

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

03–1336

EMR NETWORK,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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**CERTIFICATE AS TO PARTIES, RULINGS,
AND RELATED CASES**

1. Parties.

All parties, intervenors, and amici appearing before the agency and in this Court are listed in the Brief for EMR Network.

2. Ruling under review.

EMR Network petitions for review of the following decision of the Federal Communications Commission:

EMR Network Petition for Inquiry to Consider Amendment of Parts 1 and 2 Regarding Environmental Effects of Radiofrequency Radiation, Order, 18 FCC Rcd 16822 (2003) (J.A. 112–17).

3. Related cases.

This case has not previously been before this Court. We are not aware of any related case pending before this or any other court.

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GLOSSARY

Acronyms

ANSI	American National Standards Institute.
CEQ	Council on Environmental Quality.
EPA	Environmental Protection Agency.
FDA	Food and Drug Administration.
IEEE	Institute of Electrical and Electronic Engineers, Inc.
IWG	Federal Radiofrequency Interagency Working Group
NCRP	National Council on Radiation Protection and Measurements.
NEPA	National Environmental Policy Act of 1969.
NIEHS	National Institute of Environmental Health Sciences.
NIOSH	National Institute for Occupational Safety and Health.
OET	Office of Engineering and Technology.
OSHA	Occupational Safety and Health Administration.
RF	Radiofrequency.
WHO	World Health Organization.

Record documents

EMR Br.	Brief of Petitioner EMR Network.
EMR Br. Add.	Addendum to EMR Network's brief.
J.A.	Joint Appendix

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BRIEF FOR RESPONDENTS

QUESTION PRESENTED

The Federal Communications Commission has issued regulations designed to protect individuals from exposure to potentially harmful levels of radiofrequency (RF) radiation. When the Commission last revised those regulations in 1997, it determined—based on the advice of federal agencies with expertise in health and safety issues—that its regulations were sufficient to protect human health. In 2000, the Second Circuit upheld the Commission’s regulations, holding that the

Commission acted reasonably in relying on the recommendations of expert agencies and standard-setting bodies in establishing its RF exposure guidelines. *See Cellular Phone Taskforce v. FCC*, 205 F.3d 82.

The next year, EMR Network filed a petition for inquiry asking the Commission to consider again whether its RF regulations were sufficient to protect human health. The question presented is: Did the Commission reasonably exercise its discretion in declining to initiate the formal inquiry requested by EMR Network?

JURISDICTION

The Commission released the order under review on August 14, 2003.¹ EMR Network filed its petition for review on October 3, 2003. The Court has jurisdiction under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

STATUTORY PROVISIONS

Pertinent statutory provisions are reproduced in the appendix to this brief.

¹ *EMR Network Petition for Inquiry to Consider Amendment of Parts 1 and 2 Regarding Environmental Effects of Radiofrequency Radiation*, Order, 18 FCC Rcd 16822 (2003) (Order) (J.A. 112–17).

COUNTERSTATEMENT

1. Statutory background.

a. The Communications Act of 1934.

The Communications Act of 1934, among other things, seeks to regulate the transmission of radio waves in the United States to promote various public policy objectives related to radio communications. *See* 47 U.S.C. §§ 151, 301. Those objectives include making available “to all the people of the United States * * * a rapid, efficient, Nation-wide, and world-wide * * * radio communications service with adequate facilities at reasonable charges” (47 U.S.C. § 151), “encourag[ing] the provision of new technologies and services to the public” (47 U.S.C. § 157(a)), and promoting the “efficient and intensive use of the electromagnetic spectrum,” 47 U.S.C. § 309(j)(3)(D).

To help achieve these and other objectives, the Communications Act grants the Federal Communications Commission broad authority to regulate the use of radio and the operation of equipment capable of producing electromagnetic energy. 47 U.S.C. §§ 301, 302, 303(a)–(f). The Commission, in turn, carries out its statutory responsibilities under the Communications Act by, among other things, issuing licenses authorizing the use of radio communications and establishing procedures for approval of equipment capable of emitting electromagnetic energy. *See, e.g.*, 47 U.S.C. § 308; 47 C.F.R. § 2.901 *et seq.* (equipment authorization procedures).

b. The National Environmental Policy Act of 1969.

The National Environmental Policy Act of 1969 (NEPA) represents “a broad national commitment to protecting and promoting environmental quality.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989). To implement that commitment, NEPA directs federal agencies to “identify and develop methods and procedures, in consultation with the Council on Environmental Quality [CEQ]” to ensure that environmental effects are considered in agency decisionmaking, and it requires agencies to prepare environmental impact statements before undertaking “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(B), (C). NEPA, however, “does not mandate particular results” or “impose substantive environmental obligations.” *Methow Valley*, 490 U.S. at 350, 351. It merely ensures that the agency “will have available, and will carefully consider, detailed information concerning significant environmental impacts.” *Id.* at 349.

Under CEQ regulations, an agency need not prepare an environmental impact statement for every action it takes. When the extent of the environmental impact is uncertain, an agency may perform an environmental assessment to determine whether a detailed environmental impact statement is required. *See* 40 C.F.R. §§ 1501.3, 1501.4, 1507.3(b)(2)(iii), 1508.9, 1508.13. Likewise, an agency may “categorically exclude” actions that will not have “a significant effect on

the human environment” from NEPA’s requirements. 40 C.F.R. §§ 1500.5(k), 1507.3(b)(2)(ii), 1508.4.

2. The Commission’s RF regulations.

a. At issue here is the environmental effect of radio communications that are authorized by the Commission. Communication by radio occurs by transmitting electromagnetic signals encoded with information through space.² The propagation of any electromagnetic energy—including light—is known as “radiation,” while radiofrequency, or RF, radiation specifically denotes the propagation of the portion of the electromagnetic spectrum used in radio communications. OET Bulletin No. 56, at 2.

Radio signals contain little energy relative to their “high energy” electromagnetic cousins, such as ultraviolet rays, X-rays, and gamma rays. *Id.* at 4–5. At high exposure levels, however, RF radiation can heat body tissue, producing what is known as a “thermal” effect. *Id.* at 6. (A microwave oven, for example, heats food by exposing it to very high levels of microwave radiation. *Id.*) If the body cannot dissipate the heat quickly enough, the thermal effect can be hazardous to human health. *Id.* at 6–7.

² Federal Communications Commission, Office of Engineering and Technology, *Questions and Answers about Biological Effects and Potential Hazards of Radiofrequency Electromagnetic Fields*, OET Bulletin No. 56 (4th ed. Aug. 1999), at 3, available at http://www.fcc.gov/Bureaus/Engineering_Technology/Documents/bulletins/oet56/oet56e4.pdf (as visited Mar. 5, 2004) (OET Bulletin No. 56).

The Commission has issued regulations under NEPA to protect against the thermal effect of RF radiation. The regulations specify RF exposure levels that are well below the levels that laboratory studies have shown can produce potentially harmful biological effects. *See* 47 C.F.R. §§ 1.1310, 2.1091, 2.1093; OET Bulletin No. 56, at 13 n.10. Parties seeking Commission authorization to exceed those exposure levels must prepare an environmental assessment for Commission analysis under NEPA. 47 C.F.R. §§ 1.1306(b)(3), 1.1307(b). Parties that comply with the specified exposure levels (or that operate RF devices that the Commission has determined have no significant environmental impact) are categorically excluded from individualized environmental analyses. 47 C.F.R. §§ 1.1306, 1.1307.

b. In adopting its RF exposure guidelines, the Commission has traditionally given significant weight to the recommendations of the federal agencies and private standard-setting bodies that have specialized expertise in RF health and safety issues. In 1974, the Commission adopted a policy requiring “licensees to observe applicable exposure safety standards,” including the standard developed by the Occupational Safety and Health Administration (OSHA) to ensure safe working conditions. *Implementation of the National Environmental Policy Act of 1969*, Report and Order, 49 FCC 2d 1313, 1327 n.32, 1366–68 App. 3 (1974). In 1985, the Commission adopted specific guidelines based on standards that had been developed by the American National

Standards Institute (ANSI), a non-governmental standard-setting body.³ Although the Commission expressed a preference “to defer in this area to the expert federal health and safety agencies” (100 FCC 2d at 552 ¶ 26), it relied on the ANSI standard because OSHA’s standard was in flux, and the Environmental Protection Agency (EPA) had not issued guidelines concerning exposure of the general public to RF radiation, *id.* at 550 ¶ 21.

