

Certificate as to Parties, Rulings, and Related Cases

1. **Parties before the FCC:**

EMR Network (a non-profit corporation based in Montpelier, Vt.)

Parties before this Court:

EMR Network,

Petitioner

Federal Communications Commission
United States of America,

Respondents

2. **Ruling under review:**

Order of Federal Communications Commission, released August 14, 2003, printed in Joint Appendix at A-112

Agency Citation: FCC 03-191

3. This case has not previously been before this Court.

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Jurisdictional Statement

EMR Network (EMR), a non-profit citizens organization concerned with the effects of electromagnetic radiation, filed a petition with the Federal Communications Commission (FCC) dated September 25, 2001, requesting the Commission to inquire into the need for revising the FCC's RF Radiation Rules governing permissible levels of RF radiation from FCC-regulated transmitters. On December 11, 2001, the Acting Chief of the FCC's Office of Engineering & Technology (OET) issued a letter dismissing the EMR Petition for Inquiry pursuant to 47 CFR § 0.241. EMR then filed an Application for Review of the dismissal letter by the full Commission, pursuant to 47 CFR § 1.115, under date of January 10, 2002. On August 14, 2003, the Commission released its final Order upholding the dismissal of the EMR Petition. [FCC 03-191]

On October 3, 2003, EMR served and filed a timely Petition for Review of the FCC Order of August 14, 2003, by this Court.

Petitioner's standing is based on the fact that members of EMR Network are exposed to RF radiation and would benefit from the FCC updating its rules to provide them more protection. EMR was the original petitioner before the FCC below.

This Court's jurisdiction is based on 28 U.S.C. §§ 2342-2344, 2349 and 47 U.S.C. § 402(a).

The September 25, 2001 Petition for Inquiry is reproduced in the Appendix at A - 1 to A - 33. The December 11, 2001 Dismissal Letter is reproduced at A - 34 to A - 35. The Application for Review by the full Commission dated January 10, 2002, is reproduced at A - 36 to A - 55.

The final Order of the Commission released on August 14, 2003 is reproduced at A - 112 to A - 117.

The EMR Network Petition for Review to the Court of Appeals is reproduced at A - 118 to A - 120.

Statement of the Issues Presented for Review

1. Is the FCC the most appropriate federal agency to initiate an updated inquiry concerning the environmental effects of RF radiation? (Point I)
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? (Point II)
3. Has the FCC acted arbitrarily and capriciously in its selective review and revision of RF radiation Rules, favoring private over public interests? (Point III)
4. Has the FCC improperly delegated its public responsibility to other agencies and to a private organization (the IEEE)? (Point IV)

Standard of Review

Under 5 U.S.C. § 706(2)(A), a reviewing court shall “hold unlawful and set aside agency action, findings, and conclusions found to be ...arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”

[The Court’s] responsibility is to assure that the agency has not abused or exceeded its authority, that every essential element of the order is supported by substantial evidence, and that the agency has given reasoned consideration to the pertinent factors.

National Broadcasting Company v. FCC, 516 F.2d 1101, at 1122 (CADDC, 1974).

Pertinent Statutes and Agency Rules

National Environmental Policy Act (NEPA)

42 U.S.C. § 4321. Congressional declaration of purpose

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

42 U.S.C. § 4331. Congressional declaration of national environmental policy

(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 and 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 chapter, 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
- (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.

42 U.S.C. § 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

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 chapter, 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 subchapter II of this chapter, 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,
- (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, and shall accompany the proposal through the existing agency review processes; ***

(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 subchapter 11 of this chapter.

Telecommunications Act of 1996

47 U.S.C. § 332(c)(7)(B)(iv)

(vi) 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.

Statement of the Case

Over the past decade, the erection of cell transmitters across the U.S. has quite literally exploded as telecommunications companies have raced to control as much of the cell phone market as possible. Cell transmitters have been installed on high-rise buildings in cities, on steel towers in open fields, sometimes disguised as trees along interstate highways, and even concealed in church steeples in small New England villages. Simultaneously, the growth in cell phone use by consumers has catapulted to a hundred and fifty million.

All of these cell transmitters emit and receive radio frequency range signals that bombard and penetrate every living creature in their path, animal as well as human.

With this explosion in cell phone transmissions has come a rapid growth in other uses for radio frequency range transmissions – digitized high speed internet access, digitized television broadcasts, email traffic and more. Often the cell transmitter towers and installations are shared by other wireless companies, multiplying the volume and range of the radio frequency signals radiating from each site.

All of this rapid technological change has been aided and encouraged by the Federal Communications Commission, whose declared mission under Congressional mandate is to “foster” rapid growth in telecommunications.

Currently, the FCC’s strategic plan is to promote competition, innovation and investment in “broadband” services and facilities, described by the FCC as follows:

Broadband technologies, which encompass all evolving high-speed digital technologies that provide consumers integrated access to voice, high-speed data, video-on-demand, and interactive delivery services, are a fundamental component of the communications revolution.

