

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

In the Matter of)	
)	
VPNet, Inc.)	File No: EB-11-SJ-0025
)	NAL/Acct. No.: 201232680003
San Juan, PR)	FRN: 0021234265
)	
)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER

Adopted: March 23, 2012

Released: March 23, 2012

By the Resident Agent, San Juan Office, South Central Region, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture and Order (NAL), we find that VPNet, Inc. (VPNet), operator of Unlicensed National Information Infrastructure (U-NII) transmission systems in San Juan, Puerto Rico, apparently willfully and repeatedly violated Sections 301 and 302(b) of the Communications Act of 1934, as amended (Act),¹ and Sections 15.1(b) and 15.1(c) of the Commission's rules (Rules)² by operating an intentional radiator without a license and in a manner inconsistent with both Part 15 of the Rules³ and the device's equipment authorization. We conclude that VPNet is apparently liable for a forfeiture in the amount of fifteen thousand dollars (\$15,000). Further, we order VPNet to submit a statement signed under penalty of perjury by an officer or director of the company stating that it is currently operating its U-NII systems in compliance with FCC rules and applicable authorizations.

II. BACKGROUND

2. Part 15 of the Rules allows devices employing relatively low-level radiofrequency (RF) signals to be operated without individual licenses, as long as their operation causes no harmful interference to licensed services and the devices do not generate emissions or field strength levels greater than a specified limit.⁴ Such devices must be authorized and operated in accordance with the Part 15 Rules.⁵ For example, Section 15.1(c) of the Rules provides that intentional radiators must operate consistent with the terms of their equipment authorizations.⁶ Operating an RF device, such as an intentional or unintentional radiator, that is not in compliance with its authorization or the Part 15 Rules is

¹ 47 U.S.C. §§ 301, 302a(b); *see also* 47 C.F.R. § 15.407.

² 47 C.F.R. §§ 15.1(b), (c).

³ 47 C.F.R. §§ 15.1 *et seq.*

⁴ *Revision of Part 15 of the Rules Regarding the Operation of Radio Frequency Devices Without an Individual License*, First Report and Order, 4 FCC Rcd 3493 (1989).

⁵ 47 C.F.R. §§ 15.1(a), 15.5.

⁶ *See* 47 C.F.R. § 15.1(c). Section 15.201(b) of the Rules provides that all intentional radiators operating under Part 15 of the Rules shall be certificated by the Commission. 47 C.F.R. § 15.201(b). The Commission issues equipment authorizations for such devices, setting forth the relevant conditions to the grant.

a violation of Section 302(b) of the Act.⁷ Additionally, operating a Part 15 device in a manner that is inconsistent with the Part 15 Rules requires a license pursuant to Section 301 of the Act. Such operation without a license violates that provision.⁸

3. On May 11 and 12, 2011, in response to a complaint of interference, an agent with the Enforcement Bureau's San Juan Office (San Juan Office) used direction-finding techniques to determine that radio emissions on the frequency 5637 MHz⁹ were emanating from the roof of the south tower of Capitol Building Center in San Juan, Puerto Rico. On May 16, 2011, the agent used direction-finding techniques again to determine that radio emissions on the frequency 5637 MHz were emanating from one of VPNet's U-NII transmitters, a Motorola Canopy, located on the roof of the south tower of the Capitol Building Center.¹⁰ The Motorola Canopy model is certified for use only with reflectors or lenses with antenna gains of 7, 10, and 18 dBi and without an external antenna connector.¹¹ On May 16, 2011, the agent from the San Juan Office observed that VPNet's U-NII transmitter was attached via an external antenna connector to a high-gain dish antenna.¹² According to the specification sheet for the high-gain dish antenna, the antenna provides a gain of 28.3 dBi.¹³

4. On May 17, 2011, VPNet's President admitted via a faxed letter that VPNet operated the U-NII transmitter on the frequency 5637 MHz.¹⁴ On May 18, 2011, VPNet's technician and an agent from the San Juan Office confirmed that VPNet owned the U-NII transmitter observed on May 16, 2011, and that the device was retuned away from 5637 MHz. The agent observed, however, that the high gain antenna was still in use via an external antenna connector.

