Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
RECONROBOTICS, INC.	)	**WP Docket 08-63**
	)	
Request for Waiver of Part 90 of the Commission's Rules for a Video and Audio Surveillance System at 430-450 MHz	)))	

To: The Commission

REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION

ARRL, the national association for Amateur Radio, formally known as the American Radio Relay League, Incorporated (ARRL), hereby respectfully submits this reply to *the "Opposition of ReconRobotics, Inc. , to the Petition for Reconsideration of ARRL*" filed on or about April 6, 2010 in the captioned docket proceeding. ARRL's Petition for Reconsideration, which is opposed by ReconRobotics, Inc. (ReconRobotics) requests that the Commission reconsider and rescind [1] the *Order*, DA 10-291, released February 23, 2010 issued under the delegated authority of the Deputy Chief, Wireless Telecommunications Bureau, and the Deputy Chief, Public Safety and Homeland Security Bureau. For its Reply to ReconRobotics' Opposition, ARRL states as follows:

1. ReconRobotics first attempts to have ARRL's Petition for Reconsideration dismissed on procedural grounds. ReconRobotics notes that ARRL's Petition for Reconsideration was styled in the opening paragraph as a Petition filed pursuant to Section 1.429 of the Commission's Rules (47 C.F.R. §1.429), and that such a

[1] ARRL also requested that, *pendente lite*, the Wireless Bureau and the Public Safety and Homeland Security Bureau stay the effectiveness of the waiver pursuant to Section 1.102(b)(2) of the Commission's Rules.

characterization was incorrect.[2] ARRL's Petition was so styled because this proceeding, as the Commission chose to process it, was in the form of a notice and comment, docketed proceeding, in the nature of a rulemaking proceeding, at least in form. ARRL asserts, contrary to ReconRobotics' argument, that Section 1.429 of the Commission's Rules permits Petitions for Reconsideration under these circumstances. *See*, 47 C.F.R. §1.429(a). ReconRobotics states incorrectly that Section 1.429 Petitions "are necessarily acted on by the full Commission." In fact, Section 1.429(a) states in part that "[w]here the action was taken by the Commission, the petition will be acted on by the Commission. Where action was taken by a staff official under delegated authority, the petition may be acted on by the staff official or referred to the Commission for action." Therefore, the Petition was properly styled a Section 1.429 Petition for Reconsideration under Section 1.429 of the Commission's Rules and there is no procedural impropriety.

2. It is in any case of no consequence whether the ARRL Petition is considered a Petition for Reconsideration pursuant to Section 1.429 or one pursuant to Section 1.106 of the Commission's rules (which pertains to adjudicatory proceedings). As noted in footnote 2 of ARRL's Petition, the Petition was filed timely in any case, *whether considered under Section 1.429 or Section 1.106 of the Commission's Rules*: "This Petition for Reconsideration is being filed within thirty (30) days of the release date of the *Order*. It is therefore timely filed per Section 1.429(d) or Section 1.106 of the Commission's Rules."

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[2] ReconRobotics claims that there are three options for seeking administrative review, but that only two of them are applicable here, and that ARRL proceeded under neither. It claims that Section 1.429 was not an option because (1) Section 1.429 was not a "notice and comment rulemaking" and (2) all Section 1.429 Petitions have to be acted on by the full Commission and the *Order* in this case was issued under delegated authority by two bureaus. ReconRobotics is wrong on both counts. First, Section 1.429 is applicable here because this was a notice and comment docketed proceeding. Second, Section 1.429 petitions do <u>not</u> have to be acted on by the full Commission, as Section 1.429(a) *plainly* states.

3. ARRL's Petition can, if the Commission prefers, be considered a Section 1.106 Petition, and the Petition clearly envisioned that option. There is no difference which of the two Reconsideration rules is invoked in this case, because either way, ARRL's Petition timely sought administrative reconsideration of the *Order* which in this case was improvidently granted.[3] The Commission does not utilize the "Star Chamber" pleading limitations urged by ReconRobotics. Under the circumstances, ARRL's Petition for Reconsideration was sufficiently styled, timely filed, and procedurally firm. ReconRobotics' protestations to the contrary are a red herring, intended to distract the Commission's attention from the serious defects that ARRL has noted in the *Order* granting the waiver.

