

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

In the Matter of)	
)	File No. EB-08-SE-567
Proxim Wireless Corporation)	NAL/Acct. No. 200932100040
)	FRN 0005850607

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: January 29, 2009

Released: February 2, 2009

By the Chief, Spectrum Enforcement Division, Enforcement Bureau:

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture* (“NAL”), we find Proxim Wireless Corporation (“Proxim”) apparently liable for a forfeiture in the amount of eleven thousand dollars (\$11,000) for willful and repeated violation of Section 302(b) of the Communications Act of 1934, as amended (“Act”),¹ and Section 2.803(a) of the Commission’s Rules (“Rules”).² The noted apparent violations involve Proxim’s marketing of non-compliant wireless access points.³

II. BACKGROUND

2. The Commission received a report from the National Telecommunication and Information Administration (“NTIA”) indicating that Proxim’s ORiNICO AP-4000 wireless access point (“AP-4000”), an unlicensed National Information Infrastructure (“U-NII”) device operating in the frequency band 5.250-5.350 GHz,⁴ is not in compliance with Section 15.407(h)(2) of the Rules.⁵ Section 15.407(h)(2) requires U-NII devices operating in that frequency range to employ a Dynamic Frequency Selection (“DFS”)⁶ radar mechanism to detect the presence of radar systems and avoid co-channel operation with radar systems.

3. Following receipt of the report from the NTIA, the FCC’s Office of Engineering and Technology (“OET”) examined an additional Proxim wireless access point, the ORiNOCO AP-700 (“AP-700”), a U-NII device. This device is certified under FCC ID HZB-AP-700, which is held by Proxim. However, the device examined by OET was instead labeled with the FCC ID IXMAPAGAT02, which is held by Universal Scientific Industrial Co., Ltd. (“USI”) and assigned to a different device.

¹ 47 U.S.C. § 302a(b).

² 47 C.F.R. § 2.803(a).

³ Wireless access points are used to provide wireless internet connections.

⁴ Section 15.403(s) of the rules, 47 C.F.R. § 15.403(s), defines U-NII devices as “[i]ntentional radiators operating in the frequency bands 5.15-5.35 GHz and 5.470-5.825 GHz that use wideband digital modulation techniques and provide a wide array of high data rate mobile and fixed communications for individuals, businesses, and institutions.”

⁵ 47 C.F.R. § 15.407(h)(2).

⁶ Section 15.403(g) of the rules, 47 C.F.R. § 15.403(g), defines DFS as “a mechanism that dynamically detects signals from other systems and avoids co-channel operation with these systems, notably radar systems.”

4. Subsequently the Enforcement Bureau's Spectrum Enforcement Division ("Division") began an investigation. In pursuance of the investigation, the Division directed letters of inquiry to Proxim on July 9 and September 2, 2008.⁷ Proxim responded to those LOIs on August 14 and September 11, 2008, respectively.⁸ Proxim stated that USI, a Taiwan company, manufactures both the AP-4000 and the AP-700; that Proxim began importing and marketing DFS-equipped AP-4000s in the United States after the grant of FCC ID HZB-L49U24U50 on October 17, 2007; and that the AP-4000 is compliant with the DFS requirement of Section 15.407(h)(2) of the Rules.⁹ Proxim admitted that, after October 2007, it marketed 5,069 AP-4000s and 412 AP-700s that were mislabeled with the FCC ID IXMAPAGAT02.¹⁰ Additionally, Proxim stated that on May 7, 2008, it corrected the mislabeling by implementing an "Engineering Change Order" which ensured that the products were properly labeled and that it will ship replacement labels to customers by August 22, 2008.¹¹

5. The second LOI also directed Proxim pursuant to Section 2.956(a)(2) of the Rules¹² to submit, within 10 calendar days, an unmodified, production line sample of the AP-4000 for testing at the Laboratory of the Commission's Office of Engineering and Technology ("OET Lab"). Proxim submitted a sample for testing. The OET Lab tested the sample on October 17, 2008, and found that it was not compliant with the DFS requirement of Section 15.407(h)(2) of the Rules. In addition to its lack of DFS compliance, the sample differed from the device tested for certification in 2007 by operating in only one of two frequency bands for which DFS compliance is required.

