ 25.

<sup>7</sup> *Id.* at 4539-40 ¶ 12, 4544 ¶ 22. *See also 1976 Equipment Advertising Order*, 62 FCC 2d at 729 ¶ 6; *1976 Trade Show Order*, 58 FCC 2d at 787-88 ¶¶ 16-18.

<sup>8</sup> *ACR Electronics, Inc.*, 19 FCC Rcd 22293 (2004).

<sup>9</sup> ACR has marketed its PLB-200 under the names TerraFix, AquaFix and AeroFix for land, marine and aviation markets, respectively. *See NAL*, 19 FCC Rcd at 22293-94 ¶¶ 2, 4.

<sup>10</sup> *See 47 C.F.R. § 2.909(a)* (holding manufacturers, such as ACR, who are grantees of Commission certifications, responsible for compliance with the equipment requirements and standards).

notice with its trade show displays and several of its power point presentations.<sup>11</sup> Moreover, the NAL found that ACR did not include any disclaimer notice in the over 700 PLB-200 brochures it distributed. To the contrary, one of the brochures distributed by ACR included language on the “PLB Specifications” page, under “Certification,” that proclaimed that the PLB-200 was “FCC approved.”<sup>12</sup> The other brochure distributed by ACR stated prominently on the front cover “Personal Locator Beacon APPROVED for sale in the U.S.”<sup>13</sup> The NAL further found that while ACR included language in its own internal price lists that indicated that FCC approval was pending, ACR did not include any disclaimer notice in the price lists it actually distributed at the trade shows.<sup>14</sup> And, the NAL found that ACR did not include the required disclaimer notice in the approximately 25 press kit folio it distributed -- but, instead, included language that prominently proclaimed on the folder’s front cover in bold print “Personal Locator Beacons, New and Improved, For Sale in the U.S.” and, in contrast, included language on the folder’s back cover in a black border in small print “New Integral GPS PLB Available April -- pending FCC approval.”<sup>15</sup> The NAL concluded that ACR’s displays, industry presentations, and distributed promotional materials, without any disclaimer notice and/or without the requisite disclaimer notice, constituted apparent willful and repeated violations of the Commission’s equipment marketing restrictions.<sup>16</sup>

5. Additionally, the NAL found that several retail websites were offering the PLB-200 for sale, and that these websites included prices, specified delivery dates and allowed customers to place orders.<sup>17</sup> The NAL noted that one website stated that the PLB-200 was “FCC approved” and another website represented that the PLB-200 “[e]xceeds rigorous testing standards of ... [the] FCC.”<sup>18</sup> As late as the week of September 7, 2004, the NAL found that the PLB-200 was being offered for sale, without the requisite disclaimer notice, in a sporting outdoor mail order catalogue sent to consumers.<sup>19</sup>

6. Moreover, the NAL found that ACR launched a substantial media campaign by advertising the PLB-200 “in multiple outdoor and sporting magazines and catalogues that were clearly directed and targeted to the consuming general public,” notwithstanding the company’s representations that its marketing efforts were “never directed at the general public.”<sup>20</sup> Indeed, the NAL found that ACR devoted approximately one third of its entire first quarter 2004 advertising budget (\$100,000 out of \$300,000)<sup>21</sup> promoting the PLB-200 in full-page ads in multiple publications available and targeted to

<sup>11</sup> See NAL, 19 FCC Rcd at 22296 ¶¶ 10-11.

<sup>12</sup> *Id.* at 22295-96 ¶¶ 7-8.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 22296 ¶ 9.

<sup>15</sup> *Id.* at 22294-95 ¶ 6.

<sup>16</sup> *Id.* at 22299-301 ¶¶ 15-18.

<sup>17</sup> *Id.* at 22300-301 ¶ 17.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 22297-98 ¶ 12.

<sup>21</sup> *Id.* at 22297 n. 33.

consumer end-users.<sup>22</sup> The NAL further found that ACR did not include the required disclaimer notice in its consumer advertisements.<sup>23</sup> Rather, the NAL found that ACR's full-page ads described the "NEW [TerraFix or AquaFix] 406 Personal Locator Beacon, the best way to be found fast," and depicted the model in terms of actual model size. Only at the bottom of the page in black border did the ads include the language, "New Integral GPS PLB Available April – Pending FCC Approval."<sup>24</sup> The NAL concluded that ACR apparently willfully and repeatedly violated the Commission's equipment marketing restrictions because its consumer advertisements did not comport with the requirements of Section 2.803(c).<sup>25</sup>