4. ReconRobotics next argues that ARRL's Petition is "repetitive" and should be dismissed on that basis. This argument is illogical. ARRL's Petition asserts that the *Order*, issued under delegated authority, *failed to address a number of significant arguments* made in comments filed timely in the proceeding. Because ARRL and others raised those arguments timely, and the delegated authority failed to address them in the *Order*, ARRL's objection to that failure cannot be dismissed as "repetitive." The Administrative Procedure Act does not permit an agency to ignore substantive (and in this case determinative) arguments and then dismiss an administrative appeal noting these omissions, on the basis that the arguments not dealt with by the agency were raised earlier by the administrative appellant. Surely, ARRL raised the arguments in its

[3] ARRL does note that Section 1.106 of the Commission's Rules provides a shorter time (7 days, plus mailing time per Section 1.4) than does Section 1.429 of the Rules (10 days, plus mailing time per Section 1.4) for filing replies to Oppositions to Petitions for Reconsideration. ARRL is filing this Reply such that it is timely in either case.

comments that it raises in the Petition for Reconsideration.[4] The entire point, however, is that the Commission did <u>*not*</u> address them in the *Order*, though it was obligated to do so. That is a valid basis for seeking reconsideration, and ARRL fulfilled the obligations of both Section 1.429(c) and Section 1.106(b)(1). ReconRobotics cites authorities for the proposition that a "petition that simply reiterates arguments previously considered and rejected will be denied." That is precisely the opposite of the situation here, where decisional arguments made by ARRL were completely ignored in the *Order*. As well, conclusions were drawn in the *Order* which were not explained in view of contrary evidence submitted by ARRL and others. An agency action is arbitrary and capricious if it is "not supported by substantial evidence" in the record as a whole, including "whatever in the record fairly detracts from" the agency's conclusions.[5]

5. ReconRobotics next alleges that ARRL's request that the *Order* be stayed pending consideration of ARRL's Petition is infirm because ARRL allegedly did not make the showings necessary to justify a stay. As stated in ARRL's Petition, however, and as per footnote 1 *supra*, ARRL was proceeding squarely under the specific language of Section 1.102(b)(2) of the Commission's Rules which, with respect to Commission actions taken under delegated authority, provides: "If a petition for reconsideration of a non-hearing action is filed, the designated authority may, in its discretion stay the effect of its action pending disposition of the petition for reconsideration." ARRL recognizes that a stay by the "designated authority" under this rule is discretionary, and that the

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[4] There is, however, new information raised in ARRL's Petition for Reconsideration ,which are the numerous instances of illegal marketing of the ReconRobotics device recently, and the effect of that on the ability of the Commission to rely on marketing limitations as a basis for its assumptions about interference avoidance. This is discussed *infra*.

[5] *BFI Waste Systems of North America, Inc. v. FAA*, 293 F.3d 527, 532 (D.C. Cir. 2002); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

Deputy Bureau Chiefs that jointly issued the *Order* may decide not to issue it. That said, there was ample basis stated in ARRL's Petition for Reconsideration to justify the grant of an administrative stay in this instance by the delegated authorities that issued the *Order*. The irreparable harm in allowing the marketing and deployment of an interference-causing device with labeling which (as ReconRobotics concedes) is *substantially misleading to the customer*, and which operates in an ill-chosen band that will, as ARRL has shown, result in interference to and from licensed users is quite obvious from the four corners of ARRL's Petition for Reconsideration. ReconRobotics cannot, and in its Opposition does not assert that it will be harmed by the inability to market and sell this device in this frequency band rather than a more appropriate one. This is because it has not heretofore had any authority to market and sell the device in the United States. As of this writing, ReconRobotics apparently still does not have such authority, since it has apparently not yet obtained a grant of certification for the device under the Commission's equipment authorization program.[6] Finally, ARRL has more than amply demonstrated a likelihood of prevailing on the merits. The grant of this waiver must be rescinded and reconsidered on any of several bases, not the least of which is that the Commission has, *sub silentio,* granted a waiver of the Table of Frequency Allocations, Section 2.106, without admitting that it has done so; without having been requested to do so by ReconRobotics; and without any justification stated for having done so. The Commission is obligated on this basis alone to revisit this matter and to rescind the granted waiver. The public interest is furthered by a stay in this instance because absent such, this interference-causing and interference-susceptible device will be

[6] ARRL has, however, demonstrated (with absolutely no rebuttal from ReconRobotics) that ReconRobotics has been engaged in repeated, ongoing and unabashed instances of illegal marketing of this device throughout the United States, discussed more fully *infra*.

