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September 1, 2010

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Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street SW
Washington DC 20554

**Re: WP Docket No. 08-63, ReconRobotics Inc., Request for Waiver
Ex Parte Communication**

Dear Ms. Dortch:

On behalf of ReconRobotics, Inc., pursuant to Section 1.1206(b)(1) of the Commission's Rules, I am electronically filing this written *ex parte* communication in the above-referenced docket.

A. BACKGROUND

On February 23, 2010, the Commission issued a waiver to ReconRobotics.¹ Three timely petitions for reconsideration were filed.² ReconRobotics opposed.³ The pleading cycles are over.

¹ *ReconRobotics, Inc., Request for Waiver of Part 90 of the Commission's Rules*, Order, 25 FCC Rcd 1782 (2010).

² Petition for Reconsideration of ARRL (filed March 24, 2010); Petition for Reconsideration of Kristopher Kirby (filed March 10, 2010); Petition for Reconsideration of W. Lee McVey (filed March 6, 2010).

³ Opposition of ReconRobotics, Inc. to the Petition for Reconsideration of ARRL (filed April 6, 2010); Opposition of ReconRobotics, Inc. to the Petitions for Reconsideration of W. Lee McVey and Kristopher Kirby (filed April 14, 2010). Neither of the latter petitioners complied with the service rules. ReconRobotics filed its opposition within the time period allowed under the rules, as computed from actual notice of the petitions.

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On August 18, 2010, almost four months after the reconsideration deadline, James Edwin Whedbee, M.Ed., filed a pleading captioned “Motion to Set Aside, Vacate, or Correct Order by Cancellation of the Waiver Order, Construing the Application Therefor as a Petition for Rulemaking, and Reinstating Proceedings as a Notice of Proposed Rulemaking Consistent with 5 U.S.C. Section 553” (“Motion to Set Aside.”)

ReconRobotics opposed. Among other grounds, we noted that the Motion to Set Aside is merely a late-filed petition for reconsideration by another name.⁴

Mr. Whedbee replied on the same day.⁵

Mr. Whedbee subsequently supplemented his reply with a filing captioned “Suggestions in Support of Motion to Set Aside, Vacate, or Correct Order by Cancellation of the Waiver Order, Construing the Application Therefor as a Petition for Rulemaking, and Reinstating Proceedings as a Notice of Proposed Rulemaking Consistent with 5 U.S.C. Section 553” (“Suggestions in Support”). That pleading cites case law in an effort to show that Mr. Whedbee’s Motion to Set Aside should not be treated as a petition for reconsideration, and is timely filed.

We respond here to Mr. Whedbee’s Suggestions in Support.

B. DISCUSSION

In a word, the cases Mr. Whedbee cites not only fail to support his position, but have nothing to do with his position.

Mr. Whedbee begins with two cases in the Supreme Court of Ohio that construe a provision of the Ohio state rules of civil procedure.⁶ Neither has any conceivable bearing on a Commission waiver.

⁴ Opposition to Motion to Set Aside of ReconRobotics, Inc. at 1 (filed Aug. 20, 2010).

⁵ Reply to Opposition to Motion to Set Aside of James Edwin Whedbee (filed Aug. 20, 2010).

⁶ Suggestions in Support at 1, *citing In Re Whitman*, 690 N.E.2d 535 (Ohio 1998) (modification of separation agreement in divorce case); *Kay v. Marc Glassman*, 665 N.E.2d 1102 (Ohio 1996) (failure to file answer in slip-and-fall case).

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Mr. Whedbee then cites four bureau orders that variously grant and deny Motions to Set Aside and Petitions for Reconsideration.⁷ These appear to have been chosen at random. None remotely addresses the issue for which Mr. Whedbee cites them: whether a Motion to Set Aside that belatedly challenges a waiver (or any other Commission action) can withstand being classed as a petition for reconsideration.

On the question of timeliness, Mr. Whedbee cites *Sprint v. FCC*, 315 F.3d 369 (D.C. Cir. 2003),⁸ which is likewise irrelevant. The cited passage concerns whether the pendency of a petition for reconsideration permits the Commission to unilaterally amend the challenged rules, without APA notice, after a lapse of four years.⁹ The court *rejected* that view; but that is beside the point, as no outcome in the case could have supported Mr. Whedbee.