6. On November 12, 2008, the Division directed a third LOI to Proxim.¹³ Proxim responded to the third LOI on November 25, 2008.¹⁴ Proxim has requested confidential treatment of its answers to

⁷ See Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission, to Walter Morris, Director of Engineering, Proxim Wireless Corporation (July 9, 2008) ("LOI"); Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission, to Gabriel Herbert, Vice President, Worldwide Operations and Customer Support, Proxim Wireless Corporation (September 2, 2008) ("Second LOI").

⁸ See Letter from Gabriel Herbert, Vice President, Worldwide Operations and Customer Support, Proxim Wireless Corporation, to Thomas D. Fitz-Gibbon, Esq., Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission (August 14, 2008) ("First LOI Response"); Letter from Gabriel Herbert, Vice President, Worldwide Operations and Customer Support, Proxim Wireless Corporation, to Ricardo Durham, Senior Deputy Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission, and Thomas D. Fitz-Gibbon, Esq., Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission (September 11, 2008) ("Second LOI Response").

⁹ See First LOI Response at 1-5.

¹⁰ See First LOI Response at 1-5 and Second LOI Response at 1. USI gave Proxim permission to use the FCC ID IXMAPAGAT02 on the label of the AP-4000. See Letter of Authorization dated March 16, 2004, from Martin Smith, Section Manager, USI, to "whom it may concern" (attachment to First LOI Response). However, the label was still noncompliant because the device authorized by USI's certification does not have DFS capability (USI's certification was issued in 2004, well before DFS capability was required).

¹¹ See First LOI Response at 2.

¹² 47 C.F.R. § 2.956(a)(2).

¹³ See Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission to Gabriel Herbert, Vice President, Worldwide Operations and Customer Support, Proxim Wireless Corporation. (September 2, 2008) ("Third LOI").

¹⁴ See Letter from Gabriel Herbert, Vice President, Worldwide Operations and Customer Support, Proxim Wireless Corporation, to Neal McNeil, Deputy Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission, and Thomas D. Fitz-Gibbon, Esq., Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission (November 24, 2008) ("Third LOI Response").

questions 1(a) and 1(d) of the third LOI.¹⁵ That request remains pending. Accordingly, Proxim's answers to these questions are discussed in an Appendix hereto, and we are treating the Appendix as confidential at this time.

III. DISCUSSION

A. Proxim Apparently Marketed Both Non-Compliant and Improperly Labeled Devices

7. Section 302(b) of the Act provides that “[n]o person shall manufacture, import, sell, offer for sale, or ship devices or home electronic equipment and systems, or use devices, which fail to comply with regulations promulgated pursuant to this section.” Section 2.803(a)(1) of the Commission's implementing regulations provides in pertinent part that:

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 radiofrequency device¹⁶ unless ... [i]n the case of a device [that is] 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....

In addition, Section 15.407(h)(2) of the Rules provides in pertinent part:

Radar Detection Function of Dynamic Frequency Selection (DFS). U-NII devices operating in the 5.25-5.35 GHz and 5.47-5.725 GHz bands shall employ a DFS radar detection mechanism to detect the presence of radar systems and to avoid co-channel operation with radar systems.

As discussed in the confidential Appendix, we find, on the basis of Proxim's third LOI response, that Proxim apparently marketed AP-4000 wireless access points that are not compliant with the DFS requirement of Section 15.407(h)(2), in violation of Section 302(b) of the Act and Section 2.803(a) of the Rules. The finding is also supported by the OET Lab's testing, which indicated that the AP-4000 was non-compliant with Section 15.407(h)(2).