distributed with *inadequate* warnings to public safety users, who will be materially misled by the manufacturer of the device. Those users will not be aware that the device may be rendered inoperative by the presence of perfectly legal, co-channel Amateur Radio operation. Of this, ReconRobotics' Opposition cavalierly claims, at page 14 thereof that such "incoming" interference is "ReconRobotics' problem, not the Amateurs'." Not so. The problem falls not to ReconRobotics, but to (1) the public safety users of the devices, since ReconRobotics will be out of the picture, post-point-of-sale, and (2) to the Amateur Radio operators who will either be the victims of the interference or the catalyst for the failure of the device, potentially jeopardizing the lives of first responders. So, while Section 1.102 of the Commission's rules is discretionary, it would be irresponsible of the Commission not to stay the *Order* in this case.

6. To the ample evidence of repeated and intentional illegal marketing of the Recon Scout device, well-documented in ARRL's Petition, all that ReconRobotics can muster in response is that this is an "enforcement matter" and it has nothing to do with the grant of the waiver. Actually, it has *everything* to do with the grant of the waiver. The Commission granted the waiver based on the presumption that its deployment would be limited to certain classes of licensed users, and that the number of those users, and of the devices, would be limited. ReconRobotics has established by its conduct and its marketing structure that it cannot be relied on by the Commission to comply with any marketing conditions associated with this waiver. Absent such assurance, the limits and conditions are meaningless and the acknowledged interference potential of these devices will go essentially unregulated and unchecked.

7. ReconRobotics argues that the technical evidence submitted by ARRL in its Petition does not rebut ReconRobotics' "experimental" evidence that the 420-450 MHz band is somehow required for proper operation of the Recon Scout device. ARRL is satisfied that its technical material adequately rebuts ReconRobotics' contentions. The point addressed by those studies, however, which is uncontested, is that the *Order* is devoid of any justification for the choice of frequency bands. The Commission should rescind the *Order* and evaluate this issue for the first time. ARRL has cited alternative frequency bands that would be perfectly suitable for this device and its applications, and which would not suffer the same incompatibilities that the 430-450 MHz band entails. This is not a matter of Amateur Radio operators not wanting to share spectrum, as ReconRobotics asserts. The Amateur Service shares the 420-450 MHz band compatibly with Government Radiolocation and has for years. It shares virtually all Amateur Radio allocations above 225 MHz with other licensed services. But the allocation decisions that resulted in those sharing decisions have always been adjudicated via the normal allocation process. Those allocation decisions were not made by rule waivers granted to single -- and as here, irresponsible -- individual manufacturers, solely for the manufacturer's own convenience.

8. ReconRobotics charges that ARRL's technical rebuttal of ReconRobotics' own material attempting to justify the use of the 430-540 MHz band in lieu of other bands is late and therefore not subject to consideration. Had the Commission addressed the issue of alternative bands in the *Order*, ReconRobotics might have had a point. But ARRL's comments in this proceeding squarely raised the issue and it was ignored in the *Order*. On reconsideration, the Commission must now address it.

9. ReconRobotics does not contest the rather obvious need to modify the labeling requirements that are insufficient to convey to the user the operating conditions that the Commission has placed on the devices, to the detriment of the hundreds of thousands of licensed Amateur users of the 420-450 MHz band. This matter alone should result in a stay of the *Order* while the Commission fixes it. ARRL's language should be used.

10. ReconRobotics claims at page 10 of its Opposition that there is no "allocation by waiver" here, because the "U.S. Table of Allocations lists Private Land Mobile for the 420-450 MHz band" and because "Part 90 of the Commission's Rules also lists the band." Also, it claims, users will be required to obtain Part 90 licenses. In making this argument, ReconRobotics is guilty of a <u>severe</u> misunderstanding of the Table of Allocations. T*here is* ***no*** *domestic allocation for Public Safety land mobile services anywhere in the 430-450 MHz band.*[7] The Commission erred in granting a waiver only of Part 90 rules, because what was necessary was a waiver of Section 2.106 of the Commission's Rules, the Table of Allocations.[8] As ARRL has noted twice, the only allocations in the 420-450 MHz band are for Government Radiolocation (limited to military radars) on a primary basis, and on a secondary basis, the Amateur Service. Spectrum allocation by permanent, nationwide waiver to one manufacturer is contrary to the allocation process used by the Commission in the past, and the Commission has not enunciated a valid reason for departing from past spectrum management practice.