In 1992, the Institute of Electrical and Electronic Engineers, Inc. (IEEE) adopted new RF guidelines (which were endorsed by the ANSI), prompting the Commission to revisit its RF regulations. *See Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, Notice of Proposed Rulemaking, 8 FCC Rcd 2849, 2849 ¶ 1 (1993). In addition, a congressionally chartered organization, the National Council on Radiation Protection and Measurements (NCRP), had developed RF guidelines in 1986 that were stricter in some respects than the ANSI/IEEE standard. *Id.* at 2852–53 ¶ 25.

In 1996, the Commission’s revised its RF regulations to take into account the revised ANSI/IEEE and the NCRP guidelines. Placing “special emphasis on the recommendations and comments of Federal health and safety agencies,” including those of the EPA and the

³ *Responsibility of the Federal Communications Commission to Consider Biological Effects of Radio Frequency Radiation when Authorizing the Use of Radio Frequency Devices*, Report and Order, 100 FCC 2d 543, 551 ¶ 24 (1985), *on recon.*, 58 Radio Reg. 2d (P&F) 1128 (1985).

National Institute for Occupational Safety and Health (NIOSH), the Commission adopted (with some exceptions) the NCRP guidelines.⁴ For portable devices, such as wireless phones, the Commission relied on the ANSI/IEEE guidelines, which were “essentially the same as those recommended by NCRP.” 11 FCC Rcd at 15146 ¶ 62.

In 1997, the Commission reaffirmed its decision to rely on the advice of the expert agencies when it rejected petitions for reconsideration asserting that the 1996 revisions were inadequate to protect against “non-thermal” biological effects (*i.e.*, health problems not associated with the heating of body tissue) and to protect individuals who were “hypersensitive” to electromagnetic radiation.⁵ Although the parties filing those petitions submitted a variety of studies purporting to demonstrate that exposure to non-thermal levels of RF radiation could have biological effects,⁶ the EPA had advised the Commission in 1993

⁴ See *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, Report and Order, 11 FCC Rcd 15123, 15130–31, 15134 ¶¶ 17, 19, 28 (1996) (*RF Order*).

⁵ *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, Second Memorandum Opinion and Order and Notice of Proposed Rulemaking, 12 FCC Rcd 13494, 13503–05 ¶¶ 25–31 (1997) (*RF Reconsideration Order*).

⁶ See, *e.g.*, Comments of the Ad-hoc Ass’n of Parties Concerned about the Federal Communications Commission’s Radiofrequency Health and Safety Rules, filed in ET Docket No. 93–62 on July 3, July 11, and Aug. 8, 1997; Comments of Cellular Phone Taskforce, filed in ET Docket No. 93–62 on July 23, 1997. These comments and those referenced in the next two notes are available at <http://www.fcc.gov/cgb/ecfs/>.

that, although some studies reported that RF radiation had non-thermal effects, the majority of studies showed that “no significant health effects are associated with chronic, low-level exposure to RF radiation.”⁷ The EPA further concluded in 1996 and in 1997 that the Commission’s RF regulations provided “adequate protection of public health.”⁸ The Commission relied on these assurances, concluding that it would be “impracticable” to “independently evaluate the significance of studies purporting to show biological effects, determine if such effects constitute a safety hazard, and then adopt stricter standards [than] those advocated by federal health and safety agencies.” 12 FCC Rcd at 13505 ¶ 31. The Commission recognized that “ongoing research” in the field could lead the expert federal agencies and the non-governmental standard-setting bodies to revisit their recommendations. *Id.* at 13506 ¶ 32. If that occurred, the Commission stated, it would also consider whether to amend its RF exposure guidelines to conform to the new recommendations. *Id.*

3. The *Cellular Phone Taskforce* decision.

The Commission’s assessment of non-thermal effects was upheld by the Second Circuit in *Cellular Phone Taskforce v. FCC*, 205 F.3d 82

⁷ Comments of EPA at 4–5, filed in ET Docket 93–62 on Nov. 16, 1993.

⁸ Letter from Carol M. Browner, EPA, to Reed E. Hundt, Chairman, FCC, filed in ET Docket No. 93–62 on July 25, 1996; Letter from Mary D. Nichols, Ass’t Administrator for Air and Radiation, EPA, to Reed E. Hundt, Chairman, FCC, filed in ET Docket No. 93–62 on Mar. 5, 1997.

(2d Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001). The court noted that “both the ANSI and the NCRP considered non-thermal effects” and concluded that “no reliable scientific data” showed non-thermal effects to be “meaningfully related to human health” and that “the existence of non-thermal effects is clouded by a host of conflicting reports and opinions.” *Id.* at 90 (internal quotation marks omitted). The court also found that “[a]ll of the expert agencies consulted were aware” of the Commission’s reliance on the ANSI and NCRP guidelines and that they “had been advised of such evidence of non-thermal health effects as may have existed,” and yet they “found the FCC’s approach to be satisfactory.” *Id.* The court concluded that, under those circumstances, “it was reasonable for the FCC to continue to rely on the ANSI and NCRP standards absent new evidence indicating that the fundamental scientific understanding underlying the ANSI and NCRP standards was no longer valid.” *Id.*

The court also rejected arguments that the Commission’s decision was arbitrary because it failed to consider new evidence suggesting that exposure non-thermal levels of RF radiation could produce adverse health effects. *Id.* The court found that this evidence, “[a]t most,” “established that the existence of non-thermal effects is ‘controversial’ and that room for disagreement exists among experts in the field.” *Id.* Observing that, in “the face of conflicting evidence at the frontiers of science, courts’ deference to expert determinations should be at its

greatest,” the court held that the Commission “was justified in continuing to rely on the ANSI and NCRP standards,” rather than attempting to develop separate RF guidelines with respect to non-thermal effects. *Id.*

The court was also satisfied that there was “a mechanism in place for accommodating changes in scientific knowledge,” *i.e.*, the continuing work being done by standard-setting organizations. *Id.* at 90–91 (quoting *RF Order*, 11 FCC Rcd at 15136 ¶ 34, and *RF Reconsideration Order*, 12 FCC Rcd at 13506 ¶ 32). The court held that the Commission “could reasonably expect” publicly available scientific papers to be considered by organizations “working on revising their standards.” *Id.* at 91. The court further held that the Commission could also reasonably expect federal health and safety agencies “to keep abreast of scientific developments in carrying out their missions.” *Id.* The court did not dispute that some “scientific uncertainty” surrounds the effects of RF-radiation exposure. *Id.* at 90. But, in upholding the Commission’s judgment, the court recognized that setting “safety margins” was intrinsically a “policy matter,” and, as such, “an agency confronted with scientific uncertainty has some leeway to resolve that uncertainty by means of more regulation or less.” *Id.* at 91.

On January 8, 2001, the Supreme Court declined to review the Second Circuit’s decision. 531 U.S. 1070.

