



Federal Communications Commission
Washington, D.C. 20554

January 25, 2013

DA 13-101

James Edwin Whedbee
5816 NE Buttonwood Tree Lane
Gladstone, MO 64119-2236

Re: Petition for Reconsideration from Denial of Petition for Declaratory Ruling
GN Docket No. 12-91

Dear Mr. Whedbee:

This letter responds to your petition for reconsideration¹ of the denial of the above-referenced petition for declaratory ruling.² For the reasons set forth below, we deny the petition.

Background. As noted in our *Letter*, in the *PRB-1* decision the Commission established a policy of limited preemption of state and local regulations governing amateur station facilities, including antennas and support structures, but expressly decided not to extend its limited preemption policy to private codes, covenants, and restrictions (CC&Rs), including homeowner association rules that restrict amateur radio facilities.³ In 2001, the Commission reaffirmed its decision not to preempt CC&Rs for amateur radio operators,⁴ but added that it would do so should Congress see fit to enact a statutory directive mandating the expansion of its limited preemption policy to include more than state and local regulations.⁵

On February 22, 2012, President Obama signed into law the Middle Class Tax Relief and Job Creation Act of 2012 (Spectrum Act), which, *inter alia*, requires the Commission to report to Congress regarding the uses and capabilities of Amateur Radio Service communications in emergencies and disaster relief.⁶ The statute requires that the study identify impediments to enhanced Amateur Radio Service communications and make recommendations regarding the

¹ Petition for Reconsideration from Denial of Petition for Declaratory Ruling (filed May 3, 2012) (PFR).

² See James Edwin Whedbee, *Letter*, 27 FCC Rcd 4920 (WTB MD 2012) (*Letter*).

³ See Federal Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities, *Memorandum Opinion and Order*, PRB-1, 101 F.C.C. 2d 952, 960 n.6 (1985).

⁴ Modification and Clarification of Policies and Procedures Governing Siting and Maintenance of Amateur Radio Antenna and Support Structures, and Amendment of Section 97.15 of the Commission's Rules Governing the Amateur Radio Service, *Memorandum Opinion and Order*, 17 FCC Rcd 333, 337 ¶ 9 (2001) (*MO&O*), *recon. dismissed*, 17 FCC Rcd 19408 (WTB PSPWD 2002); see also Don Schellhardt, *Letter*, 22 FCC Rcd 4025, 4026 (denied a petition requesting that the Commission override CC&Rs in certain circumstances, concluding that the petitioner had not presented grounds for the Commission to revisit its *PRB-1* policy), *aff'd*, *Letter*, 22 FCC Rcd 13511 (WTB MD 2007).

⁵ See *MO&O*, 17 FCC Rcd at 336 ¶ 8.

⁶ See Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6414 (2012).

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removal of such impediments, including "the effects of unreasonable or unnecessary private land use restrictions on residential antenna installations."⁷

Prior Proceedings. On April 2, 2012, the Wireless Telecommunications Bureau and Public Safety and Homeland Security Bureau (the Bureaus) issued a *Public Notice*, opening a docket (GN Docket No. 12-91) seeking comments relating to the topics of the study to be submitted to Congress, with comments due May 17, 2012.⁸ In that *Public Notice*, the Bureaus specifically sought comment on the issues that are the subject of your current petition. These included questions about the private land use restrictions that amateur radio operators have encountered, the prevalence of such restrictions, and their effects on the amateur radio service and its ability to respond to emergencies.⁹

Four days later, on April 6, 2012, you filed comments in that docket.¹⁰ Those comments included your views on the foregoing questions.¹¹ On April 21, 2012, you also filed in that same docket a petition for a declaratory ruling.¹² This supplemental pleading summarized certain of the comments filed on these questions as of that early date, urged the Commission to address CC&Rs, and also argued that CC&Rs that restrict amateur radio facilities violate Section 310(d) of the Communications Act of 1934, as amended.¹³ You asserted that there is a "controversy of CCR enforcement against amateur radio operators,"¹⁴ and you requested a declaratory ruling terminating the controversy by holding that such CC&Rs are unenforceable.¹⁵

On May 3, 2012, the Wireless Telecommunications Bureau's Mobility Division (Division) denied your petition. The Division concluded that the foregoing congressional directive to conduct a study that, *inter alia*, examines the effects of such CC&Rs, and which resulted in the opening of GN Docket No. 12-91 for public comment on such questions, did not create any controversy or uncertainty regarding the Commission's clear and longstanding policy regarding preemption of CC&Rs that restrict amateur radio facilities.¹⁶

⁷ *Id.* at § 6414(b)(2).

⁸ See Commission Seeks Comment on Emergency Communications by Amateur Radio and Impediments to Amateur Radio Communications, *Public Notice*, 27 FCC Rcd 3200 (WTB/PSHSB 2012).

⁹ *Id.* at 3202.

¹⁰ Comments of James Edwin Whedbee (filed April 6, 2012).

¹¹ *Id.* at 15-17.

¹² Petition for Declaratory Ruling, or in the Alternative, Informal Request for Commission Action Terminating Controversy (filed April 21, 2012) (PDR).

¹³ 47 U.S.C. § 310(d).

¹⁴ See PDR at 3.

¹⁵ *Id.* at 4.