7. In its response to the NAL,<sup>26</sup> ACR acknowledges that it did not include the requisite disclaimer notice in its marketing materials for the PLB-200 prior to obtaining certification from the Commission's Office of Engineering and Technology on October 5, 2004.<sup>27</sup> Nevertheless, ACR seeks cancellation or a substantial reduction of the proposed forfeiture. ACR reiterates the arguments it made in its response to the Enforcement Bureau's Letter of Inquiry ("LOI"), which it claims "have not been properly analyzed by the Commission."<sup>28</sup> ACR also notes that it "has had a long history of compliance with Commission rules,"<sup>29</sup> and further contends that the "quantum" of the proposed forfeiture was unreasonable.<sup>30</sup>

### III. DISCUSSION

8. The forfeiture amount proposed in this case was assessed in accordance with Section

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<sup>22</sup> Specifically, the NAL noted that according to ACR's media schedule, it advertised the PLB-200 in the following consumer publications: Outside Magazine's 2004 April Buying Guide (circulation 650,000); Backpacker Magazine's 2004 March Buyer's Guide, April and Summer issues and Camper Magazine (circulation 295,000); Alaska's Magazine 2004 May issue (circulation: 185,000); Rock 'N Ice Magazine's 2004 June issue (circulation: 34,000); Safari Club Magazine's 2004 May/June issue (circulation: 39,500); Rocky Mountain Sports Magazine's 2004 April and May issues (circulation: 60,000); Paddler Magazine's 2004 May/June issue (circulation: 59,000); Kayak Magazine's 2004 May/June issue (circulation: 59,000); Couloir Magazine's 2004 Winter issue (circulation: 41,000); Backcountry Magazine's 2004 January and February issues (circulation: 14,000); and Adventure Sport Magazine's 2004 April and May issues (circulation: 25,000). See NAL, 19 FCC Rcd at 22297 ¶ 12 and n. 35.

<sup>23</sup> *Id.* at 22298 ¶ 12.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 22302 ¶ 21.

<sup>26</sup> Response of ACR Electronics, Inc. to the Notice of Apparent Liability for Forfeiture (filed December 1, 2004) ("Response").

<sup>27</sup> See FCC Identifier B66ACR-PLB-200; see also NAL, 19 FCC Rcd at 22303 n. 64.

<sup>28</sup> Response at 2.

<sup>29</sup> *Id.* at 10.

<sup>30</sup> *Id.* at 2. See also Letter from Bruce Eisen, Esq., Kaye Scholer LLP, to Brian Butler, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission (filed April 28, 2004 and supplemented May 4, 2004).

503(b) of the Communications Act of 1934, as amended (“Act”),<sup>31</sup> Section 1.80 of the Rules,<sup>32</sup> and the *Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*.<sup>33</sup> In assessing forfeitures, Section 503(b)(2)(D) of the Act requires that we 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.<sup>34</sup> We have considered ACR’s arguments in light of the above statutory factors, and have determined that the proposed forfeiture should be reduced on the basis of the company’s past history of compliance with the Commission’s equipment marketing regulations.

9. In its response, ACR argues that the NAL failed to take into account the nature of the trade shows at which it marketed the PLB-200. Specifically, ACR asserts that the trade shows “were closed venues allowing equipment suppliers to share information with customers, and not to negotiate pricing or to inform end user consumers about the product.”<sup>35</sup> Since end user consumers do not attend the trade shows, ACR maintains that those who did attend “could reasonably have been expected to understand that the PLB-200 was not for sale.”<sup>36</sup>

10. We find that the NAL properly considered and rejected ACR’s arguments concerning the nature of the trade shows. As noted in the NAL, the Commission recognized in adopting the trade show exception that industry trade shows are specialized and limited venues; nevertheless, the Commission required that manufacturers displaying devices and distributing related materials at trade shows conspicuously post the requisite disclaimer notice to alert prospective wholesalers and retailers that the devices have not been approved by the FCC and may not be legally sold or offered for sale until approval is obtained.<sup>37</sup> Moreover, we find ACR’s suggestion that its business customers “could reasonably have been expected to understand that the PLB-200 was not for sale” unpersuasive. Manufacturers may use industry trade shows to display and advertise both new equipment that has been FCC-authorized, as well as new equipment that is in the development stage or is awaiting FCC authorization. In the latter situations, the disclaimer notice required by Section 2.803(c) is necessary to ensure that distributors and retailers clearly understand that the unauthorized device may not be either sold or offered for sale. Absent the required disclaimer notice, we are not persuaded that customers would understand that the

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<sup>31</sup> 47 U.S.C. § 503(b).

