



**Advancing Sound Public Policy  
On the Use of Electromagnetic Radiation (EMR)**  
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## **Background on Citizens Brief Filed Against the FCC in D.C. Circuit Court of Appeals**

**February 11, 2004**

Background documents are found at: [http://www.emrpolicy.org/litigation/case\\_law/loi\\_background.htm](http://www.emrpolicy.org/litigation/case_law/loi_background.htm)

On February 6, 2004 The EMR Network (EMR) filed its brief against the Federal Communications Commission (FCC) in the U.S. Court of Appeals for the D.C. Circuit. The appeal requests the Court to reverse FCC's August, 2003 dismissal of EMR's 2001 Petition for Inquiry into the need for revising FCC's Radiofrequency (RF) Radiation Rules governing permissible levels of RF radiation from FCC-regulated transmitters. The EMR Policy Institute, a non-profit group working at the federal level on non-ionizing radiation environmental issues, recruited Whitney North Seymour, Jr. as counsel for this appeal and is also contributing funds to cover other legal expenses.

The Issues raised in this appeal are:

1. Is the FCC the most appropriate federal agency to initiate an updated inquiry concerning the environmental effects of RF radiation?
2. Does the National Environmental Policy Act (NEPA) impose a continuing responsibility on the FCC to review its Rules regarding the environmental effects of RF radiation?
3. Has the FCC acted arbitrarily and capriciously in its selective review and revision of RF Radiation Rules, favoring private over public interests?
4. Has the FCC improperly delegated its public responsibility to other agencies and to a private organization (the Institute of Electrical and Electronics Engineers (IEEE))?

EMR argues that NEPA (42 U.S.C. §§ 4321, 4331, 4331(b), 4332) imposes a "continuing responsibility" on FCC, as it does on all federal agencies, to "use all practicable means" to "fulfill the responsibilities of each generation as a trustee of the environment for succeeding generations; assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;" and that "all agencies of the Federal Government shall 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."

In December 2002, the FCC issued a staff-level dismissal letter to EMR asserting that the FCC is not the appropriate federal agency to make this determination in the first instance.

EMR contends that the FCC has taken inconsistent positions in reviewing its RF Radiation Human Exposure Guidelines, giving an appearance of pro-industry bias. Further, EMR asserts that the FCC is prohibited by NEPA from shifting its statutory responsibility to initiate changes in RF radiation guidelines onto other public agencies or private industry.

FCC reiterated its avoidance of its statutory responsibility in its August 14, 2003 commission-level dismissal Order 03-191, stating that it is not inclined to initiate such an inquiry on its own.

EMR argues that regardless of whether the Commissioners think they are the "most appropriate" forum to initiate an inquiry, and whether its members may not be "inclined" to do so - they do not have a choice in the matter.

Congress did not give them the luxury to pick and choose what they want to do. They are public officials with a clear public responsibility. Their refusal was a plain abuse of authority and contrary to law.

EMR bases its argument on the landmark Scenic Hudson decision from the Second Circuit in 1965, Scenic Hudson Preservation Conference v. Federal Power Commission which clearly articulates the principle that a Federal agency charged with protecting the public interest has an affirmative duty to act:

*The totality of a project's immediate and long-range effects, and not merely the engineering and navigation aspects, are to be considered in a licensing proceeding . . .*

*The agency does not do its duty when it merely decides upon a poor or nonrepresentative record. As the sole representative of the public, which is a third party in these proceedings, the agency owes the duty to investigate all the pertinent facts, and to see that they are adduced when the parties have not put them in . . . The agency must always act upon the record made, and if that is not sufficient, it should see the record is supplemented before it acts. It must always preserve the elements of fair play, but it is not fair play for it to create an injustice, instead of remedying one, by omitting to inform itself and by acting ignorantly when intelligent action is possible. . . . (Emphasis added. Brief pp. 29-30.)*

EMR cites Federal case law from the First, Second, Fourth, Fifth, Sixth, Ninth, Tenth and District of Columbia Circuit Courts that clearly holds that as a Federal agency, FCC may not evade its statutory duties under NEPA:

*NEPA's commands, however, do not permit the responsible federal agency to abdicate its statutory duties by reflexively rubber stamping a statement prepared by others. The agency must independently perform its reviewing, analytical and judgmental functions and participate actively and significantly in the preparation and drafting process. (Emphasis added. Brief p. 52.)*

*The congressional mandate is clear. Federal officials are to appraise continuously all of their activities not only in terms of strict economic or technological considerations but also with reference to broad environmental concerns. They are to coordinate hitherto separate operations so that undesirable environmental effects may be perceived and minimized. Subject only to the limitation of practicability, they are to strive constantly to improve federal programs to preserve and enhance the environment. In other words, federal officials are required to assume the responsibility that the Congress recognized, in section 101(c) of the NEPA, as the obligation of all citizens: to incorporate the consideration of environmental factors into the decision-making process. (Brief p. 35.)*

Whitney North Seymour, Jr. is providing representation for this appeal pro bono. A graduate of Yale Law School, Mr. Seymour has had a long career in public service and public interest legal work along with many years of community service as director/trustee of numerous non-profit community and civic groups. He was Independent Counsel for the Michael Deaver Investigation from 1986-89. He served as United States Attorney for the Southern District of New York from 1970-73. He served as New York State Senator from 1966-68. His private practice of the law has included a partnership in a prominent New York law firm from 1950-1983. He served as President of the New York Bar Association from 1974-75 and President of the Federal Bar Council from 1980-82.

Mr. Seymour's interest in environmental law includes having co-founded The Natural Resources Defense Council in 1969. He views the issues encompassed in policy development for the public's exposure to RF radiation as the cutting edge of environmental law in the 21<sup>st</sup> century. He states in the brief that:

*The question raised by this appeal is whether the FCC has a legal duty to take a "hard look" at the growing evidence that low-intensity radiofrequency range emissions are causing biological changes in living creatures - and must therefore discontinue its present "See no evil. Hear no evil. Speak no evil." policy toward possible environmental effects on human health.*

"EMR is requesting the Court to reverse the Commission's dismissal Order and require the FCC to issue a Notice of Inquiry about the need to revise its Rules concerning the environmental effects of RF radiation," states Janet Newton, President of The EMR Policy Institute, who assisted Mr. Seymour in preparing the appeal brief filed last week. "Given the explosion in the past decade of RF radiation-dependent technologies that are in continuous operation throughout our environment, the FCC must shoulder its statutory responsibility and take a NEPA-compliant "hard look" to protect the public interest in this evolving public health question, especially in light of the fact that the other regulatory agencies - EPA and FDA - have been largely defunded in their fiduciary roles."