8. Section 2.925(a)(1) of the Rules¹⁷ provides:

Each equipment covered in an application for equipment authorization shall bear a nameplate or label listing the following: (1) FCC Identifier consisting of the two elements in the exact order specified in §2.926. The FCC Identifier shall be preceded by the term *FCC ID* in capital letters on a single line, and shall be of a type size large enough to be legible without the aid of magnification.

Based on Proxim's first and second LOI responses, we find that the labels of 5,069 AP-4000s and 412 AP-700s marketed by Proxim do not include the correct FCC ID number and, therefore, these devices are

¹⁵ See Letter from David L Renaud, Vice President, Corporate Affairs, and General Counsel, Proxim Wireless Corporation, to Neal McNeil, Assistant Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission, and Thomas D. Fitz-Gibbon, Esq., Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission (November 24, 2008).

¹⁶ 47 C.F.R. § 2.801 defines a radiofrequency device as “any device which in its operation is capable of emitting radiofrequency energy by radiation, conduction, or other means.”

¹⁷ 47 C.F.R. § 2.925(a)(1).

not labeled as specified by Section 2.925(a)(1) of the Rules. We also find that Proxim's marketing of these mislabeled devices was in violation of Section 302(b) of the Act and Section 2.803(a) of the Rules.

9. We, accordingly, find that Proxim apparently marketed¹⁸ non-compliant, as well as mislabeled, radio frequency devices, in willful¹⁹ and repeated²⁰ violation of Section 302(b) of the Act and Section 2.803(a) of the Rules.²¹

B. Proposed Forfeiture

10. Section 503(b) of the Act²² authorizes the Commission to assess a forfeiture for each willful or repeated violation of the Act or of any rule, regulation, or order issued by the Commission under the Act. In exercising such authority, we are required to take into account "the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."²³

11. Section 503(b)(6) of the Act²⁴ bars the Commission from proposing a forfeiture for violations that occurred more than a year prior to the issuance of an *NAL*. Section 503(b)(6) does not, however, bar the Commission from assessing whether Proxim's conduct prior to that time period apparently violated the provisions of the Act and Rules and from considering such conduct in determining the appropriate forfeiture amount for violations that occurred within the one-year statutory period.²⁵

¹⁸ Marketing, as defined in 47 C.F.R. § 2.803(e)(4), "includes sale or lease, or offering for sale or lease, including advertising for sale or lease, or importation, shipment, or distribution for the purpose of selling or leasing or offering for sale or lease."

¹⁹ Section 312(f)(1) of the Act, 47 U.S.C. § 312(f)(1), which applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that "[t]he term 'willful', ... means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act" See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387 (1991).

²⁰ Section 312(f)(2) of the Act provides that "[t]he term 'repeated', ... means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day." 47 U.S.C. § 312(f)(2). See, e.g., *Callais Cablevision, Inc., Grand Isle, Louisiana*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362 ¶ 10 (2001) ("*Callais Cablevision*") (issuing a Notice of Apparent Liability for, *inter alia*, a cable television operator's repeated signal leakage).

²¹ See *Revision of Part 2 of the Commission's Rules Relating to the Marketing and Authorization of Radio Frequency Devices*, Report and Order, 12 FCC Rcd 4533, 4552 (1997) (stating that the marketing of modified equipment by a party who fails to perform the steps required by Section 2.909(d) would violate the marketing rules). See also *Ryzex Inc.*, Notice of Apparent Liability, 23 FCC Rcd 878, 883 (Enf. Bur., Spectrum Enf. Div. 2008); *DBK Concepts, Inc.*, Notice of Apparent Liability, 23 FCC Rcd 2870, 2874 (Enf. Bur., Spectrum Enf. Div. 2008).

²² 47 U.S.C. § 503(b).

²³ 47 U.S.C. § 503(b)(2)(E).

²⁴ 47 U.S.C. § 503(b)(6).