<sup>32</sup> 47 C.F.R. § 1.80.

<sup>33</sup> 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) (“*Forfeiture Policy Statement*”).

<sup>34</sup> 47 U.S.C. § 503(b)(2)(D).

<sup>35</sup> Response at 3.

<sup>36</sup> *Id.*

<sup>37</sup> See *1976 Trade Show Order*, 58 FCC 2d at 786-87 ¶¶ 13-16; see also *Vortex Computers*, 9 FCC Rcd 255, 255 ¶ 5 (F.O.B. 1994) (promoting or displaying equipment at trade shows, “even though on-the-spot orders might not be solicited or accepted” is considered “active marketing” to potential distributors and retailers). It should be noted that although the Commission has further relaxed the equipment marketing restrictions to allow manufacturers to offer pre-authorized devices for sale to wholesalers, retailers and other business entities (but not to end-user consumers), provided they give the prospective buyers written notice that the device has not been authorized but will be authorized at the time of delivery, the Commission did not abandon -- but rather reaffirmed -- the trade show disclaimer notice requirement. See *1997 Equipment Marketing Order*, 12 FCC Rcd at 4537-39 ¶¶ 8-11.

PLB-200 could not be sold or offered for sale, particularly given that brochures distributed by ACR at the trade shows inaccurately stated that the device was “FCC approved” or “APPROVED for sale in the U.S.”<sup>38</sup>

11. ACR also argues that the NAL failed to take into account that “in almost every instance,” ACR “made it known that the equipment at issue was unavailable for sale until such time as the FCC had provided its approval,” by including disclaimer notices that “at least partially complied” with the requirements of Section 2.803(c).<sup>39</sup> In this regard, ACR asserts that “the Commission must acknowledge that the trade show brochures describing the PLB-200 were largely enclosed within a press kit folder, the back of which included the words ‘Pending FCC Approval’ in yellow print within a black border.”<sup>40</sup>

12. We find ACR’s claim that it made it known that the PLB-200 was unavailable for sale pending FCC approval “in almost every instance” is belied by the record. As set forth in the NAL, ACR acknowledged in its response to the LOI that it distributed approximately 700 brochures to potential distributors and retailers at the trade shows. These brochures did not include *any* disclaimer, much less the specific disclaimer required by Section 2.803(c), and, in fact, incorrectly stated that the device was “FCC approved” or “APPROVED for sale in the U.S.” Moreover, the NAL found, and ACR does not dispute, that its displays of the PLB-200 at the trade shows and the price lists<sup>41</sup> distributed at the trade shows did not include *any* disclaimer. The NAL noted, by contrast, that ACR distributed only 25 complete press kit folio at the trade shows, which included the words “APPROVED for sale in the U.S.” on the front cover and only included the words “Pending FCC Approval” on the back cover.<sup>42</sup> The vast majority of promotional materials distributed by ACR at the trade shows did not include *any* disclaimer notice, contrary to ACR’s claims.

13. ACR asserts that the NAL “makes a great deal of independent Bureau research findings that at least one retailer was accepting purchase orders and that ‘several retail websites were offering the Terrafix and Aquafix PLB-200s for sale.’” In this regard, ACR submits that it “has no control over its customers’ websites or advertising materials.”<sup>43</sup> ACR also submits that violations attributed to retailer websites and catalogues should not be deemed “willful” since ACR was not aware of the content included

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<sup>38</sup> Cf. *Ace Communications Fishers*, 9 FCC Rcd 3084, 3084 ¶ 8 (F.O.B., Enf. Div. 1994), *forfeiture ordered*, 12 FCC Rcd 1558 (F.O.B., Compliance Div. 1997) (finding that the marketing of an unauthorized device, which was falsely labeled with a FCC identifier, misled “others into believing that the FCC issued an equipment authorization” justifying an upwardly adjusted proposed forfeiture).

<sup>39</sup> Response at 3, 8.

<sup>40</sup> *Id.* at 4.

<sup>41</sup> In its response to the LOI, ACR indicated that it 200 price lists were prepared for distribution, but that a “significantly less,” unspecified number of lists were actually distributed at the trade shows. NAL 19 FCC Rcd at 22296 ¶ 9. In its response to the NAL, ACR claims, for the first time, that approximately 35-40 price lists were distributed to commercial buyers at the trade shows. Response, Statement of Paul D. N. Hardin, ACR Vice President of Sales & Marketing (“Hardin Statement”), at 3.