[\[www.fcc.gov/broadband\]](http://www.fcc.gov/broadband)

The problem is that no one knows what the environmental impact of this blanket of radiofrequency radiation is on the people and animals in its path, especially the most vulnerable members of society – the elderly, infirm, small children, the unborn. The reason no one knows is that the one agency that has been given total pre-emptive control over this issue by the U.S. Congress is the FCC, which refuses to try to find out, as the FCC final Order in this case shows.

It is self-evident that any further restriction imposed by the FCC on the level, volume or range of RF transmissions in order to protect human beings

from harm will increase costs to industry and slow the giddy growth in telecommunications services.

While one is obligated to assume that the FCC's inaction is founded in good faith or simple bureaucratic obstinacy, the fact is inescapable that the effect of that agency inaction is a huge economic benefit to the telecommunications industry at the risk of potential harm to millions of ordinary citizens. This result is not the even-handed administration of the law the country is entitled to receive from public bodies charged with impartial protection of the rights of all citizens in our democracy.

Congress has assigned the primary responsibility for initiating and making changes in radiofrequency guidelines to the FCC, whose primary expertise is in radio physics and engineering, not human biology. A number of Federal Health Agencies, such as the EPA, the FDA (Food and Drug Administration), NIOSH (National Institute for Occupational Safety and Health) and OSHA (Occupation Safety and Health Administration) have expertise in human biology.¹

¹The EPA is required to guide other agencies in protecting the environment from both ionizing (nuclear) and non-ionizing (wireless) radiation. [Executive Reorganization Plan No. 3, 42 U.S.C. 2021(h)]. The FDA's authority is to "carry out an electronic product radiation control program" including "ionizing or non-ionizing electromagnetic or particulate

As noted in the EMR Petition, representatives of these agencies have recommended additional RF radiation protection, including consideration of non-thermal RF radiation exposures, differentiation of acute and chronic exposure conditions, setting limits based on differential sensitivity of tissues and eleven other specific suggestions.

EPA stresses that the current FCC exposure limits address only harm from heating effects of RF/MW radiation. (A-105 - A-107) Non-thermal bioeffects from exposures to RF/MW radiation; long-term, intermittent, and chronic exposure patterns; and sensitive populations are not addressed in the current safety limits.

The Petitioner, EMR, is a citizens organization which has exercised the citizen's right to petition the government for redress of grievances guaranteed by the First Amendment. EMR is not an organization of fear-mongering zealots seeking to hobble the working of public bodies, but an alliance of community organizations and concerned professionals in engineering and health, who are

radiation.” 21 U.S.C. 360(hh) and (ii). NIOSH is responsible for research and recommendations for the prevention of work-related disease and injury. The Institute is part of the Centers for Disease Control and Prevention (CDC), located in the Department of Health and Human Services.

acting responsibly through established channels to generate objective scientific research into these troubling questions. The EMR Network's statement of purpose can be found on the internet at www.emrnetwork.org. Its Mission Statement, also published on its website, is as follows:

EMR Network Mission Statement

We believe that electromagnetic radiation (EMR), which includes the extremely low frequencies (ELF), the radio frequencies (RF) and microwave (MW) radiation, may be hazardous to life and may constitute a significant threat to public health. This belief is based on credible research, spanning decades of scientific inquiry. Our mission is to enhance local, regional, national, and international efforts to reduce, mitigate, and where possible, eliminate hazardous exposure to EMR.

We are committed to fostering the appropriate scientific research. Our charge is to educate the public, government officials and those in other scientific disciplines about the biological effects and environmental concerns associated with EMR.

The EMR Network was created to provide a forum for effective and balanced information for citizen-action groups, the media, municipal agents, government officials and scientists alike.

In keeping with this mission, the EMR Network earlier engaged responsible, experienced Washington counsel to petition the FCC to initiate an inquiry into the environmental impact of current telecommunications

[Executive Reorganization Plan No. 3, 42 U.S.C. 2021(h)]. The OSHA mission does not extend beyond the workplace.

transmissions. The FCC stonewalled this request, denied all responsibility for informing itself about the possible harm its policies may be doing to the general public, and slammed the door.

This case is an appeal to the independent judges of this Court to examine the legal obligations of the FCC to monitor the environmental impact of its obsolete RF radiation rules and to take appropriate corrective action on the Agency's own initiative.

The Second Circuit Case

Several years ago a consortium of concerned organizations filed a direct substantive challenge to the guidelines governing RF radiation adopted by the FCC in 1985 and modified in 1996-7. That challenge was heard before the Second Circuit Court of Appeals, which filed an opinion in February, 2000 upholding the FCC's earlier actions. The case is reported at Cellular Phone Taskforce v. FCC, 205 F.3d 82 (2nd Cir. 2000), cert. denied, 531 U.S. 1070 (2001).

The present case is a different proceeding, not challenging the existing FCC rules on the merits, but instead involving the continuing responsibility of Federal agencies under the National Environmental Policy Act to use "all

practicable means” to assure for all Americans “safe” and “healthful” surroundings. 42 U.S.C. § 4331.

