

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

In the Matter of)
)
Revision of Part 15 of the Commission's Rules) ET Docket No. 98-153
Regarding Ultra-Wideband Transmission)
Systems)

To: The Commission

OPPOSITION TO MOTION FOR INTERIM STAY OF ENFORCEMENT

The U.S. GPS Industry Council ("USGPS"), by its attorneys, pursuant to Section 1.45 of the Commission's rules, hereby opposes the "Motion for Interim Stay of Enforcement of the Ground Penetrating Radar Industry Coalition," filed June 17, 2002 ("Motion"). In its Motion the Ground Penetrating Radar Industry Coalition ("GPRIC") requests that certain subsections of the new FCC rules adopted in the *First Report & Order* in the above-referenced proceeding¹ be stayed on the ground that they "were adopted unlawfully, in contravention of the Administrative Procedure Act (APA)." Motion at 2. The Commission cannot grant the relief that GPRIC requests, even if there is merit to the underlying procedural argument that it makes concerning the failure of the Commission to issue a Further Notice of Proposed Rule-Making prior to the adoption of

¹ See *Revision of Part 15 of the Commission's Rules Regarding Ultra-Wideband Transmission Systems*, FCC 02-48, slip op. (released April 22, 2002) ("*First Report & Order*").

final rules.² Because no FCC rules authorizing ground penetrating radars (“GPRs”) are currently in effect, a stay in the effectiveness of the new rules about which GPRIC complains would have the consequence of removing any basis for lawful operation of GPRs, leaving GPRIC’s members in a worse position than they would be with the new rules in effect. Moreover, as GPR manufacturers and users have in fact been operating without any authority for many years, grant of the relief requested in the form of unlicensed operations would unreasonably reward use of RF emitting equipment without prior FCC approval. Accordingly, a stay is inappropriate and cannot achieve the result that GPRIC desires.

Discussion

At the beginning of its Motion, GPRIC makes the contradictory request that the Commission “announce that it will stay enforcement of the challenged provisions and permit GPR manufacture and operation at the Part 15 general limits pending reconsideration.” Motion at 2 (emphasis added). These requests are fundamentally inconsistent. The Commission cannot simultaneously suspend the effect of the rules it has adopted to allow the use of GPRs and at the same time announce a unilateral policy that permits unfettered manufacture and operation of devices that it has found to require specific limitations. In effect, GPRIC asks the Commission to ignore its findings in this proceeding and announce a new regulatory approach that permits operation of GPRs without any restrictions whatsoever. Such an outcome cannot be squared with GPRIC’s complaints of procedural inadequacies in the adoption of the new Part 15 rules,

² Apart from the procedural arguments, USGPS rejects GPRIC’s unfounded assertions that the record in the *NOI* proceeding does not support the limitations adopted for GPRs. *See* Motion at 3-4. Consideration of these assertions is, in any case, more appropriate for the separate reconsideration proceeding, and does not bear on the fundamental reasons outlined herein for rejection of the Motion.

particularly its argument that new rules can only be adopted after clear notice based upon findings rooted in the public record. If the procedural argument is correct, it applies even more strongly to the alternative regulatory approach that GPRIC advocates.

In sum, while GPRIC can justifiably argue that the Commission was premature to adopt final rules governing the operation of GPRs, it cannot reasonably maintain that the rules that were adopted should unilaterally be replaced with alternative, less restrictive requirements. Such action is fundamentally inconsistent with the grounds upon which GPRIC itself seeks relief – the procedural appropriateness of adopting final rules based on an incomplete record. For this reason, GPRIC cannot meet the four-factor test for obtaining a stay,³ as outlined below.

(1) Likelihood of Success on the Merits – As USGPS has previously argued, GPRIC may well be correct that adoption of rules authorizing operation of GPRs based solely on a vague *Notice of Proposed Rule Making* provided inadequate notice to the public. Success on this legal point, however, could not produce the result that GPRIC apparently desires – unfettered operation of GPRs without any rules or limitations. In the absence of the rules about which GPRIC complains, there would be no regulations at all establishing a basis for GPRs to operate lawfully. Accordingly, a stay of the rules premised on the procedural argument that GPRIC makes would be a practical setback for its members because it would remove any basis for the operation of GPRs prior to eventual adoption of final rules for their implementation under appropriate procedures. As discussed above, the Commission cannot both stay the rules it has adopted in the *First Report & Order* and effectively adopt an alternative, uncodified rule authorizing use of

GPRs without restriction. The procedural merits of GPRIC's argument thus undermine, rather than support, the relief it seeks.