Finally, Mr. Whedbee cites *Global NAPS v. FCC*, 247 F.2d 252 (D.C. Cir. 2001) for the proposition that the Commission must set aside the ReconRobotics waiver if his motion substantiates that the Commission committed clear error.¹⁰ The case says something else: that a tariff interpretation warrants reversal *only* where it is not supported by substantial evidence, or the Commission has made a clear error in judgment.¹¹ The court backed the Commission; but again, the outcome does not matter, as the case had no bearing on the issues here. Moreover, as laid out in our prior filings, there is no plausible showing in the record that the Commission committed any error in this matter, clear or otherwise.

⁷ *EMR Consulting*, DA 07-1068 (Policy Div., Public Safety and Homeland Security Bur. released March 7, 2007) (denying timely-filed Motion to Set Aside extended construction authority for public safety station); *Samuel Moses*, File Nos. 0000415681 *et al.* (Wireless Telecommunications Bur. released Oct. 4, 2006) (partially granting timely-filed petition for reconsideration on showing of interference to PLMR stations); *Leonard D. Martin*, File No. EB-98-HU-147 (Enforcement Bur. released July 12, 2000) (reducing amount of forfeiture order following discovery of internal misrouting of documents within Commission offices); *Stratos Mobile Networks (USA), LLC*, DA 00-82 (Commercial Wireless Div., Wireless Telecommunications Bur. released Jan. 18, 2000) (withdrawing me-too waiver grant and reopening request for waiver).

⁸ Suggestions in Support at 2.

⁹ *Sprint v. FCC*, 315 F.2d at 375.

¹⁰ Suggestions in Support at 3.

¹¹ *Global NAPS v. FCC*, 247 F.2d at 258.

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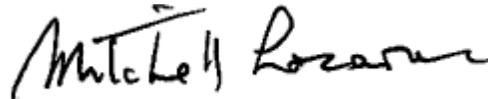
In the end, a party cannot evade the 30-day filing deadline on a petition for reconsideration by calling his pleading something else. The Commission has repeatedly so held.¹²

C. CONCLUSION

Mr. Whedbee is no stranger to the Commission, with over 100 filings in the Electronic Comment Filing System. He could have made his views known in the waiver proceeding, and also could have sought reconsideration within the allowed time frame. Having done neither, he is now barred from ambushing the proceeding with late-filed arguments.

Procedural note: ReconRobotics will not respond further to Mr. Whedbee unless he presents either relevant facts or colorably valid legal arguments that could not have been raised by the reconsideration deadline. Our silence going forward does not constitute concurrence with Mr. Whedbee's points. We will, of course, respond promptly to any Commission requests for additional pleadings.

Respectfully submitted,



Mitchell Lazarus
Counsel to ReconRobotics, Inc.

cc: Chairman Julius Genachowski
Commissioner Michael J. Copps
Commissioner Robert McDowell
Commissioner Mignon Clyburn
Commissioner Meredith Attwell Baker
Ruth Milkman
James Schlichting

Monica Shah Desai
Roger Noel
Scot Stone
James Arden Barnett, Jr.
David Furth
Julius P. Knapp
James Edwin Whedbee, M.Ed.

¹² *James A. Kay, Jr.*, WT Docket Nos. 94-147, 97-56, Second Memorandum Opinion and Order, FCC 10-104 at ¶ 4 (released June 2, 2010) (request that Commission reopen matter and revisit carefully considered determination is petition for reconsideration no matter what its caption); *Nevada Ready Mix Corporation*, 24 FCC Rcd 4648 at ¶ 7 (2009) (dismissing pleading as late-filed petition for reconsideration even though captioned otherwise); *Minnesota PCS Limited Partnership*, 17 FCC Rcd 126 at ¶ 4 (2001) (Commission not bound by title that filing party gives pleading, particularly if form chosen appears designed to circumvent procedural rules).