Although the Second Circuit case does not control the outcome of this appeal, the Court is urged to study the opinion in that case, for it contains valuable background information on the genesis and legal status of the FCC’s guidelines that are implicated by these proceedings.

Course of the Proceedings Below

September 25, 2001: EMR filed a “Petition for Inquiry” requesting the FCC to issue a Notice of Inquiry to gather information and opinion about the need to revise the regulations in Parts 1 and 2 of the FCC’s Rules concerning the environmental effects of radiofrequency radiation. (A - 1 to A - 33)

December 11, 2001: the Chief of the FCC Office of Engineering & Technology (OET) issued a letter dismissing the EMR Petition for Inquiry. (A - 34 to A - 35)

January 10, 2002: EMR filed an Application for Review of the letter of dismissal with the full Commission. (A - 36 to A - 55)

April 30, 2002: Petitioner submitted various scientific studies as a supplement to its Application for Review. (A - 56 to A - 98)

July 25, 2002: Petitioner submitted a group of letters from Federal agencies supporting further research. (A - 99 to A - 111)

August 14, 2003: The FCC released its final Order denying the EMR Application for Review. (A - 112 to A - 117)

This appeal followed.

Statement of Facts

Background:

(a) RF Radiation

An official publication of the FCC Office of Engineering & Technology provides this description of radiofrequency energy:

Radio waves and microwaves are forms of electromagnetic energy that are collectively described by the term “radiofrequency” or “RF.” RF emissions and associated phenomena can be discussed in terms of “energy,” “radiation” or “fields.” Radiation is defined as the propagation of energy through space in the form of waves or particles. Electromagnetic “radiation” can best be described as waves of electric and magnetic energy moving together (i.e. radiating) through space as illustrated in Figure 1. These waves are generated by the movement of electrical charges such as in a conductive metal object or antenna. For example, the alternating movement of charge (i.e., the “current”) in an antenna used by a radio or television broadcast station or in a cellular base station antenna generates electromagnetic waves that radiate away from the “transmit” antenna and are then intercepted by a “receive” antenna such as a rooftop TV antenna, car radio antenna or an antenna integrated into a hand-held device such as a cellular telephone. The term “electromagnetic field” is used to indicate the presence of electromagnetic energy at a given location.

* * *

Probably the most important use for RF energy is in providing telecommunications services to the public, industry and government. Radio and television broadcasting, cellular telephones, personal communications services (PCS), pagers, cordless telephones, business radio, radio communications for public and fire departments, amateur radio, microwave point-to-point radio links and satellite communications are just a few of the many applications of RF energy for telecommunications.

[Questions and Answers about Biological Effects and Potential Hazards of Radiofrequency Electromagnetic Fields, OET Bulletin 56 (4th ed.) 1999, pp. 1, 3. Full text available on FCC website: www.fcc.gov]

(b) FCC Guidelines

The FCC's OET has published a bulletin (OET Bulletin 65, 1997) to evaluate compliance with the FCC's 1996 RF emissions guidelines. The Bulletin provides the following description of the FCC guidelines:

In 1996, the FCC adopted new guidelines and procedures for evaluating environmental effects of RF emissions. The new guidelines incorporate two tiers of exposure limits based on whether exposure occurs in an occupational or "controlled" situation or whether the general population is exposed or exposure is in an "uncontrolled" situation. In addition to guidelines for evaluating fixed transmitters, the FCC adopted new limits for evaluating exposure from mobile and portable devices, such as cellular telephones and personal communications devices. The FCC also revised its policy with respect to categorically excluding certain transmitters and services from requirements for routine evaluation for compliance with the guidelines.

* * *

The National Environmental Policy Act of 1969 (NEPA) requires agencies of the Federal Government to evaluate the effects of their actions on the quality of the human environment. To meet its responsibilities under NEPA, the Commission has adopted requirements for evaluating the environmental impact of its actions. One of several environmental factors addressed by these requirements is human exposure to RF energy emitted by FCC-regulated transmitters and facilities.

* * *

In 1985, the FCC first adopted guidelines to be used for evaluating human exposure to RF emissions. The FCC revised and updated these guidelines on August 1, 1996, as a result of a rule-making proceeding initiated in 1993. The new guidelines incorporate limits for Maximum Permissible Exposure (MPE) in terms of electric and magnetic field strength and power density for transmitters operating at frequencies between 300 kHz and 100 GHz. Limits are also specified for localized (“partial body”) absorption that are used primarily for evaluating exposure due to transmitting devices such as hand-held portable telephones. Implementation of the new guidelines for mobile and portable devices became effective August 7, 1996. For other applicants and licensees a transition period was established before the new guidelines would apply.

The FCC’s MPE limits are based on exposure limits recommended by the National Council on Radiation Protection and Measurements (NCRP) and, over a wide range of frequencies, the exposure limits developed by the Institute of Electrical and Electronics Engineers, Inc. (IEEE) and adopted by the American National Standards Institute (ANSI) to replace the 1982 ANSI guidelines. Limits for localized

absorption are based on recommendations of both ANSI/IEEE and NCRP.

[Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency Electromagnetic Fields, OET Bulletin 65 (Ed. 97-01) 1997. pp. 1, 6, 7, 8 (fns omitted). Full text available on FCC website: www.fcc.gov.]

The Second Circuit has ruled that the procedures followed by the FCC in the original 1985 adoption of its RFR guidelines constituted informal rulemaking and complied with the requirements of both the APA and NEPA.

Cellular Phone Taskforce v. FCC, *supra*, at pp. 89-95.

EMR Network's Petition

The EMR Petition put forth a number of significant factual arguments why revisiting the validity of the FCC's Guidelines for RF Radiation was long overdue:

1. The scientific research used to formulate the Guidelines was now sixteen years old, years during which immense technological changes had taken place. (A - 3))
2. The Guidelines were based on a microwave oven mentality – how much power would be required to heat human flesh and cause biological change. (A - 3, A - 5 - A - 6, A - 19).

3. A number of scientific studies during intervening years had demonstrated that biologic change could be caused by prolonged exposure to RF waves at very low power density. (A - 9)

4. Other nations in the international community have adopted RF guidelines that are as much as 100 to 1000 times stricter than the FCC's outdated Guidelines (notably Russia, Italy, and Poland). (A - 19, A - 33)

5. A group of technical staff members of various Federal health agencies with responsibility for RF safety policy have unofficially challenged the IEEE on the validity of its premises in recommending the guidelines adopted by the FCC. (A - 4, A - 6, A - 13 - A - 16)

These factors individually and collectively were more than sufficient to raise a red warning flag to any responsible public officials. Instead, they were totally stonewalled and rejected by the Acting Chief of the FCC's Office of Engineering and Technology in a letter dated December 11, 2001, dismissing the EMR Petition out of hand.

In that letter, the Acting Chief made these remarkable assertions:

If efforts to revise or update our RF safety limits based on research in the field or on other factors are appropriate, that determination should be made by these or other federal agencies with primary expertise in and responsibility for ensuring health and safety, and should not be made in the first instance by the FCC. Accordingly, any proceeding

or inquiry should be initiated by and maintained under the auspices of such agency or agencies, and the determination of whether such an inquiry or proceeding is appropriate at this time should also be made by such agency or agencies. Accordingly, our dismissal of your petition should not be construed as a determination on the substantive merits of the matters it raises. (Emphasis added.) (A - 35)

EMR's counsel then filed an Application for Review, dated January 10, 2002, asking the full Commission to overturn the Acting Chief's dismissal letter. (A - 36)

For the Commission's review, EMR supplemented the factual support for its request that the FCC initiate fact-gathering on the validity of the obsolete RF Radiation Guidelines.

On April 30, 2003, EMR's counsel submitted copies of published studies showing biological effects from RF Radiation levels within the limits set by the FCC's Guidelines. (A - 56) The Petitioner summarized the significance of these studies as follows:

Key to The EMR Network argument is the mounting evidence in the research literature that potential adverse bioeffects have been demonstrated at non-thermal RF exposure levels. The current FCC guidelines are based on research reported no later than 1986. The studies on HSP [heat shock proteins] response to electromagnetic fields and specifically RF radiation date from 1994. Two studies [5, 6] published in the past two years demonstrate HSP response at exposure levels at or below the current FCC guidelines. Two reports [4, 6] discuss the hypothesis that the demonstrated responses are potential mechanisms for cancer development at non-thermal

exposure levels. All of these reports support the concern about exposure to RF radiation on human health. (A - 58)

On July 25, 2002, EMR's Counsel submitted letters from several Federal agency officials expressing their views on the need for continuing research on the environmental effects of RF radiation. (A - 99)

The representative of the Radiation Protection Division of the Environmental Protection Agency wrote (July 16, 2002):

The FCC's exposure guideline is considered protective of effects arising from a thermal mechanism but not from all possible mechanisms. Therefore, the generalization by many that the guidelines protect human beings from harm by an and all mechanisms is not justified.

These guidelines are based on findings of an adverse effect level of 4 watts per kilogram (W/kg) body weight. This SAR [Specific Absorption Rate] was observed in laboratory research involving acute exposures that elevated the body temperature of animals, including nonhuman primates. The exposure guidelines did not consider information that addresses nonthermal, prolonged exposures, i.e., from research showing effects with implications for possible adversity in situations involving chronic/prolonged, low-level (nonthermal) exposures. Relatively few chronic, low-level exposure studies of laboratory animals and epidemiological studies of human populations have been reported and the majority of these studies do not show obvious adverse health effects. However, there are reports that suggest that potentially adverse health effects, such as cancer, may occur. (Emphasis added.) (A - 106)

The Director of the National Institute of Environmental Health Sciences (NIEHS) at the National Institutes of Health of the Department of Health & Human Services wrote (February 21, 2002):