(2) Irreparable Harm in the Absence of a Stay – Because a stay of the GPR rules would eliminate any basis for their lawful operation, it is evident that GPRIC's members would suffer far more harm as the result of a stay than in the absence of one. Permitting the rules to go into effect pending reconsideration at least allows GPRs to operate with some limits. Stay of the rule would leave no basis for lawful operation of GPRs. Accordingly, GPRIC cannot legitimately claim that its members will be harmed at all, let alone irreparably, in the absence of a stay.⁴ To the contrary, the rules complained of would, for the first time, provide a regulatory imprimatur for spectrum use that was previously unauthorized.⁵

(3) Harm to Other Parties – So long as GPR operators abided by the absence of FCC regulations permitting GPR use, and suspended unauthorized operations, the issuance of a stay would, indeed, cause no harm to other parties. It is evident from the arguments made by GPRIC, however, that it does not view the rules authorizing GPRs as necessary to their continued use. Indeed, it is well-established that GPR manufacturers have, to date, simply ignored the fact that present regulations require them

³ See *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n. v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

⁴ This alone should be sufficient basis for disposing of the Motion as a finding that a movant has failed to demonstrate irreparable harm, or any of the other three factors, is sufficient to reject a motion for stay. See *Amendment of the Commission's Rules Regarding the 37.0 – 38.6 GHz and 38.6 – 40.0 GHz Bands*, 15 FCC Rcd 10579, 10581 (2000).

⁵ The fact that GPR manufacturers and users have previously ignored the Commission's authority to regulate RF emitting devices and thereby established GPRs in the marketplace certainly provides no basis for perpetuating this operation in the absence of appropriate regulations necessary to protect approved spectrum users.

to seek either waivers or experimental licenses to operate equipment in bands restricted for safety-of-life.

Given the deployment nationwide of over 1,000 highly mobile GPR devices for a total of approximately 200 days a year, the likelihood that each job performed using these devices lasts only two days (*see* Motion at 6), and the inherently pulsed nature of the interference produced, it is likely that affected safety services would be subject to harmful interference without being able to identify the source and nature of the interference. For this reason, interference problems caused by GPRs are likely to occur without being easily traced or quantified.

Moreover, UWB GPRs trade penetration for resolution as they transmit in higher frequency bands. To achieve optimum ground penetration, the majority of UWB GPRs currently operate below 1 GHz. However, as these devices begin to operate above 1 GHz, they will achieve better resolution while offering diminished ground penetration. As a result, UWB GPRs can be expected to increase power to continue to achieve both resolution and penetration, thereby risking increased interference to FCC-licensed services above 1 GHz, including safety-of-life services. Unlike conventional unlicensed Part 15 devices, which are unintentional emitters, UWB GPRs are intentional emitters. Accordingly, if GPR users were to view the issuance of a stay as a license to continue to operate without authority or restriction under FCC rules, as appears very likely, such continued operations would have a substantial potential for harm to a variety of other interests through possible unexpected interference in bands allocated for safety-of-life services.

(4) Public Interest – No danger to the public interest is posed by allowing the GPR rules adopted under Part 15 to become effective. As adopted, the rules about which GPRIC complains provide both a basis for GPR operations and protection for FCC-licensed services. GPRIC offers no support for the assertion that GPR manufacturers and users would be severely impaired by the rules. Conversely, as discussed above, grant of a stay would place the GPR industry in the position of having no affirmative basis for operation under FCC rules.

Conclusion

For all of the foregoing reasons, the Commission must reject GPRIC's Motion for Interim Stay of Enforcement. At a minimum, any interim operation of GPRs must be pursuant to the restrictions adopted in the *First Report & Order*. Were the Commission to stay the effectiveness of these regulations, the use of all GPRs would need to be suspended, as there would be no regulations permitting their operation. Leaving aside procedural issues, permitting the rules to go into effect, pending reconsideration, provides the best accommodation for all parties concerned, and is consistent with the record established to date in this proceeding.

Respectfully submitted,

THE U.S. GPS INDUSTRY COUNCIL

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CERTIFICATE OF SERVICE

I, Rochelle D. Johnson, do hereby certify that on this 24th day of June, 2002, I sent by electronic mail and by U.S. first-class, postage prepaid mail, a copy of the foregoing “Opposition to Motion for Interim Stay of Enforcement” to the following:

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