<sup>42</sup> To the extent that ACR claims that the brochures were “largely enclosed” within the press kit folder, it is unclear to us precisely how 700 brochures could have been included and distributed in only 25 press kit folio. Instead, it appears that the majority of the brochures were distributed separately from the press kits.

<sup>43</sup> Response at 5.

in those sources.<sup>44</sup>

14. As an initial matter, we note that the NAL did not find the marketing of the PLB-200 on the retail websites and in retail catalogues to constitute “willful” violations by ACR, nor did it propose forfeitures against ACR for those violations.<sup>45</sup> Rather, the NAL cited the retail websites and catalogues to refute ACR’s claim that its retailers are professional buyers who are familiar with the equipment authorization requirements and would not offer unauthorized devices for sale. Further, while we recognize that ACR does not exert control over its customers’ websites and catalogues, it does control and is responsible for brochures, price lists and other promotional materials it distributed to its customers. As explained in the NAL and set forth above, not only did these promotional materials fail to inform ACR’s customers that the PLB-200 could not be sold or offered for sale until Commission authorization is obtained, some of the brochures incorrectly stated that the device was “FCC Approved” or “APPROVED for sale in the U.S.” Thus, as noted in the NAL, it is hardly surprising that the PLB-200s were offered for sale on retail websites and in retail catalogues.

15. ACR further asserts that “[w]ithout exception, every single ACR account knew that the [PLB-200] was not [authorized] and could not be sold until it was.”<sup>46</sup> In support of this claim, ACR provides an e-mail dated September 16, 2003 from an ACR sales manager to a buyer for one of its retailers, Mountain Gear. In this e-mail, the ACR sales manager states, in relevant part:

We are anticipating having the new model to show at OR winter, however, until we get final approval from the FCC we cannot sell or ship it. Worst case scenario, this will be the end of March '04 or Beginning of April '04. With this in mind, it may not be a good idea to show the new model in your Spring book, since it may create some back order problems.

This e-mail does not support ACR’s position or demonstrate that ACR provided complete and accurate information to its retailers regarding the status of the PLB-200. First, we note that the e-mail only states that ACR could not sell or ship the PLB-200 until it received FCC approval. It does not convey that the device could not even be offered for sale or that orders could not be taken for the device prior to obtaining FCC approval. To the contrary, the e-mail indicates that including the PLB-200 in the Spring book “may create some back order problems,” which suggests that it would be permissible for Mountain Gear to offer the device for sale and take orders prior to FCC approval.

16. Second, the e-mail indicates that under the worst case scenario, the device would be FCC approved by the end of March or beginning of April 2004. The device, however, was approved in October 2004. ACR offers no evidence that it subsequently informed Mountain Gear or any of its retailers that the PLB-200 was not in fact approved by the FCC in March or April. Third, as detailed above, ACR distributed over 700 brochures inaccurately promoting the PLB-200 as “FCC approved” to

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<sup>44</sup> *Id.* at 7.

<sup>45</sup> On November 1, 2004, citations were issued to five retailers, which listed and offered the PLB-200 for sale, prior to the Commission’s certification of the device. See *Recreational Equipment, Inc.*, File No. EB-04-SE-281 (Enf. Bur., Spectrum Enf. Div., November 1, 2004); *Boat USA*, File No. EB-04-SE-291 (Enf. Bur., Spectrum Enf. Div., November 1, 2004); *West Marine Inc.*, File No. EB-04-SE-292 (Enf. Bur., Spectrum Enf. Div., November 1, 2004); *Mountain Gear*, File No. EB-04-SE-293 (Enf. Bur., Spectrum Enf. Div., November 1, 2004); *Sportman’s Guide*, File No. EB-04-SE-294 (Enf. Bur., Spectrum Enf. Div., November 1, 2004).

<sup>46</sup> Response at 3.

its potential distributors and retailers. As Mountain Gear was one of ACR's retailers, Mountain Gear might reasonably rely upon the false information contained in such brochures and identify the PLB-200 as "FCC approved" on its retail website.