The NIEHS and the NTP [National Toxicology Program] believe that additional research is needed to determine whether there are potential adverse human health effects from long-term exposure to radiofrequency radiation emissions from wireless communication devices (e.g., cellular phones) and base stations. The NTP plans to conduct laboratory research in rodents to help clarify any potential health hazard for the U.S. population from such exposures. These studies will focus on whether chronic exposure to radiofrequency radiation emissions cause non-thermal health effects. We are currently working with technical experts from the National Institute of Standards and Technology to test the suitability of various radiofrequency radiation exposure systems for use in these studies. Once completed, the results of these studies will be peer-reviewed in a public forum and then made available to the public and to health and regulatory agencies, including those represented on the RFIAWG. (A - 108)

The Acting Director of the National Institute for Occupational Safety and Health of the Public Health Service of DHHS wrote (April 2, 2002):

As you noted in your letter, the National Institute for Occupational Safety and Health (NIOSH) is the federal agency responsible for conducting research and making recommendations for the prevention of work-related disease and injury. Thus, NIOSH has an interest in this public health issue, but not a specific role in the regulatory aspects of exposure to RF radiation. In addition to conducting research on this topic, we regularly participate in discussions with other federal agencies to evaluate the hazards of occupational exposure to RF radiation.

Over the last decade, RF radiation exposures have become a broader issue due to the drastic increase in wireless telecommunications sources. NIOSH has carefully noted the conclusions of the major scientific review panels published in the last few years to review the RF radiation bioeffects literature, such as those convened by federal health agencies in Canada and the United Kingdom. (A - 110)

All of this factual material was rejected by the FCC in its Order released August 14, 2003, which is the subject of this appeal. (A - 112) The FCC, after a series of sideswipes at counsel's arguments, simply refused to acknowledge that it had any responsibility to look into the questions raised by EMR's papers, or to initiate any review of the environmental effects of its own Guidelines:

We find that OET was correct in dismissing the petition, having determined 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. (Emphasis added.) (A - 112)

SUMMARY OF ARGUMENT

The Telecommunications Act of 1996 assigned to the FCC the sole responsibility for establishing radiofrequency radiation guidelines to prevent environmental harm to human health. (47 U.S.C. § 332(c)(7)(B)(iv)) The FCC cannot escape this responsibility by claiming it does not know how to evaluate the impact of its own regulations. (Point I)

The National Environmental Policy Act (NEPA) (42 U.S.C. § 4331(b)) imposes a “continuing responsibility” on every Federal agency – including the FCC – to use “all practicable means” to assure safe and healthful surroundings to all Americans. (Point II)

The FCC has taken inconsistent positions in reviewing its RF Radiation Human Exposure Guidelines, giving an appearance of pro-industry bias. (Point III)

The FCC is prohibited by NEPA from shifting its statutory responsibility onto other public agencies or private industry. (Point IV)

This Court should reverse the FCC’s Order and require the agency to initiate an inquiry into the need to revise its RF Radiation Guidelines.

(Conclusion)

ARGUMENT

POINT I

**LIKE IT OR NOT, CONGRESS ASSIGNED THE FCC
PRIMARY RESPONSIBILITY FOR SETTING
RF RADIATION HUMAN EXPOSURE GUIDELINES,
AND THE COMMISSION DOES NOT HAVE THE OPTION
TO DECLINE TO PERFORM THAT FUNCTION;
ONLY CONGRESS CAN RELIEVE THE FCC OF THAT DUTY**

The heart of the FCC Order presented for review by this Court is the following statement in the opening paragraph on page 1 of the Order:

EMR had requested that we initiate a proceeding to gather information and opinion about the need to revise our regulation for radiofrequency (“RF”) radiation and use the information so obtained to revise our current guidelines for evaluating human exposure to RF emissions from transmitters under the jurisdiction of the Commission. We find that OET was correct in dismissing the petition, having determined 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. (Emphasis added.)

(A - 112)

The FCC’s avoidance of its statutory responsibility assumes a patronizing tone later in the same Order, where the Commission states that the Commissioners are “not inclined” to generate any inquiry into current evidence of environmental harm caused by the present FCC RF Radiation Guidelines:

In the absence of a demonstrable show of concern, or even interest, by other expert agencies with the same (or greater) knowledge of research in this field – and its implications – as we possess, we are not inclined to generate such an inquiry on our own. (Emphasis added.)

(A-116 - A-117)

The Commissioners may not think they are the “most appropriate” forum to initiate an inquiry, and its members may not be “inclined” to do so – but 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 to act was a plain abuse of authority and contrary to law.