4. Continuing research on non-thermal effects.

To date, no federal health and safety agency nor any non-governmental standard-setting body has concluded that non-thermal effects from RF radiation pose a health concern. In August 1999, the Commission's Office of Engineering and Technology (OET) summarized the scientific research on non-thermal effects as "inconclusive." OET Bulletin No. 56, at 8. In May 2001, the General Accounting Office (GAO) reported the "consensus" opinion of the Food and Drug Administration (FDA), the World Health Organization (WHO), and "other major health agencies" that existing research showed no adverse health effects from the RF energy emitted from wireless phones.⁹ In 2003, the National Institute of Environmental Health Sciences (NIEHS) released a "fact sheet" noting that most scientific organizations have concluded that the studies conducted to date are insufficient "to estimate potential human cancer risks from low-level [RF] exposures."¹⁰ In April 1999, the EPA advised the Commission specifically that, although a "few studies report that at non-thermal levels, long term

⁹ General Accounting Office, *Research and Regulatory Efforts on Mobile Phone Health Issues*, GAO-01-545 (May 2001) (GAO Report); see also WHO, Electromagnetic Fields, <http://www.who.int/peh-emf/about/WhatisEMF/en/index1.html> (as visited Mar. 5, 2004) (WHO-EMF Webpage).

¹⁰ NIEHS, National Toxicology Program, Fact Sheet, Studies of Radiofrequency Radiation Emitted by Cellular Phones (2003), available at <http://ntp-server.niehs.nih.gov/htdocs/liason/factsheets/CellPhoneFacts.pdf> (as visited Mar. 5, 2004).

exposure to RF energy may have biological consequences,” the majority of studies indicate “no significant non-thermal human health hazards.”¹¹ EPA reiterated that position in a 2002 letter to EMR Network.¹²

Research efforts are, however, underway to develop a more complete understanding of non-thermal effects. For example, the National Toxicology Program headquartered at NIEHS is conducting, at the recommendation of the FDA, a long-term study of the potential health effects of wireless phones.¹³ The GAO has also noted numerous private, federal, and international research efforts that are specifically designed to evaluate whether the RF emissions from wireless phones produce any adverse health effects. *See* GAO Report at 12–13.

The Commission also continues to actively participate in various committees and working groups that are investigating the health effects of RF radiation. Commission staff participate in the Federal Radiofrequency Interagency Working Group (IWG)—along with staff from the EPA, OSHA, NIOSH, FDA, and the National

¹¹ Letter from Robert Brenner, Acting Deputy Assistant Administrator for Air and Radiation, EPA, to Dale Hatfield, Chief, OET (Apr. 30, 1999) (1999 EPA Letter), available at http://www.osha.gov/SLTC/radiofrequencyradiation/epa_990430.html (as visited Mar. 5, 2004).

¹² Letter from Norbert Hankin, Center for Science and Risk Management, Radiation Protection Division, EPA, to Janet Newton, President, EMR Network (J.A. 106).

¹³ Order ¶ 10 (J.A. 116); *see also* Letter from Kathleen M. Rest, Acting Director, NIEHS, to Janet Newton, President, EMR Network (Feb. 21, 2002) (J.A. 110).

Telecommunications and Information Administration—to “monitor[] developments related to RF biological effects.” Order ¶ 8 n.18 (J.A. 115); *see also* Pet. for Inquiry, Exh. A (J.A. 23). Commission staff informs us that the IWG meets several times each year to discuss ongoing developments related to RF safety issues. Commission staff also participate in international efforts sponsored by the WHO and others to study the health effects of RF exposure.¹⁴ In addition, Commission staff are involved in “various IEEE committees and subgroups related to RF research, oversight, and standard setting.” Order ¶ 8 n.18 (J.A. 115); *see also* Application for Review, Att. 1 (J.A. 51–52). And Commission scientist Robert F. Cleveland is an officer and a member of the board of directors of the Bioelectromagnetics Society, an “international resource for excellence in scientific research, knowledge and understanding of the interaction of electromagnetic fields with biological systems.”¹⁵ “With this participation, among other means, the Commission stays informed of studies and other information, as well as the activities and opinions of other agencies pertinent to this area.” Order ¶ 8 n.18 (J.A. 115).

¹⁴ Order ¶ 10 n.25 (J.A. 116); *see also* WHO, Organizations Associated with the EMF Project, <http://www.who.int/peh-emf/about/related/en/> (as visited Mar. 5, 2004) (WHO-Organizations Webpage).

¹⁵ *See* Bioelectromagnetics Society, About BEMS, <http://www.bioelectromagnetics.org/society.php> *and* <http://www.bioelectromagnetics.org/officers.php> (as visited Mar. 5, 2004)

The IEEE also continually re-evaluates its RF exposure standards. *See* Order ¶ 2 & n.8 (J.A. 112–13); Application for Review at 2, 6 (J.A. 41, 45). At the IEEE’s request, the members of the IWG sent a letter in June 1999 to suggest issues that the IEEE could explore in examining its RF guidelines. The IWG Letter includes issues relating to non-thermal effects. Order ¶¶ 3, 7 (J.A. 113, 114); Pet. for Inquiry, Exh. A (IWG Letter) (J.A. 22–29). In making those suggestions, the members of the IWG emphasized that the IWG Letter did not “represent the official policy or position” of their respective agencies. Pet. for Inquiry, Exh. A (J.A. 22).

5. EMR Network’s petition for inquiry and the order on review.

a. On September 25, 2001, EMR Network filed a petition with the Commission requesting that the agency issue a “Notice of Inquiry” to “gather information and opinion about the need to revise” the Commission’s RF exposure regulations. Pet. for Inquiry at 1 (J.A. 4). EMR Network proposed no specific RF standards, but relied on the IWG letter as a “blueprint” for issues that the requested inquiry should encompass. *Id.* at iii, 3, 10 (J.A. 3, 6, 13). Although acknowledging as “true” the Commission’s prior admonitions that it was not a “health and safety agency,” EMR Network expected that the “expert agencies” would participate in the inquiry proceeding and in any subsequent rulemaking proceedings. *Id.* at 3–4 (citing *RF Reconsideration Order*, 12 FCC Rcd at 13505 ¶ 30) (J.A. 6–7). EMR Network noted that various research

efforts were underway to examine the health effects of RF radiation. *Id.* at 9, 18 (J.A. 12, 21). EMR Network posited, however, that the ongoing research need not “delay the prompt opening” of a new proceeding because the “inquiry and any subsequent rulemaking are likely to be of sufficient duration to pick up important developments and findings over the next several years.” *Id.* at 9, 18 (J.A. 12, 21).

b. On December 11, 2001, the Office of Engineering and Technology dismissed EMR Network’s petition. Letter from Bruce A. Franca, Acting Chief, OET, to James R. Hobson, Miller & Van Eaton, P.L.L.C. (Dec. 11, 2001) (J.A. 34–35). The OET explained that the Commission “monitors developments in the field of health research” as it relates to exposure to RF radiation, but that the Commission “is not an expert agency in health-related issues.” *Id.* at 1 (J.A. 34). The OET further explained that the Commission relies on federal agencies that have expertise in health-related matters to develop and recommend RF standards. *Id.* at 1–2 (J.A. 34–35). The OET concluded that efforts to revise the RF safety limits “based on research in the field or on other factors” should be directed “in the first instance” to “federal agencies with primary expertise in and responsibility for ensuring health and safety,” and that dismissal of EMR Network’s petition was not “a determination on the substantive merits of the matters it raises.” *Id.* at 2 (J.A. 35).

c. On January 10, 2002, EMR Network filed an application for review of the OET's decision with the full Commission. EMR Network asserted that the OET had failed to provide a sufficient explanation for dismissing the petition for inquiry (Application for Review at 3–6 (J.A. 42–45)), that the OET exceeded its authority on delegation (*id.* at 6–8 (J.A. 45–47)), and that the Commission should not “leave the matter entirely in the hands of the IEEE” because that organization is “dominated by private, commercial interests,” *id.* at 9 (J.A. 48).