²⁵ See 47 U.S.C. § 503(b)(2)(D), 47 C.F.R. § 1.80(b)(4); see also *Behringer USA, Inc.*, Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 1820, 1825 (2006), *forfeiture ordered*, Forfeiture Order, 22 FCC Rcd. 1051 (2007); *Globcom, Inc. d/b/a Globcom Global Communications*, Notice of Apparent Liability for Forfeiture, 18 FCC Rcd 19893, 19903 (2003), *forfeiture ordered*, Forfeiture Order, 21 FCC Rcd 4710 (2006); *Roadrunner Transportation, Inc.*, Forfeiture Order, 15 FCC Rcd 9669, 9671-71 (2000); *Cate Communications Corp.*, Memorandum Opinion and Order, 60 RR 2d 1386, 1388 (1986); *Eastern Broadcasting Corp.*, Memorandum Opinion and Order, 10 FCC 2d 37 (1967), *recon. den.*, 11 FCC 2d 193 (1967); *Bureau D'Electronique Appliquee, Inc.*, Notice of Apparent Liability for Forfeiture, 20 FCC Rcd 3445, 3447-48 (Enf. Bur., Spectrum Enf. Div. 2005), *forfeiture ordered*, Forfeiture Order, 20 FCC Rcd 17893 (Enf. Bur., Spectrum Enf. Div. 2005).

Thus, while we may consider the fact that Proxim's conduct has continued over a period that began during 2005 or earlier, the forfeiture amount we propose herein relates only to Proxim's apparent violations that have occurred within the past year.

12. Under the *Forfeiture Policy Statement*²⁶ and Section 1.80 of the Rules,²⁷ the base forfeiture amount for the marketing of unauthorized equipment is \$7,000 per model. As set forth in the confidential appendix, Proxim apparently marketed AP-4000 wireless access points that are not compliant with the DFS requirement of Section 15.407(h)(2) of the Rules. In addition, Proxim apparently marketed AP-700 and AP-4000 wireless access points that were not labeled in accordance with Section 2.925 of the Rules. Thus, we find that the base forfeiture amount for Proxim's marketing of two models of non-compliant wireless access points, in willful and repeated violation of Section 302(b) of the Act and Section 2.803(a) of the Rules, is \$14,000. We note that the \$7,000 base forfeiture amount is typically imposed for marketing devices that are not in compliance with applicable technical requirements or are not authorized by an equipment authorization. Because marketing an improperly labeled device is not as significant a violation as marketing an unauthorized or technically non-compliant device, we find that a downward adjustment of the base forfeiture amount from \$7,000 to \$4,000 is warranted for Proxim's marketing of the mislabeled AP-700.²⁸

13. We, accordingly, find that a total proposed forfeiture of \$11,000 is appropriate.

IV. ORDERING CLAUSES

14. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act, and Sections 0.111, 0.311 and 1.80 of the Rules,²⁹ Proxim, **IS NOTIFIED** of its **APPARENT LIABILITY FOR A FORFEITURE** in the amount of eleven thousand dollars (\$11,000) for marketing non-compliant wireless access points and wireless access points not labeled in accordance with Section 2.925 of the Rules, in willful and repeated violation of Section 302(b) of the Act and Section 2.803(a) of the Rules.

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

16. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Account Number and FRN Number referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code). Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625,

²⁶ *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087, 17113 (1997) ("*Forfeiture Policy Statement*"), recon. denied, 15 FCC Rcd 303 (1999).

²⁷ 47 C.F.R. § 1.80.

²⁸ See *Ryzex*, 23 FCC Rcd at 884; *DBK*, 23 FCC Rcd at 2875.

²⁹ 47 C.F.R. § 0.111, 0.311 and 1.80.

Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures. Proxim will also send electronic notification on the date said payment is made to Thomas.Fitz-Gibbon@fcc.gov.

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

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

19. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture shall be sent by first class mail and certified mail return receipt requested to Gabriel Herbert, Vice President, Worldwide Operations and Customer Support, Proxim Wireless Corporation, 1561 Buckeye Drive, Milpitas, CA 95035.

FEDERAL COMMUNICATIONS COMMISSION

Kathryn S. Berthot
Chief, Spectrum Enforcement Division
Enforcement Bureau