17. ACR contends that the proposed \$75,000 forfeiture is unreasonable, given that it included "Pending FCC approval" language in its press kit folio. While ACR concedes that the language fell short of the exact wording required by Section 2.803(c), it contends that the language nevertheless "significantly fulfilled the purpose" of Section 2.803(c) and "represented a good faith effort" on its part.<sup>47</sup>

ACR's contentions notwithstanding, we find that the language "Pending FCC approval" not only fell short of Section 2.803(c)'s exact wording, but that it failed to state that the PLB-200 could not be sold, leased or offered for sale or lease until FCC approval was obtained and thus failed to include an essential and necessary component of the Section 2.803(c) notice requirement.<sup>48</sup>

18. ACR also complains that it was "grossly unfair" and unprecedented for the NAL "to pass over the wording that was included on the backside of the folio and dismiss it as 'nonconspicuous.'"<sup>49</sup> ACR's complaint is disingenuous. ACR only distributed 25 press kit folio, which prominently stated that the PLB-200 was for sale on its front cover, and only stated that FCC approval was pending in small print in the bottom darkened border on its back cover. We find that, consistent with precedent,<sup>50</sup> the NAL correctly found that ACR's inconspicuous placement of the language was designed to obscure, not inform, and in any event, contrasted with and was negated by the folio's front cover and the enclosed brochure, which falsely stated that the PLB-200 was FCC-approved. Therefore, we find that ACR's inclusion of the language "Pending FCC approval" in its press kit folio did not demonstrate a good faith effort to comply with, and did not fulfill the objectives and requirements of, Section 2.803(c).

19. Similarly, ACR contends that the NAL erroneously focused on the exact wording of the advertisements it placed in consumer publications. Again, ACR concedes that this disclaimer "fell short of the exact requirements of the rule" but asserts that it "nevertheless indicated that the device was not for sale until the necessary scrutiny had been given by the Commission."<sup>51</sup> We agree with the NAL's conclusion that the language, "Pending FCC approval," included in ACR's advertisements did not comport with the requirements of Section 2.803(c) and certainly did not alert consumer end-users "that FCC approval must be obtained prior to any sales, leases, or offers to sell and/or lease such equipment."<sup>52</sup>

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<sup>47</sup> *Id.* at 9-10.

<sup>48</sup> See e.g., *ASLAN Computer Corporation*, 9 FCC Rcd 2030, ¶ 5 (F.O.B. 1994) (finding that language "DEMO UNIT NOT FOR SALE" did not comply, and did not demonstrate a good faith effort to comply, with the requirements of Section 2.803(c) -- because the regulatory "disclaimer language ... is very specific and intended to convey to the general public or prospective purchasers the fact that a particular device needs FCC authorization, does not have it, and cannot be sold or offered for sale until such authorization has been granted").

<sup>49</sup> Response at 4.

<sup>50</sup> See *KFC USA, Inc.*, 7 FCC Rcd 2398 ¶ 4 (1992), *proposed forfeiture rescinded on other grounds*, *Thomas J. & Nancy A. McIlraith et al.*, 12 FCC Rcd 14999 (1997) (finding that the disclaimer notice accompanying a trade show's display of an unauthorized device was not "conspicuous," because the location was not apparent to attendants). Similarly, we find that the location of the "Pending FCC approval" at the backside of the press kit folio was not apparent to its recipients.

<sup>51</sup> Response at 7.

<sup>52</sup> NAL, 19 FCC Rcd 22301-02 ¶ 20.



In this connection, we note that the Commission has cautioned manufacturers, as the responsible parties,<sup>53</sup> to “exercise due caution in both the selection of the medium and the presentation employed” to ensure that consumers are fully apprised and not unfairly targeted.<sup>54</sup> We think consumers are even less likely than industry to understand that “Pending FCC approval” means that a device cannot be sold or offered for sale. Accordingly, we find that ACR’s advertisements did not convey the requisite information to consumer end-users and thus did not constitute mere technical violations of the requirements of Section 2.803(c).

20. ACR also contends that a substantial reduction in the proposed forfeiture is warranted because it had “no intent to violate a rule in order to profit or gain,”<sup>55</sup> and it made a “swift commitment” to take corrective action and amend its disclaimer with the exact words required.<sup>56</sup> By displaying and distributing promotional materials at industry trade shows, by making selective presentations to select customers, and by placing advertisements in consumer publications, ACR engaged in deliberate acts, which are deemed willful violations of the Act and the Rules, irrespective of any intent to commit violations, profit or gain.<sup>57</sup> As for ACR’s corrective actions, which were not taken until after the Bureau issued the LOI to ACR, such actions do not mitigate or excuse liability for its past violations and thus do not warrant any reduction in the proposed forfeiture amount.<sup>58</sup>