¹⁶ See *Letter*, 27 FCC Rcd at 4921.

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On that same date, two weeks before the expiration of the deadline for the public to file comments in the docket on these issues in preparation for the Commission's report to Congress required by the statute, you requested reconsideration of the denial.

On August 20, 2012, the Bureaus released a *Report* regarding the uses and capabilities of Amateur Radio Service communications in emergencies and disaster relief.¹⁷ The *Report* concluded, based on the public comments received in response to the *Public Notice*, that there was no compelling reason to revisit the Commission's previous determinations that preemption should not be expanded to CC&Rs.¹⁸

Discussion. Section 1.2(b) of the Commission's Rules states, in part, "The bureau or office to which a petition for declaratory ruling has been submitted or assigned should docket such a petition[. . .] then should seek comment on the petition via public notice."¹⁹ You argue that the Division was required to seek comment on your petition for declaratory ruling prior to acting on it.²⁰ We disagree. Section 1.2(b) provides that petitions for declaratory ruling "should," rather than "must" or "shall," be placed on public notice for public comment, and thus affords the bureau or office some degree of discretion to act without public notice in unusual circumstances. In the rulemaking proceeding adopting Section 1.2(b), the Commission explained that it intended to make the process for petitions for declaratory ruling "similar" to that for petitions for rulemaking,²¹ on which bureaus and offices may act without public notice when the petition is "moot, premature, repetitive, [or] frivolous."²² Therefore we find that a petition for declaratory ruling that is "moot, premature, repetitive, [or] frivolous" may be addressed without public notice consistent with the language of Section 1.2(b) and the Commission's intent. As explained below, we conclude that the Division properly acted on your petition for declaratory ruling. Given the opportunity for public comment already afforded by the *Public Notice* and the opening of GN Docket No. 12-91, and in light of the pendency (and later release) of the Commission's report to Congress and the statutory purpose of that report, your petition was moot, premature, repetitive, and frivolous.

As a threshold matter, your petition for reconsideration appears to be moot. The *Public Notice* procedure effectively granted you the relief you are seeking. That procedure identified for public comment the issues relating to CC&Rs addressed by your PDR (which was filed in that same docket), and it ultimately led to a Commission report to Congress concluding based on the record that there was no compelling reason to revisit the Commission's prior determination – thereby terminating any arguable controversy on the matter. Putting your PDR out for yet

¹⁷ See *Uses and Capabilities of Amateur Radio Service Communications in Emergencies and Disaster Relief: Report to Congress Pursuant to Section 6414 of the Middle Class Tax Relief and Job Creation Act of 2012*, *Report*, 27 FCC Rcd 10039 (WTB/PSHSB 2012).

¹⁸ See *id.* at 10051 ¶ 39.

¹⁹ 47 C.F.R. § 1.2(b).

²⁰ See PFR at 1.

²¹ See Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization, *Report and Order* GC Docket No. 10-44, 26 FCC Rcd 1594, 1598-99 ¶ 12 (2011).

²² See 47 C.F.R. § 1.401(e).

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another round of comment in the midst of this existing comment cycle in the docket, as you argue that the Division should have done, would have been confusingly repetitive, and the Division properly exercised its discretion in construing Section 1.2(b) not to require such disruption of its processes when you had been granted essentially the relief you currently seek.

In any event, except for your Section 310(d) argument addressed below, your PDR was repetitive of the comments you had already filed in the same docket. It was also premature. You argue that the Spectrum Act “commanded the Commission” to “consider the issue” of CC&Rs, that “by Congressional mandate alone, a controversy exists,” and that “Congress not only expects a report from the Commission, but likewise undoubtedly anticipates actions by this Commission to avoid inconveniencing Congress.”²³ The Spectrum Act, however, required only that the Commission submit to Congress a report on a study identifying impediments to enhanced Amateur Radio Service communications and recommendations regarding the removal of such impediments. Nothing in the legislation supports the notion that Congress required or even expected the Commission to act in advance of any action that Congress may decide to take after reviewing the Commission’s report. The Division was well within its discretion in ordering its docket to decline to authorize a further round of comment, duplicating the procedure set forth in the Bureau’s *Public Notice*, in advance of submission of the report and any determination by Congress that further action would be appropriate.

You also argue that CC&Rs that restrict amateur radio facilities violate Section 310(d) due to “their effect of taking control away from licensees and transferring such control to an unqualified homeowners’ association.”²⁴ This assertion is based on a plain misreading of Section 310(d), which prohibits a licensee from transferring, assigning, or disposing of a license, or any rights under that license, to any person without consent of the Commission. CC&Rs apply to, among other things, permitted uses of a piece of property, including in some cases what may be placed on the property. They do not vest control of the operation of a station in any person other than the licensee or result in a transfer of control of the station to any such person. Since the petition for declaratory ruling was based on a frivolous statutory interpretation, it was subject to denial without further solicitation of comment for this reason as well.

Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Section 1.106 of the Commission’s Rules, 47 C.F.R. § 1.106, the Petition for Reconsideration from Denial of Petition for Declaratory Ruling filed on May 3, 2012 by James Edwin Whedbee IS DENIED.

This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131 and 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Scot Stone
Deputy Chief, Mobility Division
Wireless Telecommunications Bureau

²³ See PFR at 2-3.

²⁴ See *id.* at 3.