III. DISCUSSION

5. Section 503(b) of the Act provides that any person who willfully or repeatedly fails to comply substantially with the terms and conditions of any license, or willfully or repeatedly fails to comply with any of the provisions of the Act or of any rule, regulation, or order issued by the Commission thereunder, shall be liable for a forfeiture penalty.¹⁵ Section 312(f)(1) of the Act defines "willful" as the "conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the

⁷ 47 C.F.R. § 15.1(c). *See* 47 U.S.C. § 302a(b).

⁸ 47 C.F.R. § 15.1(b).

⁹ Agents from the San Juan Office believe that the emissions on 5637 MHz interfered with the Federal Aviation Administration's (FAA) Terminal Doppler Weather Radar (TDWR) system that serves the San Juan International Airport. TDWR installations exist at 45 major airports in the United States and Puerto Rico and assist air traffic controllers in detecting low-altitude wind shear that can pose a risk to aircraft. *See* MIT Lincoln Laboratories, <http://www.ll.mit.edu/mission/aviation/faawxsystems/tdwr.html> (last visited Jan. 26, 2011).

¹⁰ The device was a Motorola Canopy model # BH 5400, FCC ID ABZ89FT7623.

¹¹ *See* equipment authorization for FCC ID ABZ89FT7623. The Commission approved the device as submitted in Motorola's equipment application. Motorola's device was tested by DLS Electronic Systems, Inc. The device was only tested with reflectors or lenses with antenna gains of 7, 10, and 18 dBi. Thus, the device was only approved for use with reflectors or lenses with antenna gains of 7, 10, and 18 dBi. None of the photos of the device tested by DLS Electronic Systems, Inc. included an external antenna connector. Thus, the device was only approved for use without an external antenna connector. *See* <https://apps.fcc.gov/eas/GetApplicationAttachment.html?id=1176358> (last visited Aug. 12, 2011).

¹² The high gain dish antenna, model no. SP2-5.2, is manufactured by Radio Waves, Inc.

¹³ *See* <http://www.wlanmall.com/foot-parabolic-dish-antenna-p-706.html> (last visited Aug. 12, 2011).

¹⁴ *See* Letter from Felipe Hernandez, President VPNet, Inc., to Reuben Jusino, Field Officer, San Juan Office, Enforcement Bureau (May 17, 2011) (on file in EB-11-SJ-0025).

¹⁵ 47 U.S.C. § 503(b).

law.¹⁶ The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,¹⁷ and the Commission has so interpreted the term in the Section 503(b) context.¹⁸ The Commission may also assess a forfeiture for violations that are merely repeated, and not willful.¹⁹ The term “repeated” means the commission or omission of such act more than once or for more than one day.²⁰

A. Unlicensed Operation of U-NII Device

6. Section 301 of the Act prohibits the use or operation of any apparatus for the transmission of energy or communications or signals by radio within the United States except under and in accordance with the Act and with a license.²¹ An exception to the license requirement under Section 301 is found in Part 15 of the Rules,²² which sets forth conditions under which intentional radiators may operate without an individual license. Pursuant to Section 15.1(b) of the Rules, however, “operation of an intentional . . . radiator that is *not* in accordance with the regulations in this part *must be licensed*”²³ Thus, if an intentional radiator fails to comply with the conditions set forth in its equipment authorization,²⁴ the operation is no longer covered by the unlicensed provisions of Part 15 and must be licensed pursuant to Section 301 of the Act.