On April 26, 2002, EMR Network submitted five studies to support its view that “potential adverse bioeffects have been demonstrated at non-thermal RF exposure levels.” Letter from Janet Newton, President, EMR Network, to Marlene H. Dortch, Secretary, FCC (Apr. 26, 2002), at 2 (J.A. 58). On July 25, 2002, EMR Network filed with the Commission four letters that it had solicited from the other agencies that participate in the IWG (two of which did not respond) and the National Institute of Health concerning their role in developing RF exposure guidelines. Letter from James R. Hobson, Miller & Van Eaton, P.L.L.C., to Marlene H. Dortch, Secretary, FCC (July 25, 2002) (J.A. 99–111).

d. In the order on review, the Commission upheld the OET's dismissal of EMR Network's petition for inquiry, concluding that “this Commission is not the most appropriate forum to initiate such an

inquiry or proceeding concerning the environmental effects of RF radiation *at this time.*” Order ¶ 1 (J.A. 112) (emphasis added).

The Commission reaffirmed the “sound guiding principle” that it would rely “on the expertise of health and safety agencies” in developing its RF exposure guidelines. Order ¶ 6 (J.A. 114). The Commission observed that “other more expert agencies” had the same information as the Commission and saw no need for action. Order ¶ 6 n.14 (J.A. 114); *see also id.* ¶ 7 (J.A. 114). Indeed, the Commission noted, no expert body had indicated “a demonstrable show of concern, or even interest” in having the Commission initiate the inquiry requested by EMR Network. Order ¶ 11 (J.A. 116); *see also* Order ¶ 12 (J.A. 116–17).

The Commission rejected the contention that it had disclaimed its statutory responsibilities by relying on the advice of its sister agencies. Order ¶ 9 (J.A. 115–16). The Commission acknowledged that only it could initiate changes to its RF regulations (Order ¶ 11 (J.A. 116)), and it reaffirmed that, given an “appropriate indication” by an expert source, the Commission “could consider the need for an investigative effort” concerning possible revisions to those regulations. Order ¶ 8 (J.A. 115). The Commission also explained that it could and potentially would initiate action on its own if it were presented with “compelling evidence of a need for such action.” Order ¶ 6 n.14 (J.A. 114). But the Commission found that EMR Network had not presented “reliable pertinent information developed by an appropriate agency or other

expert source” to warrant opening a proceeding. Order ¶ 11 (J.A. 116). The Commission emphasized that its decision was “not based on an unwillingness to choose among conflicting expert information and recommendation,” but “on the dearth of such information or recommendation.” Order ¶ 9 (J.A. 115).

The Commission also rejected EMR Networks’ suggestion that the agency devalue the opinion of the IEEE. The Commission explained that the IEEE is a nonprofit organization “with members representing a variety of interests, including government, industry, and academia,” and that it is “composed of leading experts in this area.” Order ¶ 10 (J.A. 116). The Commission also explained that membership in the IEEE committees responsible for RF exposure guidelines is open, “permitting the government and academia to participate to the full extent they desire.” *Id.*

In any event, the Commission emphasized that the IEEE “is not the only source of expertise upon which this agency relies.” Order ¶ 10 (J.A. 116). For example, the Commission explained that it relied heavily on the recommendations of the NCRP and Federal Government health and safety agencies when it last revised its RF guidelines. Order ¶ 10 n.25 (J.A. 116). The Commission also reaffirmed that its staff “continues to participate” in the IWG, the IEEE, and in “international activities related to RF exposure,” and that it “stays informed of studies and other information available, as well as the activities and opinions of

other agencies pertinent to this area.” Order ¶¶ 8 n.18, 10 n.25 (J.A. 115, 116). The Commission concluded that all this, plus the comfort that other agencies are also “continuing to monitor literature and conduct research in the area,” supported its determination that the formal inquiry that EMR Network had requested was not warranted at this time. Order ¶ 12 (J.A. 117).

SUMMARY OF ARGUMENT

The Commission has extremely broad discretion whether to grant a request to initiate a new proceeding, and the Commission acted well within that discretion when it rejected EMR Network’s petition for an inquiry on the need to revise the agency’s RF regulations. When the Commission revised those regulations in 1997, it rejected arguments that they account for the possibility that RF radiation could have harmful non-thermal effects. The Commission’s decision was grounded in the recommendations of expert federal agencies and the work of standard-setting bodies, and its decision (and its reliance on the experts) was found to be eminently reasonable by the Second Circuit.

The Commission continues to maintain an ongoing relationship with the federal agencies that have statutory responsibilities regarding the biological effects of RF radiation, and the Commission actively participates in the work of the standard-setting bodies and international organizations that have expertise in the field. Through these ongoing activities, the Commission is assured that its RF exposure guidelines

protect the public according to the best science available. The Commission, therefore, saw no basis for initiating a formal inquiry at this time to solicit information and opinion about the need to revise those guidelines. For that reason, the Commission reasonably declined to initiate the inquiry sought by EMR Network.

1. Nothing in NEPA limits the Commission's discretion whether to open a formal proceeding to re-examine its RF regulations. Even if NEPA required the Commission to take a "hard look" at environmental effects (which, in this case, it does not), the Commission satisfied that standard and reasonably concluded that EMR Network had failed to present a seriously different picture of the environmental landscape warranting initiation of a new proceeding. The Commission's view is well-justified, because the landscape today is exactly the same as it was when it considered non-thermal effects in 1997.

2. The Commission's approach also comports with NEPA's directive to federal agencies to "improve and coordinate Federal plans, functions, programs, and resources" on environmental issues. 42 U.S.C. § 4331(b). Despite EMR Network's contention that the Commission must take additional steps—including initiating a formal inquiry and conducting its own research—NEPA leaves to the agency's discretion how best to coordinate its environmental activities with its sister agencies. EMR Network's demands, moreover, must be rejected because

they do not advance the statutory objective of “improving and coordinating” Federal Government activities.

3. Equally without merit is EMR Network’s argument that the Commission unlawfully delegates its NEPA responsibilities when it gives weight to the advice of its sister agencies and other expert bodies in its environmental decisionmaking. NEPA permits—and even encourages—agencies to undertake that sort of cooperative activity.

4. EMR Network also argues that the Commission must initiate a proceeding because its RF regulations have limited preemptive effect. But Congress often preempts state regulation in favor of a uniform national standard. No principle of administrative law suggests that the agency’s discretion to determine how best to proceed is limited in those circumstances.

5. EMR Network’s intimations about the Commission’s motive for rejecting the petition for inquiry are groundless. The Commission declined to initiate an inquiry because it concluded that a new proceeding was unwarranted. Because that conclusion is reasonable, EMR Network’s petition for review must be denied.