The Telecommunications Act of 1996 – passed following intensive lobbying and lavish campaign contributions to Members of Congress of both parties – blocked all local environmental opposition to the siting of cell transmitters in communities across the United States by giving the FCC total and absolute preemptive control over the question of environmental harm. The impact of that legislation, and the FCC’s response, was summarized succinctly by the Second Circuit in Cellular Phone Taskforce v. FCC, 205 F.3d 82, at 88 (2nd Cir. 2000):

While the FCC was considering the proposed guidelines, Congress passed the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (the “Act”), several provisions of which affected the FCC’s ongoing proceedings. In particular, the Act preempted state and local governments from regulating the placement, construction or modification of personal wire-less service facilities on the basis of the health effects of RF radiation where the facilities would operate within levels determined by the FCC to be safe. *See* 47 U.S.C. § 332(c)(7)(B)(iv). In the Second Order that is at issue in this case, the FCC announced, *inter alia*, a rule that prohibited state and local governments from regulating any personal wireless service facilities based upon perceived health risks posed by RF emissions as long as the facilities conformed to the FCC Guidelines regarding such emissions.

The Second Circuit emphasized the significance of the Telecommunications Act of 1996 at page 95-96:

IV. The FCC’s Preemption of Certain State Regulation

As noted earlier, while the rule-making process was underway, Congress passed the Telecommunications Act of 1996, providing, *inter alia*, that

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.

47 U.S.C. § 332(c)(7)(B)(iv).

The FCC, as part of its rulemaking, issued a comparable interpretive ruling preempting state and local governments from regulating, based on RF emissions, the operation of personal wireless service facilities that are in compliance with the FCC regulations concerning such emissions.

The Court rejected the petitioners' argument there that under the Telecommunications Act of 1996 state and local governments could still regulate the "operation" of cell transmission towers (at p. 96):

Section 332(c)(7)(B)(iv) does not amount to clear congressional intent to permit state and local governments to regulate the operation of such facilities. The FCC's interpretation is therefore entitled to deference and, because the FCC's interpretation is reasonable, we are bound to accept it.

The Commission's regulations governing radiofrequency emissions therefore totally control any and all citizen and governmental challenges to environmental harm at any level of local and state government. The hands of town, city and state officials are completely tied by this absolute vesting of power and authority in the FCC.

Although the Commissioners and FCC staff may feel inadequate to perform this responsibility, they have no choice in the matter. The law of the land requires that they issue and maintain regulations governing radiofrequency emissions to guard the human health of every citizen in the nation. It is a duty that

cannot be blithely brushed aside. The FCC is charged by law with protecting the public from environmental harm caused by RF emissions, and it must take its responsibility seriously.

The Commission has totally abandoned that responsibility in this proceeding. Its members must therefore be directed by the reviewing Court to initiate an inquiry into the environmental effects of its existing regulations without further delay.

The Commission Is Not “an Umpire Blandly Calling Balls and Strikes for Adversaries Appearing Before It”

A Federal agency charged with protecting the public interest has an affirmative duty to act. This principle was clearly articulated in the landmark Scenic Hudson case in the Second Circuit in 1965, Scenic Hudson Preservation Conference v. Federal Power Commission, 354 Fed.2d 608 (2nd Cir. 1965), cert. denied 384 U.S. 941 (1966). In that case, the Federal Power Commission contented itself with deciding the technical appropriateness of a proposed pumped storage plant on Storm King Mountain in the Hudson Highlands. On Appeal the Circuit Court pointed out (at p. 620) that Congress gave the FPC a broader planning responsibility.

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. (*Id.*, at p. 620)

And again,

The Commission has an affirmative duty to inquire into and consider all relevant facts. (*Ibid.*)

Later on in its opinion, the Scenic Hudson Court cited an ICC Commissioner's description of how a Federal agency should perform its responsibilities:

'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.)

Isbrandtsen Co. v. United States, 96 F.Supp. 883, 892 (S.D.N.Y. 1951), affirmed by an equally divided court. A/S J. Ludwig Mowinckels Rederi v. Isbrandtsen Co., 342 U.S. 9150, 72 S.Ct. 623 (1952).

The Commissioners in this case have obviously forgotten their duty as executives of a Federal agency charged with the public interest. This Court should remind them that their oaths of office require them to carry out the law and not sit

back and pick and choose whether they feel “inclined” to do so or not. As the

Scenic Hudson Court correctly observed:

In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission. (Emphasis added.)

The FCC erred as a matter of law in asserting that it had no obligation to initiate the inquiry sought by the EMR petition. That result is compelled by the text of the 1996 Act and the absence of any statute assigning the duty of adopting emissions regulations to any other federal agency.

POINT II

**LIKE OTHER FEDERAL AGENCIES WHOSE POLICIES
IMPACT ON THE ENVIRONMENT, THE FCC HAS A
“CONTINUING RESPONSIBILITY” UNDER NEPA
TO “USE ALL PRACTICABLE MEANS” TO IMPROVE
AND COORDINATE FEDERAL PLANS, FUNCTIONS,
PROGRAMS AND RESOURCES TO ASSURE SAFE AND
HEALTHFUL SURROUNDINGS FOR ALL AMERICANS**

The National Environmental Policy Act (NEPA) is the basic national charter for protection of the environment. The Act declares it a national policy to “encourage productive and enjoyable harmony between man and the environment;

to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; and to enrich the understanding of the ecological systems and natural resources important to the Nation” (42 U.S.C. § 4321). The Act specifically declares a “continuing policy of the Federal Government, in cooperation with State and local governments, and other public and private organizations to use all practicable means and measures...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” (42 U.S.C. § 4331).