21. Finally, ACR contends that the proposed \$75,000 forfeiture is excessive in light of the recent decision *Pilot Travel Centers, LLC*,<sup>59</sup> and ACR’s own “long history of overall compliance with the Commission rules and ... leadership position in its industry.”<sup>60</sup> ACR’s reliance upon *Pilot Travel Centers, LLC* is misplaced. In *Pilot Travel Centers, LLC*, the Commission proposed an upwardly adjusted \$125,000 forfeiture against a retailer who continued to market un-certificated devices after having had received nine citation warnings. Although ACR correctly noted that there were no prior findings of its non-compliance with the equipment marketing restrictions, it ignored the NAL’s findings that the “degree” of its marketing of the PLB-200 was so “substantial” that a “straightforward application of the [\$7,000] base forfeiture amount for each violation” would have resulted in “a significantly higher proposed forfeiture amount.”<sup>61</sup> Given the “quantum” of ACR’s violations, we find that the \$75,000 proposed forfeiture was not excessive and that *Pilot Travel Center, LLC* does not support ACR’s case for

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<sup>53</sup> See *supra* n. 10.

<sup>54</sup> 1997 *Equipment Marketing Order*, 12 FCC Rcd at 4540 ¶ 12.

<sup>55</sup> Response at 10.

<sup>56</sup> *Id.* at 9-10.

<sup>57</sup> See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387, 4388 ¶ 5 (1991), *recon. denied*, 7 FCC Rcd 3454 (1992); see also *Profit Enterprises, Inc.*, 8 FCC Rcd 2846, 2846 ¶ 5 (1993).

<sup>58</sup> See *AT&T Wireless Services, Inc.*, 17 FCC Rcd 7891 (2002), *forfeiture ordered*, 17 FCC Rcd 21866, 21875-76 ¶¶ 26-28 (2002); *TCI Cablevision of Maryland, Inc.*, 7 FCC Rcd 6013, 6014 ¶ 8 (1992); *Seawest Yacht Brokers*, 9 FCC Rcd 6099, 6099 ¶ 7 (1994); *Ace Communications Fishers*, 12 FCC Rcd 1558, 1560 ¶ 8 (Compliance Div. 1997).

<sup>59</sup> 19 FCC Rcd 23113 (2004).

<sup>60</sup> Response at 10.

<sup>61</sup> 19 FCC Rcd at 22303 ¶ 24.

reduction. We do find, however, that a reduction of the proposed amount to \$65,000 is warranted based on ACR's prior history of overall compliance with the Commission's equipment related regulations.<sup>62</sup>

#### IV. ORDERING CLAUSES

22. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act, and Sections and 1.80 of the Rules,<sup>63</sup> ACR Electronics, Inc. **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of the sixty five thousand dollars (\$65,000) for willfully and repeatedly violating Section 302(b) of the Act and Section 2.803(a) of the Rules.

23. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 358340, Pittsburgh, PA 15251-8340. Payment by overnight mail may be sent to Mellon Bank /LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, PA 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106.

24. Requests for payment of the full amount of this NAL under an installment plan should be sent to: Chief, Revenue and Receivable Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.<sup>64</sup>

25. **IT IS FURTHER ORDERED** that a copy of this Forfeiture Order shall be sent by first class mail and certified mail return receipt requested to Paul Frank, President, ACR Electronics, Inc., 5757 Ravenswood Road, Ft. Lauderdale, Florida 33312, and Bruce A. Eisen, Esq., Kaye Scholer LLP, 901 15<sup>th</sup> Street, N.W., Suite 1100, Washington, D.C. 20005.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>62</sup> See *Johannus Orgelbow B.V. The Netherlands*, 19 FCC Rcd 7196, 7199 ¶ 10 (Enf. Bur. 2004); *Animation Technologies, Inc.*, 9 FCC Rcd 2059, 2059 ¶ 3 (F.O.B. 1994); see also *KGB, Inc.*, 13 FCC Rcd 16396, 16398 ¶ 8 (1998); *Ad-Venture Media, Inc.*, 19 FCC Rcd 9848, 9849 ¶ 6 (Enf. Bur. 2004); *Max Media of Montana, LLC*, 18 FCC Rcd 21375, 21379 ¶ 14 (Enf. Bur. 2003).

<sup>63</sup> 47 U.S.C. § 503(b); 47 C.F.R. § 1.80.

<sup>64</sup> See 47 C.F.R. § 1.1914.