STANDARD OF REVIEW

EMR Network asks this Court to overturn the Commission’s judgment and to order the Commission to issue a notice of inquiry to “gather information and opinion about the need to revise [the regulations] concerning the environmental effects of radiofrequency

radiation.” EMR Br. 57. As EMR Network acknowledges (Br. 3–4), it can prevail only if the Commission’s decision is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). The arbitrary-and-capricious standard is “[h]ighly deferential,” and, under it, courts “presume[] the validity of agency action.” *AT&T Corp. v. FCC*, 349 F.3d 692, 698 (D.C. Cir. 2003) (internal citations omitted). “[T]he ultimate standard of review is a narrow one,” and the “court is not empowered to substitute its judgment for that of the agency.” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

Because this case involves an agency’s decision not to initiate a new proceeding, it is “evaluated with a deference so broad so as to make the process akin to nonreviewability.” *CellNet Communications, Inc. v. FCC*, 965 F.2d 1106, 1111 (D.C. Cir. 1992). An agency may, “without fearing [judicial] intervention, decline to initiate rulemaking proceedings up until the moment when indisputable evidence of the need for such proceedings has been presented to it.” *Capital Network Systems, Inc. v. FCC*, 3 F.3d 1526, 1533 (D.C. Cir. 1993). An agency also may decline to initiate action when “the scientific state of the art [is] such that sufficient data are not yet available on which to premise adequate regulation.” *WWHT, Inc. v. FCC*, 656 F.2d 807, 817 (D.C. Cir. 1981) (quoting *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1046 (D.C. Cir. 1979)). As long as the agency’s decision is “not in

any respect irrational or demonstrably incorrect,” it must be upheld. *National Ass’n of Regulatory Util. Comm’rs v. Department of Energy*, 851 F.2d 1424, 1431 (D.C. Cir. 1988) (*NARUC*).

ARGUMENT

The Commission reasonably exercised its discretion in declining to initiate the inquiry requested by EMR Network.

In 2000, the Second Circuit considered arguments that the Commission had not adequately examined “new evidence” concerning the non-thermal effects of RF radiation. *Cellular Phone Taskforce*, 205 F.3d at 90. The court concluded that the new evidence put forward, “[a]t most,” established that non-thermal effects were “controversial,” and that “room for disagreement exists among experts in the field.” *Id.* The court found that the ANSI and the NCRP had both considered and rejected incorporating non-thermal effects into their recommended guidelines, and that “[a]ll of the expert agencies,” which were aware that the Commission would rely on those guidelines, “still found the FCC’s approach to be satisfactory.” *Id.* The court also found that “there was a mechanism in place for accommodating changes in scientific knowledge.” *Id.* at 90–91. “Under those circumstances,” the court concluded, “it was reasonable for the FCC to continue to rely on the ANSI and NCRP standards absent new evidence indicating that the fundamental scientific understanding underlying [those] standards was no longer valid.” *Id.* at 90.

Less than two years after the Second Circuit issued *Cellular Phone Taskforce*—nine months after the Supreme Court denied certiorari in that case (531 U.S. 1070)—EMR Network petitioned the Commission to initiate a new proceeding to reconsider its RF regulations. EMR Network did not propose any specific exposure guidelines in its petition. It did not point to any expert agency or standard-setting body that had changed its view on non-thermal effects or the adequacy of the Commission’s existing guidelines. It did not contend that the health consequences from non-thermal effects were no longer controversial in the scientific community. And it acknowledged that the IEEE was in the process of examining revisions to its guidelines, and that various research efforts were planned or ongoing. Pet. for Inquiry at 9, 18 (J.A. 12, 21). But EMR Network nevertheless filed its petition because it believed that it was time for a formal proceeding “to inquire, systematically and with interagency collaboration, into the need for revising the [RF] protection rules.” *Id.* at 18 (J.A. 12, 21).

The Commission disagreed. The Commission explained that its RF guidelines are designed “to protect the public according to the best science available, as interpreted by the agencies most expert in the pertinent field,” and that the “best science” currently available, as interpreted by every expert agency and standard-setting body in the United States, indicates that adverse health consequences from

exposure to non-thermal levels of RF radiation have not been established. Order ¶¶ 6–12 (J.A. 114–16). Finding no “compelling evidence” to disagree with the experts’ opinion, the Commission concluded that it was not “the most appropriate forum” to initiate a new proceeding on RF exposure standards “at this time.” Order ¶¶ 1, 12 (J.A. 112, 116–17).

EMR Network challenges the Commission’s decision as unreasonable and inconsistent with federal environmental mandates. As explained below, its arguments are without merit.

a. EMR Network presented no new information to warrant initiation of a formal inquiry on the Commission’s RF exposure guidelines.

EMR Network contends that the Commission’s decision is inconsistent with the Supreme Court’s holding in *Marsh v. Oregon Nat. Resources Council*, 490 U.S. 360 (1989). In *Marsh*, the Supreme Court considered the circumstances under which an agency would have to supplement an environmental impact statement that had already been completed. *Id.* at 363. Citing CEQ regulations, the Court applied a “rule of reason” with respect to supplemental statements. *Id.* at 372 (citing 40 C.F.R. § 1502.9(c) (1987)). The Court held that to require a supplement “every time new information comes to light” would “render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made.” *Id.* at 373. The Court held, however, that agencies

are still required to “take a ‘hard look’ at the environmental effects of their planned action, even after a proposal has received initial approval.” *Id.* at 374. “Application of the ‘rule of reason’ thus turns on the value of the new information to the still pending decisionmaking process.” *Id.* It does not, however, alter the standard of review: Courts still must apply the arbitrary-and-capricious standard in reviewing the agency’s decision whether to supplement. *Id.* at 376–78.

i. EMR Network’s contention (Br. 36–43) that the Commission failed to conduct a “hard look” is misplaced. In *Marsh* and in every pertinent case cited by EMR Network,¹⁶ the hard-look standard applied only with respect to supplements to case-specific environmental analyses, because, in that situation, there is a “still pending decisionmaking process” to which the hard-look standard can apply. *Marsh*, 490 U.S. at 374; *see* 40 C.F.R. § 1502.9(c) (discussing supplements to environmental impact statements only). Here, the decisionmaking process has been completed; the Commission’s RF regulations have been promulgated, and they have been upheld by the

¹⁶ *See Southern Utah Wilderness Alliance v. Norton*, 301 F.3d 1217, 1236–38 (10th Cir. 2002), *cert. granted*, 124 S. Ct. 462 (2003); *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 553, 556–57 (9th Cir. 2000); *Price Road Neighborhood Ass’n v. United States Dep’t of Transp.*, 113 F.3d 1505, 1509–10 (9th Cir. 1997); *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 443–46 (4th Cir. 1996); *Stop H-3 Ass’n v. Dole*, 740 F.2d 1442, 1463–65 (9th Cir. 1984), *cert. denied sub nom. Yamasaki v. Stop H-3 Ass’n*, 471 U.S. 1108 (1985); *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1023–25 (9th Cir. 1980).

courts.¹⁷ In this situation, the Commission’s decision declining to revisit its rules is subject to the highly deferential standard that ordinarily governs agency denials of rulemaking petitions. *See, supra*, pp. 22–24. That standard does not compel the agency to conduct a hard look; it merely requires that the agency’s decision declining to initiate a proceeding not be “irrational or demonstrably incorrect.” *NARUC*, 851 F.2d at 1431.

ii. Under any standard, however, the Commission’ conclusion that EMR Network failed to present a sufficient basis for initiating a new proceeding must be upheld as reasonable. Under CEQ regulations, an agency must supplement an environmental impact statement if there are “significant new circumstances or information relevant to environmental concerns.” 40 C.F.R. § 1502.9(c)(1)(ii). Even assuming that standard applies to categorical-exclusion regulations, an agency need not supplement “every time new information comes to light.” *Marsh*, 490 U.S. at 373; *Friends of the River v. FERC*, 720 F.2d 93, 109 (D.C. Cir. 1983). A supplement is required only if the new information “provides a *seriously* different picture of the environmental landscape.”

¹⁷ *See National Trust for Historic Preservation v. Dole*, 828 F.2d 776, 780–81 & n.9 (D.C. Cir. 1987) (holding that hard-look review applies only to an agency’s decision made “*after*” an individualized environmental evaluation and that “traditional arbitrary-and-capricious review” applies to an agency’s decision to invoke a categorical exclusion under NEPA).

City of Olmsted Falls v. FAA, 292 F.3d 261, 274 (D.C. Cir. 2002)
(quoting *Wisconsin v. Weinberger*, 745 F.2d 412, 418 (7th Cir. 1984)).