NEPA also states 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, among other things: assure safe, healthful, productive and esthetically and culturally pleasing surroundings for all Americans; attain the widest beneficial use of the environment without degradation, risk to health or safety; preserve important historic, cultural and natural aspects of our national heritage; achieve balance between population and resource use which will permit high standards of living and a wide sharing of life’s amenities; and, enhance

the quality of renewable resources and approach the maximum attainable recycling of depletable resources (42 U.S.C. § 4331).

The Act authorized and directed “that, to the fullest extent possible, the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies of the Act”, and imposes general and specific requirements on all Federal agencies (42 U.S.C. § 4332).

Agencies are required to “utilize a systematic, interdisciplinary approach which will ensure the integrated use of the natural and social sciences and the environmental design arts in planning and decision making...”. They are also to insure that “unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations”(42 U.S.C. § 4332(2)(A))

The FCC concedes that it is not exempt from NEPA. It has the same “continuing responsibility” as other agencies to review and upgrade policies – in this case its RF Radiation Guidelines – to meet current conditions. This is an affirmative ongoing responsibility. The FCC may not stick its head in the sand and pretend that nothing is happening that brings its Guidelines into question.

The legislative history of NEPA leaves no doubt that the statute requires all Federal agencies to work toward a better environment.

The NEPA represents the first comprehensive congressional response to the environmental concerns that surfaced so dramatically during the 1960's. As the Senate Committee observed, “[t]he inadequacy of present knowledge, policies, and institutions is reflected in our Nation’s history, in our national attitudes and in our contemporary life.... We no longer have the margins for error that we once enjoyed. The ultimate issue posed by shortsighted, conflicting, and often selfish demands and pressures upon the finite resources of the earth are [sic] clear.” S.Rep.No. 91-296, 91st Cong., 1st Sess. 4 (1969). Consequently, the NEPA was designed “to assure that all Federal agencies plan and work toward meeting the challenge of a better environment.” S.Rep.No. 91-296, *supra* at 9, quoted in Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department, 400 U.S. 968, 975, 91 S.Ct. 368, 27 L.Ed.2d 388 (1970) (Douglas J., dissenting), denying cert. before judgment in 446 F.2d 1013 (5th Cir. 1971), cert. denied, 406 U.S. 933, 92 S.Ct. 1775, 32 L.Ed.2d 136 (1972).

Environmental Defense Fund v. Tennessee Valley Authority, 468 F.2d 1164, 1173 (6th Cir. 1972). (Footnotes omitted.)

Citing the D.C. Court of Appeals, the Sixth Circuit has emphasized the “continuing responsibility” of Federal agencies under NEPA:

Section 101, as the District of Columbia Circuit has observed in Calvert Cliffs’ Coordinating Committee v. United States Atomic Energy Commission, 146 U.S.App.D.C. 33, 449 F.2d 1109, 1112 (1971), declares the Act’s basic substantive policies. In section 101(a) Congress

declares that it is the continuing policy of the Federal Government...to use all practicable means and measures...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. (Emphasis added.)

To implement this continuing policy of practicable consideration of environmental values, section 101(b) makes it the “continuing responsibility” of the Government to “use all practicable means...to improve and coordinate Federal plans, functions, programs, and resources” to accomplish several specified goals, including the preservation of “important historic, cultural, and natural aspects of our national heritage” and the maintenance of “an environment which supports diversity and variety of individual choice. (Emphasis added.)

(*Id.*, at 1174)

The Court explained that this requires agencies to “appraise continuously all of their activities”:

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. *See* Natural Resources Defense Council,

Inc. v. Morton, 458 F.2d 827, 836 (D.C.Cir.), dismissed as moot, 337 F.Supp. 170 (D.D.C. 1972); National Helim Corporation v. Morton, 455 F.2d 650, 656 (10th Cir. 1971); Scenic Hudson Preservation Conference v. FPC, 453 F.2d 463, 481 (2nd Cir. 1971), cert. denied, 407 U.S. 926, 92 S.Ct. 2453, 32 L.Ed.2d 813 (1972); Calvert Cliffs' Coordinating Committee, *supra*, 449 F.2d at 1112-1115; Kalur v. Resor, 335 F.Supp. 1, 14 (D.D.C. 1971); Ex.Ord. No. 11,514, 3 C.F.R. 104 (1971).

(Ibid.)

Since Congress in enacting the Telecommunications Act of 1996 gave to the FCC the preemptive authority to set regulations governing RF radiation (see Point I, *supra*) this continuing responsibility falls particularly heavily on the FCC – the only Federal agency with the legal authority to review and revise such regulations.

A federal agency has a continuing duty to gather and consider new information in assessing the environmental impact of its actions. See 42 U.S.C. § 4332(2)(A), (B); Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017, 1028 (9th Cir. 1980).