7. On May 11, 12, and 16, 2011, an agent from the San Juan Office Office observed VPNet operate a Part 15 intentional radiator—a Motorola Canopy—on the center frequency of 5637 MHz from the roof of the south tower of the Capitol Building Center complex in San Juan, Puerto Rico. The Motorola Canopy used by VPNet is not certified for use with an external antenna connector.²⁵ On May 16 and 17, 2011, agents from the San Juan Office observed that the Motorola Canopy used by VPNet had an external antenna connector. By employing an external antenna connector, VPNet’s operations did not comply with the device’s equipment authorization. Thus, VPNet’s operations fell outside the scope of the equipment authorization, and as a result, the Part 15 exception for unlicensed operation no longer applies,

¹⁶ 47 U.S.C. § 312(f)(1).

¹⁷ H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982) (“This provision [inserted in Section 312] defines the terms ‘willful’ and ‘repeated’ for purposes of section 312, and for any other relevant section of the act (e.g., Section 503) As defined[,] . . . ‘willful’ means that the licensee knew that he was doing the act in question, regardless of whether there was an intent to violate the law. ‘Repeated’ means more than once, or where the act is continuous, for more than one day. Whether an act is considered to be ‘continuous’ would depend upon the circumstances in each case. The definitions are intended primarily to clarify the language in Sections 312 and 503, and are consistent with the Commission’s application of those terms”).

¹⁸ See, e.g., *Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991), *recons. denied*, 7 FCC Rcd 3454 (1992).

¹⁹ See, e.g., *Callais Cablevision, Inc.*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362, para. 10 (2001) (*Callais Cablevision, Inc.*) (proposing a forfeiture for, *inter alia*, a cable television operator’s repeated signal leakage).

²⁰ Section 312(f)(2) of the Act, 47 U.S.C. § 312(f)(2), which also applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that “[t]he term ‘repeated’, when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.” See *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362.

²¹ 47 U.S.C. § 301.

²² See 47 C.F.R. §§ 15.1 *et seq.*

²³ 47 C.F.R. § 15.1(b)(emphasis added).

²⁴ See *supra* note 6.

²⁵ See *supra* note 11.

and a license is required under Section 301. According to Commission records, VPNet does not hold a license to operate on the frequency 5637 MHz in San Juan, Puerto Rico. Thus, based on the evidence before us, we find that VPNet apparently willfully and repeatedly violated Section 301 of the Act and Section 15.1(b) of the Rules by operating unlicensed radio transmitters.

B. Use of Unauthorized U-NII Device

8. Section 15.201(b) of the Rules²⁶ provides that all intentional radiators operating under Part 15 shall be certificated by the Commission. Section 15.1(c) of the Rules²⁷ states that the operation of an intentional radiator that is not in compliance with the administrative and technical provisions in this part is prohibited. Section 302(b) of the Act provides that “[n]o person shall . . . use devices which fail to comply with the regulations promulgated pursuant to this section.”²⁸ Consequently, the operation of an intentional radiator in a manner inconsistent with the Part 15 Rules is a violation of Section 302(b) of the Act. The Motorola Canopy device used by VPNet is only certified for use in conjunction with reflectors or lenses with antenna gains of up to 18 dBi. On May 16 and 17, 2011, agents from the San Juan Office observed the Motorola Canopy device being used with an external high-gain antenna. By using an external high-gain antenna, VPNet’s operations did not comply with either the device’s equipment authorization or with Part 15 requirements and thus were unauthorized. Therefore, based on the evidence before us, we find that VPNet apparently willfully and repeatedly violated Section 302(b) of the Act and Section 15.1(c) of the Rules by operating a U-NII transmitter with an unauthorized external high-gain antenna.²⁹

C. Proposed Forfeiture Amount and Reporting Requirement

9. Pursuant to the Commission’s *Forfeiture Policy Statement* and Section 1.80 of the Rules, the base forfeiture amount for operation without an instrument of authorization is \$10,000 and the base forfeiture amount for operation of unauthorized equipment is \$5,000.³⁰ In assessing the monetary forfeiture amount, we must also take into account the statutory factors set forth in Section 503(b)(2)(E) of the Act, which include the nature, circumstances, extent, and gravity of the violations, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.³¹ Applying the *Forfeiture Policy Statement*, Section 1.80 of the Rules, and the statutory factors to the instant case, we conclude that VPNet is apparently liable for a total forfeiture of \$15,000—consisting of \$10,000 for unlicensed operation in violation of Section 301 of the Act and Section 15.1(b) of the Rules, and \$5,000 for use of an unauthorized antenna in violation of Section 302(b) of the Act and Section 15.1(c) of the Rules.