Weinberger is particularly instructive here. In that case, the Navy had prepared an environmental impact statement concerning human exposure to extremely low frequency electromagnetic radiation, which was to be used in the Navy's submarine communications project. 745 F.2d at 415. The district court had ordered the Navy to update the environmental impact statement in light of new research on the biological effects of extremely low frequency radiation. *Id.* The Seventh Circuit reversed, holding that an agency need not update its environmental impact statement merely because it is presented with information that "may be worthy of further inquiry or may be considered important research." *Id.* at 420. Rather, the information "must be new, be significant, and be relevant to the peculiarities" of the subject matter being considered. *Id.* at 424. And, most importantly, it must present "a seriously different picture" of the proposed action's environmental impact that was "not adequately envisioned" in the initial statement. *Id.* "Not every new publication, * * * or even a stack of new articles, will necessarily meet that test." *Id.*

In 1997, the Commission rejected arguments that the RF regulations take non-thermal effects into account, explaining that its regulations were "based on recommendations of expert organizations and federal agencies with responsibilities for health and safety." *RF*

Reconsideration Order, 12 FCC Rcd at 13505 ¶ 31. The Commission concluded then that it would be “impracticable” to ignore the advice of those bodies, especially for “controversial issues,” such as non-thermal effects. *Id.* In upholding the Commission’s judgment, the Second Circuit found that the ANSI/IEEE and the NCRP had considered and rejected non-thermal effects in developing their recommended guidelines, that “[a]ll of the expert agencies” were aware of the Commission’s approach and found it satisfactory, and that certain “new evidence” that purported to undercut the RF guidelines merely showed that non-thermal effects remained “controversial.” *Cellular Phone Taskforce*, 205 F.3d at 90.

Nothing has changed. No federal health and safety agency has changed its position on non-thermal effects. *See, supra*, pp. 12–13. “[N]ot one of the agencies represented” in the IWG “has elected to initiate any action” in response to the IWG Letter. Order ¶ 7 (J.A. 114); *see Marsh*, 490 U.S. at 384 (“The concerns disclosed * * * apparently were not sufficiently serious to persuade [the state agency] to abandon its neutral position”). No expert federal agency has demonstrated a “show of concern, or even interest” despite having “the same (or greater) knowledge of research in this field—and its implications”—as the Commission. Order ¶ 11 (J.A. 116). Nor has the IEEE—which is currently reviewing its RF guidelines—“yet to determine what, if any, responsive action is appropriate.” Order ¶ 7 (J.A. 114). In short, the

absence of any “expression of concern” by these expert bodies—even after EMR Network specifically informed many of them of its petition for inquiry¹⁸—indicates that there is not (as there was not in 1997) any basis for compelling the Commission to act. *See Marsh*, 490 U.S. at 380.

Nor has EMR Network shown that non-thermal effects are today any less “controversial” than they were in 1997. *See Cellular Phone Taskforce*, 205 F.3d at 90. In 2001, the GAO surveyed epidemiological and laboratory studies on adverse health effects from mobile-phone use and concluded that most of them “found no adverse health effects.” GAO Report at 4; *see also id.* at 8–12. The WHO has similarly concluded that, “[t]o date, no adverse health effects from low level, long-term exposure to radiofrequency * * * fields have been confirmed.” WHO-EMF Webpage. These conclusions square with EPA’s advice to the Commission in 1999:

The information base on non-thermal effects has not changed significantly since the EPA’s original comments in 1993 and 1996. A few studies report that at non-thermal levels, long term exposure to RF energy may have biological consequences. The majority of currently available studies suggests, however, that there are no significant non-thermal human health hazards.—1999 EPA Letter.

This is not a “seriously different picture,” but exactly the same picture, that the Commission faced in 1997. *See Olmsted Falls*, 292 F.3d at 274.

¹⁸ *See* Letter from Janet Newton, President, EMR Network, to Dr. Ruth Kirschstein, Acting Director, National Institute of Health (Jan. 31, 2002) (J.A. 101–04).

EMR Network nevertheless contends that five “factual developments” warrant initiation of a new inquiry. EMR Br. 43. Two of these—the age of the scientific research underlying the RF regulations and the focus of those regulations on thermal effects (EMR Br. 18)—are not “developments” at all, much less “new information” presenting a “seriously different picture” of environmental effects. Nor are differences in RF standards in various countries “new information” (*see* EMR Br. 19); the Commission has long recognized that those differences exist.¹⁹ Therefore, the only legitimately “new” information presented by EMR Network consists of the IWG Letter and recently published scientific studies. *See* EMR Br. 19.

The IWG Letter does not present a seriously different picture of environmental effects. In fact, it presents no picture whatsoever. The letter merely “identified issues of potential interest” that “knowledgeable individuals” suggested that the IEEE address in considering revisions to its RF exposure guidelines. Order ¶¶ 3, 7 (J.A. 113, 114). It did not, however, “unofficially challenge[]” the IEEE’s current standards or “recommend[] additional RF radiation protection”

¹⁹ *See Responsibility of the Federal Communications Commission to Consider Biological Effects of Radio Frequency Radiation when Authorizing the Use of Radio Frequency Devices*, Notice of Inquiry, 72 FCC 2d 482, 486 n.13 (1979); *see generally* Kenneth R. Foster, *Exposure Limits for Radiofrequency Energy: Three Models* (2001), available at <http://www.who.int/peh-emf/meetings/bulgaria/en/> (as visited Mar. 5, 2004).

(EMR Br. 11, 19), much less “purport to discuss any condition that ha[s] changed” since the Commission last revised its RF regulations.²⁰ The IWG Letter, moreover, “specifically noted that it did not reflect the views of the respective agencies” that have IWG members.²¹ This disclaimer further undercuts the letter’s significance. *See Marsh*, 490 U.S. at 383 (“We also think it relevant that the [new information] did not express the official position” of the state agency whose employees developed it).

Nor do the scientific studies on which EMR Network relies significantly change the environmental landscape. Even the studies presumably most favorable to EMR Network—those that it itself submitted to the Commission—are tentative in their discussion of non-thermal effects:

- The French study is purely theoretical. It makes no findings whether RF radiation actually causes adverse health effects; to the contrary, it describes as “unclear” whether any non-thermal biological effects from RF radiation lead to adverse health effects. The study explained that “all of the studies to date that have examined brain cancer have found no statistically significant association with mobile phone use.” Peter W. French *et al.*, *Mobile Phones, Heat Shock Proteins and Cancer*, 67 *Differentiation* 93, 93, 95 (2000) (J.A. 84, 86).

²⁰ *Marsh*, 490 U.S. at 379; *see also id.* at 380 (rejecting significance of new analysis that concluded that “further evaluation of [the environmental] effect should be completed”).

²¹ Order ¶ 7 (J.A. 114); *see also* IWG Letter at 1 (J.A. 22) (“The views expressed in this correspondence are those of the members of the [IWG] and do not represent the official policy or position of the respective agencies”).

- The Pomerai study concluded that non-thermal biological effects on humans are “a possibility that needs investigation.” David de Pomerai *et al.*, *Non-thermal Heat Shock Response to Microwaves*, 405 *Nature* 417, 418 (May 25, 2000) (J.A. 90).
- The Daniells study explains that research concerning the biological effects of RF radiation is “confused” and still produces “inconsistent results.” The article also cautions that any biological effect due to “localised” heating “cannot be excluded as yet.” Clare Daniells *et al.*, *Transgenic Nematodes as Biomonitors of Microwave-induced Stress*, 399 *Mutation Research* 55, 56, 57 (1998) (J.A. 75, 76).
- The Di Carlo study involved RF exposure levels that exceed current Commission guidelines. In addition, the article found that exposure to RF radiation could be either “beneficial or adverse,” depending on a host of factors. Andrea Di Carlo *et al.*, *Chronic Electromagnetic Field Exposure Decreases HSP70 Levels and Lowers Cytoprotection*, 84 *J. of Cellular Biochemistry* 447, 451 (2002) (J.A. 95).
- The Tosi study does not address the biological effects of RF radiation. It merely provides background information on “heat shock proteins,” which play a role in some theories on the non-thermal effects of RF radiation. See Patrizia Tosi *et al.*, *Reduction of Heat-Shock Protein-70 after Prolonged Treatment with Retinoids: Biological and Clinical Implications*, 56 *Am. J. of Hematology* 143 (1997) (J.A. 66).