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[7] There is, at Section 90.103(c) an allocation for non-government Part 90 *radiolocation*, but that is limited to N0N emissions only, and there is no mobile allocation in the band at all. Part 90 is listed in the Table of Allocations in this segment solely by virtue of Footnotes US217 and US230. US217 applies only to certain radiolocation systems; US230 applies only to certain frequencies below 430 MHz, outside the bands selected by ReconRobotics, in limited areas above Line A (around Buffalo, Cleveland and Detroit). Mobile operation is not anywhere authorized by the Table of Allocations at 430-450 MHz. ReconRobotics device is well outside the Table of Allocations.

[8] It is unclear why the Office of Engineering and Technology did not address this matter. This case was never about Part 90 Service Rules. It was about allocations, and should not have been handled by the Public Safety and Homeland Security Bureau or the Wireless Bureau under delegated authority.

11. Among the allocation issues ignored in the *Order* in this proceeding is the appropriateness of the manufacturer's choice of frequency band. This must be addressed on Reconsideration, and in doing so the recent actions of the Office of Engineering and Technology in the *Order*, *Octatron and Chang Industry, Inc. Waiver of the Part 15 Regulations,* DA 10-453, ET Docket No. 05-356, released March 22, 2010, and the *Order*, *In the Matter of Remotec, Inc.* DA 10-454, released March 18, 2010, considered. These decisions reveal the inadequacies of the *Order* in this case.[9] In the *Order* in this case, the Commission relied not on data, but only on admittedly unsupported assumptions about interference potential to the Amateur Service. It made no analysis of the interference susceptibility of the device to signals from a nearby Amateur Radio transmitter or the effect on first responders from malfunction of the device when it is deployed. There was an inadequate factual predicate for the requested relief, and no analysis of available alternatives that would have necessitated denial of the waiver.

12. Finally, this waiver grant, premised as it is on the vague concept of "interference avoidance by scarcity," and limits on deployment, the only basis of which is marketing limits, cannot be allowed to stand in light of the numerous instances of a lack of control by the manufacturer of its products. ReconRobotics unwillingness to address this because of an ongoing enforcement proceeding involving the same device is telling. The Commission does not have the same head-in-the-sand option here: it must address on

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[9] The Commission never inquired of ReconRobotics what the interference range of its device was toward potential licensed radio services. To date, that information is not in the record. Yet, a waiver for ReconRobotics' device, which uses higher power than the Octatron and Chang device, was granted. The 430-450 MHz band is normally not available for high-power unlicensed devices; signals in that range have an even larger interference contour than do similarly powered devices at 902-928 MHz; and the Recon Scout would be used in a band heavily occupied by a licensed service which uses extremely sensitive receivers. Octatron and Chang were denied a waiver because they made no showing that their device would not cause interference to incumbent services in the 902-928 MHz band. ReconRobotics made no such showing, but were given a grant anyway.

reconsideration not only the impact of the apparently numerous instances of illegal marketing of this device by ReconRobotics; it must also enunciate, in light of those violations, the basis for its assumption looking forward that the marketing limitations imposed in the Order will be adhered to. ReconRobotics has given in this proceeding no assurance whatsoever that it can be relied on to comply (or, in view of its use of independent resellers, that it has the ability to do so), and all of the available evidence points to the contrary conclusion.

Therefore, for all of the above reasons, ARRL, the national association for Amateur Radio, again respectfully requests that the Commission reconsider, rescind and stay the ReconRobotics waiver and the effectiveness of the *Order* in accordance with ARRL's Petition for Reconsideration.

Respectfully submitted,

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April 16, 2010

CERTIFICATE OF SERVICE

I, Christopher D. Imlay, do hereby certify that I caused to be mailed, via first class U.S. Mail, postage prepaid, a copy of the foregoing **PETITION FOR RECONSIDERATION** to the following, this 16th day of April, 2010.

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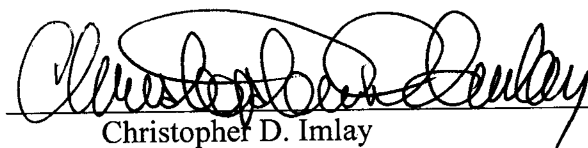

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