10. We order VPNet to submit a statement signed under penalty of perjury by an officer or director of the company stating that it is currently operating its U-NII systems in compliance with FCC rules and applicable authorizations. This statement must be provided to the Enforcement Bureau at the address listed in paragraph 16 within thirty (30) calendar days of the release date of this *NAL*.

²⁶ 47 C.F.R. § 15.201(b).

²⁷ 47 C.F.R. § 15.1(c).

²⁸ 47 U.S.C. § 302a(b).

²⁹ 47 C.F.R. § 15.1(c).

³⁰ *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997) (*Forfeiture Policy Statement*), *recons. denied*, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80.

³¹ 47 U.S.C. § 503(b)(2)(E).

IV. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.311, 0.314 and 1.80 of the Commission's rules, VPNet, Inc. is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A FORFEITURE** in the amount of fifteen thousand dollars (\$15,000) for violations of Sections 301 and 302(b) of the Act and Sections 15.1(b) and 15.1(c).³²

12. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Commission's rules within thirty calendar days of the release date of this Notice of Apparent Liability for Forfeiture and Order, VPNet, Inc., **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

13. **IT IS FURTHER ORDERED** that VPNet, Inc. **SHALL SUBMIT** a sworn statement as described in paragraph 10 to the Enforcement Bureau Office listed in paragraph 16 within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture and Order.

14. VPNet, Inc. is **HEREBY NOTIFIED** that operation of a Motorola Canopy with a high gain antenna on the frequency 5637 MHz may cause harmful interference to the Federal Aviation Administration's (FAA) Terminal Doppler Weather Radar (TDWR) system that serves the San Juan International Airport. VPNet, Inc. is **HEREBY WARNED** that any further operation of any U-NII device, on any frequency, and at any location, that results in interference to the FAA's TDWR system serving the San Juan International Airport may be considered a willful violation of Section 333 of the Act, which prohibits willful or malicious interference to any radio communication of any station licensed or authorized under the Act or operated by the United States Government.³³

15. Payment of the forfeiture must be made by credit card, check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the Account Number and FRN referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code). Requests for full payment under an installment plan should be sent to: Chief Financial Officer – Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.³⁴ If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov. VPNet shall send electronic notification on the date said payment is made to SCR-Response@fcc.gov.

16. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to Sections 1.80(f)(3) and 1.16 of the Rules.³⁵ The written statement must be mailed to Federal Communications Commission, Enforcement Bureau, South Central Region; San Juan Office at FCC, US

³² 47 U.S.C. §§ 301, 302a(b), 503(b), 47 C.F.R. §§ 0.111, 0.311, 0.314, 1.80, 15.1(b), 15.1(c).

³³ 47 U.S.C. § 333.

³⁴ See 47 C.F.R. § 1.1914.

³⁵ 47 C.F.R. §§ 1.80(f)(3), 1.16.

Federal Building Room 762, San Juan, PR 00918-1731 and must include the NAL/Acct. No. referenced in the caption. The statement should also be emailed to SCR-Response@fcc.gov.

17. 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 (GAAP); 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.

18. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture and Order shall be sent by both Certified Mail, Return Receipt Requested, and regular mail, to VPNet, Inc. at POB 193780, San Juan, PR 00919.

FEDERAL COMMUNICATIONS COMMISSION

Reuben Jusino
Resident Agent
San Juan Field Office
South Central Region
Enforcement Bureau