EMR Network appended two additional documents to its brief.

Because they were not submitted to the Commission, EMR Network may not rely on them to support its petition for review.²² In any event, these documents do not significantly alter the picture. The Marinelli study notes that the effect of electromagnetic fields on biological

²² See 47 U.S.C. § 405 (a party must give the Commission “an opportunity to pass” on “questions of fact” before seeking judicial review); see also *Brookings Municipal Tele. Co. v. FCC*, 822 F.2d 1153, 1163 (D.C. Cir. 1987) (same).

organisms is still “controversial”; indeed, even that study found a biological effect only after 24 hours of continuous exposure to RF radiation.²³ The Reuters article on one European study notes that officials have stressed the need for “follow-up research.” *3G Mobile Signals Can Cause Nausea, Headache—Study*, Reuters, Sept. 30, 2003 (reproduced at EMR Br. Add. B). The underlying study similarly cautioned about the need to confirm the results of the study independently and to conduct “more scientific research into this area.”²⁴

In sum, the articles on which EMR Network relies do not “seriously alter the environmental picture.” *Weinberger*, 745 F.2d at 423, 424. Here, the Commission denied EMR Network’s petition for inquiry because it found no “reliable pertinent information developed by an appropriate agency or other expert source” that could form “a basis for opening a rulemaking or fact-finding proceeding.” Order ¶ 11 (J.A. 116). Nothing that EMR Network presented to the Commission undermines the reasonableness of the agency’s decision.

²³ F. Marinelli *et al.*, *Exposure to 900 MHz Electromagnetic Field Induces an Unbalance Between Pro-Apoptotic and Pro-Survival Signals in T-Lymphoblastoid Leukemia CCRF-CEM Cells*, 198 J. of Cellular Physiology 324, 327, 329–30 (2004) (reproduced at EMR Br. Add. A).

²⁴ Prof. dr. ir. A.P.M. Zwamborn *et al.*, *Effects of Global Communication System Radio-frequency Fields on Well Being and Cognitive Functions of Human Subjects with and without Subjective Complaints*, at 62 (2003), available at http://www.ez.nl/beleid/home_ond/gsm/docs/TNO-FEL_REPORT_03148_Definitief.pdf (as visited Mar. 5, 2004).

b. The Commission did not violate its NEPA obligation to coordinate with other federal agencies on environmental matters.

Section 101(b) of NEPA provides that “it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation” may, among other things, assure “safe, healthful, productive, and esthetically and culturally pleasing surroundings” and “attain the widest range of beneficial uses of the environment without * * * risk to health or safety.” 42 U.S.C. §§ 4331(b)(2), (3). EMR Network contends that the Commission’s rejection of the petition for inquiry violated that “continuing responsibility.” EMR Br. 33–36, 45. Because EMR Network did not present this argument to the Commission, it cannot raise the argument here. 47 U.S.C. § 405. But even if it could, the argument would fail.

i. The Commission fulfills its continuing responsibility “to improve and coordinate Federal plans, functions, programs, and resources” in several ways. Through the IWG, the Commission coordinates with five federal agencies to “monitor[] developments related to RF biological effects.” Order ¶ 8 n.18 (J.A. 115). As EMR Network concedes, the Commission’s “primary expertise is in radio physics and engineering, not human biology,” while most of the other IWG-member agencies “have expertise in human biology.” EMR Br. 10.

The EPA, for example, is responsible for advising the President “with respect to radiation matters, directly or indirectly affecting health” and providing “guidance for all Federal agencies in the formulation of radiation standards.” 42 U.S.C. § 2021(h). Likewise, the FDA is responsible for establishing an “electronic product radiation control program designed to protect the public health and safety from electronic product radiation,” such as from mobile phones. 21 U.S.C. § 360ii(a); 21 C.F.R. § 5.10(a). By participating in the IWG, the FCC is able to draw upon the expertise and resources of these expert health and safety agencies to ensure that its RF guidelines continue “to protect the public according to the best science available.” Order ¶ 8 (J.A. 115).

The Commission coordinates with expert bodies outside of the IWG as well. The Commission is a “collaborating organization of the NCRP.” Order ¶ 10 n.25 (J.A. 116). The Commission also participates in international activities concerning RF radiation. *Id.* Commission staff participate in “IEEE committees and subgroups related to RF research, oversight, and standards setting.” Order ¶ 8 n.18 (J.A. 115); Application for Review, Att. 1 (J.A. 51–52). And, contrary to EMR Network’s aspersion (Br. 56), the Commission has “hire[d] qualified staff”: The Commission’s chief representative on the IWG is an officer and a board member in the Bioelectromagnetics Society, which the *Weinberger* court recognized as an expert organization in the study of the health effects of RF exposure. 745 F.2d at 422 n.11.

These are not the actions of an agency that has “forgotten [its] duty,” stuck its “head in the sand,” or denied “responsibility for informing itself.” EMF Br. 13, 30, 33. Nor are these the actions of an agency that is “blandly calling balls and strikes for the adversaries appearing before it.”²⁵ The Commission has merely chosen to “gather information and opinion” (EMF Br. 57) about its RF regulations through means other than issuing a notice of inquiry. EMR Network may have preferred that the Commission issue a notice of inquiry as well, but it is within the Commission’s ample discretion to disagree with EMR Network and follow a different course.

ii. EMR Network nevertheless suggests that the Commission must do more because Section 101 of NEPA imposes specific mandates on the agency. EMR Br. 45. Although this Court once suggested that Section 101 could contain “substantive provisions” that were judicially enforceable “apart from the duty to file an impact statement” (*Sierra Club v. Morton*, 514 F.2d 856, 874 (D.C. Cir. 1975)), that suggestion did not last long. The Supreme Court promptly reversed, holding that both the “procedural duty imposed on agencies” under NEPA and “the role of the courts in enforcing that duty” are “quite precise.” *Kleppe v. Sierra Club*, 427 U.S. 390, 406 (1976). The Supreme Court was even more

²⁵ EMF Br. 29 (quoting *Scenic Hudson Preservation Conf. v. Federal Power Comm’n*, 354 F.2d 608, 620 (2d Cir. 1965), *cert. denied sub nom. Consolidated Edison Co. v. Scenic Hudson Preservation Conf.*, 384 U.S. 941 (1966)).

categorical two years later when, citing *Kleppe*, it “emphasized that the only procedural requirements imposed by NEPA are those stated in the plain language of the Act.” *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 548 (1978). Those requirements, such as preparing an environmental impact statement, are found in Section 102 of NEPA, not in Section 101. *See* 42 U.S.C. §§ 4331, 4332.

But even if Section 101’s general policies were independently enforceable, it would not support EMR Network’s argument. Forcing the Commission to initiate an inquiry proceeding—when no other federal agency recommended that action—would not promote Section 101’s goal of “coordinat[ing] Federal plans [and] programs.” And granting EMR Network’s demand (Br. 38, 44) that the Commission perform its own studies—even when the health and safety agencies (and other expert bodies) are initiating and sponsoring their own studies (*see* Order ¶ 10 (J.A. 116); GAO Report at 12–18)—would neither improve nor coordinate Federal “functions [and] resources.” 42 U.S.C. § 4331(b). Imposing these new duties on the agency “would leave the agenc[y] uncertain as to [its] procedural duties under NEPA, would invite judicial involvement in the day-to-day decisionmaking process of the [Commission], and would invite litigation.” *Kleppe*, 427 U.S. at 406. It would not, however, help the Commission or the Federal Government

“carry out the policy set forth” in NEPA. 42 U.S.C. § 4331(b). For that reason, EMR Network’s invocation of Section 101 must be rejected.

c. The Commission has not improperly delegated its NEPA responsibilities.

EMR Network asserts that the Commission may not “evade its statutory duties under NEPA by palming them off to other public or private bodies.” EMR Br. 53. The Commission did not disagree. The Commission emphasized that its reliance on more expert bodies does not mean that it “could not or would not initiate action in the face of compelling evidence of a need for such action.” Order ¶ 6 n.14 (J.A. 114). The Commission also cautioned that it had not “disclaim[ed] the ability or responsibility to make” decisions under NEPA if faced with “conflicting expert information,” rather than (as here) a “dearth” of information. Order ¶ 9 (J.A. 115). And the Commission agreed that EMR Network “must petition the Commission for changes in the Commission’s rules”; it merely found that EMR Network had not presented an “adequate basis” for granting its petition for inquiry. Order ¶ 11 (J.A. 116).

EMR Network’s accusation (Br. 53) that the Commission is “hiding behind the skirts” of the federal health and safety agencies is groundless. The Commission unquestionably relies on the advice of these expert bodies, but that is exactly the type of coordination that NEPA contemplates. Both NEPA and CEQ regulations encourage

interagency cooperation and consultation. *See* 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1500.5(b), 1501.1(b). Indeed, participation by agencies with “special expertise with respect to any environmental issue” is an important part of the NEPA process; these “cooperating agencies,” among other things, advise the “lead agency,” and can even “assume responsibility” for conducting environmental analyses within their area of expertise. 40 C.F.R. § 1501.6. Given the Commission’s “continuing responsibility” under NEPA to “coordinate Federal plans, functions, programs, and resources,” it would be odd—if not outright inconsistent with NEPA’s objectives—for the Commission to proceed with a formal inquiry without the support of its sister agencies.

EMR Network’s criticism of the IEEE process is equally without merit. *See* EMR Br. 55. As the Commission explained, the IEEE is a “nonprofit entity,” is “composed of leading experts in this area,” and is “open” to participation by government and academia, as well as industry. Order ¶ 10 (J.A. 116). And EMR Network’s assumption that the IEEE has a bias toward industry that prevents it from being effective (EMR Br. 55) is refuted by the Commission’s own experience and that of other governmental participants. Order ¶ 10 (J.A. 116). In any event, the Commission made clear that the “IEEE is not the only source of expertise” on which it relies. Order ¶ 10 (J.A. 116).

EMR Network also misinterprets the case law. The cases that it cites do not prohibit an agency from relying on the advice of experts in

making decisions under NEPA; they merely hold that the agency must maintain responsibility over the final decision.²⁶ The Commission has done that here.

d. The preemptive effect of the Commission’s regulations is irrelevant.

Section 332(c)(7)(B)(iv) of the Communications Act preempts state and local regulation of “personal wireless service facilities on the basis of the environmental effects of radio frequency emissions” where those facilities comply with the Commission’s RF regulations. 47 U.S.C. § 332(c)(7)(B)(iv). EMR Network asserts that Section 332 gives the Commission “total and absolute preemptive control over the question of environmental harm,” which, in turn, restricts the Commission’s discretion whether to initiate a new proceeding on its RF exposure guidelines. EMR Br. 26 (emphasis deleted). But Congress routinely preempts state requirements that differ from federal regulatory standards. *See, e.g., Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 310 (1988). EMR Network cites no case that holds that the mere act of preemption limits the agency’s discretion whether to initiate a

²⁶ EMR Br. 53–54 (citing *Save Our Wetlands v. Sands*, 711 F.2d 634, 642 (5th Cir. 1983); *Sierra Club v. Sigler*, 695 F.2d 957, 962 n.3 (5th Cir. 1983); *Essex County Preservation Ass’n v. Campbell*, 536 F.2d 956, 960 (1st Cir. 1976); *Sierra Club v. Lynn*, 502 F.2d 43, 59 (5th Cir. 1974), *cert. denied sub nom. Sierra Club v. Hills*, 421 U.S. 994, and *Edwards Underground Water Dist. v. Hills*, 422 U.S. 1049 (1975)).

particular inquiry. EMR Network's reference to Section 332(c)(7)(B)(iv) has no bearing on this case.

e. EMR Network's unsupported accusations of agency bias do not compensate for its inability to demonstrate that a new proceeding is warranted.

EMR Network argues that judicial intervention is necessary because the Commission (and implicitly every federal agency that advises the Commission on RF radiation issues) has a "pro-industry bias" that "helps to explain" its decision not to inquire "into the potential harm its aggressive support for innovation and investment may be causing." EMR Br. 46, 47. The Commission, however, thoroughly explained why it was declining to initiate a formal inquiry, and its explanation had nothing to do with the effect that the inquiry could have on the industry or on "innovation and investment." Rather, the Commission declined to issue a notice of inquiry because there was an insufficient basis for doing so.

As EMR Network notes (Br. 48), the Commission initiated a different rulemaking proceeding to revise the RF regulations,²⁷ but (quoting Chairman Powell) EMR Network complains that that proceeding was opened only to "accelerat[e] the process of deploying necessary communications infrastructures," and not to protect public

²⁷ See *Proposed Changes in the Commission's Rules Regarding Human Exposure to Radiofrequency Electromagnetic Fields*, Notice of Proposed Rulemaking, 18 FCC Rcd 13187 (2003).

health and safety. EMR Br. 48 (emphasis deleted). In fact, in Chairman Powell's unredacted statement, he explains that the goal is "to improve our ability to fulfill our obligations under [NEPA], while at the same time accelerating the process of deploying necessary communications infrastructure." EMR Br. Add. C (emphasis added). Moreover, in that proceeding, the Commission specifically proposed to increase regulation of RF devices where appropriate "to ensure that the public is not exposed" to excessive levels of radiofrequency radiation. See 18 FCC Rcd at 13194–95 ¶¶ 17–18. There is, therefore, no basis for EMR Network's accusation that the Commission has shown a "lack of concern for the effectiveness of its standards for protection of public health and safety." EMR Br. 48.

CONCLUSION

EMR Network's petition for review should be denied, and the Commission's order affirmed.

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March 8, 2004

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EMR NETWORK,)
)
 PETITIONER,)
)
 v.)
)
 FEDERAL COMMUNICATIONS) 03-1336
 COMMISSION AND UNITED STATES)
 OF AMERICA,)
)
 RESPONDENTS.)
)
)

Certificate of Compliance

As required by Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 10177 words.

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April 12, 2004

STATUTORY APPENDIX*

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* The provisions of the National Environmental Policy Act of 1969 that are reproduced here differ slightly from the text the United States Code because of changes made when those provisions were codified. Title 42 of the Code has not yet been enacted into positive law. *See* 1 U.S.C. § 204(a).

1(a)

1. Section 101 of the National Environmental Policy Act of 1969 (42 U.S.C. § 4331) provides as follows:

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

2(a)

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

2. Section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. § 4332) provides as follows:

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

3(a)

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such

4(a)

impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this Act; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by title II of this Act.

5(a)

3. Section 332(c)(7)(B)(iv) of the Communications Act of 1934 (47 U.S.C. § 332(c)(7)(B)(iv)) provides as follows:

No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.