The Supreme Court has addressed the issue of continuing agency responsibility in the context of Environmental Impact Statements to determine when an agency must update a prior EIS. This requirement is a fair parallel to

determining when the FCC is obligated to revise and update its RF Radiation Guidelines.

In Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989), the Supreme Court declared:

[A]n agency need not supplement an EIS every time new information comes to light after the EIS is finalized. To require otherwise would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made. On the other hand, and as petitioners concede, NEPA does require that agencies take a “hard look” at the environmental effects of their planned action, even after a proposal has received initial approval. (Emphasis added.)

490 U.S. at 373-74, 109 S.Ct. at 1859 (footnotes omitted).

The Supreme Court stated that the standard which governs an agency’s decision whether to prepare a supplemental EIS is a “rule of reason” standard that requires the agency to assess the value of the new information to the still pending decisionmaking process and make a reasoned determination whether it is of such significance as to require supplementing the EIS. 490 U.S. at 373, 109 S.Ct. at 1859.

The same concept obviously applies to reviewing and revising on-going agency guidelines relating to the environmental impact of the agency’s own rules in the face of changing technologies and new scientific findings.

The Second Circuit in its recent decision rejecting a direct substantive challenge to the FCC's Guidelines squarely addressed the applicability of NEPA to the FCC. It concluded that the FCC properly considered the environmental impact of its rulemaking at the time the Guidelines were originally adopted. Cellular Phone Taskforce v. FCC, 205 F.3d 82, 95 (2nd Cir. 2000).

However, the issue presented here is a different one. The FCC's basic guidelines were adopted in 1985, with certain limited revisions in 1996-7. The scientific data on which the Guidelines were based, and on which the FCC made its original determination of environmental impact, pre-dated 1982 when the proposed Guidelines were first published. The research related solely to the thermal effects of acute exposure to various power levels and never addressed the problem of steady exposure to low-intensity emissions.

The question in this proceeding is whether the "continuing responsibility" imposed by NEPA requires the FCC to initiate a new environmental inquiry based on recent and ongoing scientific studies – even initiate new studies commissioned by the FCC itself – in light of all that has happened since 1982.

Recent Circuit Decisions Reaffirm the 1989 Marsh Requirements

The Fourth Circuit has recognized that NEPA requires agencies to take a hard look at the environmental consequences of their proposed projects even after an EIS has been prepared. Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437, 443 (4th Cir. 1996) (citing Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989)). To determine whether new circumstances or information requires the preparation of a supplemental EIS, the court noted “[t]he new circumstances must present a seriously different picture of the environmental impact of the proposed project from what was previously envisioned.” (Id.) (Emphasis in original) (Citation omitted).

The court also elucidated the test for determining whether an agency has complied with NEPA:

In reviewing an agency’s decision not to prepare a supplemental EIS, a court must undertake a two-step inquiry. First, the court must determine whether the agency took a hard look at the proffered new information. Second, if the agency did take a hard look, the court must determine whether the agency’s decision not to prepare a supplemental EIS was arbitrary or capricious.

Hughes River Watershed Conservancy v. Glickman, *supra* (citation omitted). In Hughes River, the court found that the Army Corps of Engineers failed to take a ‘hard look’ at new information regarding a potential zebra mussel infestation that

could result from construction of a planned dam on a river. 81 F.3d at 444. Both the FWS and EPA had alerted the Corps and recommended preparation of an SEIS, but when the Corps decided not to, the court found its failure to thoroughly investigate the new information to violate the requirement of a ‘hard look’ review. Id. at 444-45.

The Tenth Circuit has also recognized that agencies have a continuing responsibility under NEPA. Quoting Marsh, the court explained:

It would be incongruous with th[e] approach to environmental protection...for the blinders to adverse environmental effects, once unequivocally removed, to be restored prior to the completion of the agency action simply because the relevant proposal has received initial approval.

Southern Utah Wilderness Alliance v. Norton, 301 F.3d 1217, 1238 (10th Cir. 2002) (citing Marsh, 490 U.S. at 371).

The court in Southern Utah echoed the Fourth Circuit’s outline of the test for evaluating an agency’s decision not to prepare an SEIS, and listed several factors that the court might consider to determine whether the agency has satisfied the requirement that it take a “hard look” at new information.

The court may consider whether the agency ‘obtains opinions from its own experts, obtains opinions from experts outside the agency, gives careful scientific scrutiny, [and] responds to all legitimate concerns that are raised..., or otherwise provides a reasoned explanation for the new circumstance’s lack of significance.

Id. (Citations omitted).

A number of cases in the Ninth Circuit following Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017 (9th Cir. 1980), reiterated the important holdings of that case. Citing Warm Springs Dam, the Court in Stop H-3 Ass'n v. Dole, emphasized that “[a] federal agency has a continuing duty to gather and evaluate new information relevant to the environmental impact of its actions, even after release of an EIS.” Stop H-3 Ass'n v. Dole, 740 F.2d 1442, 1463 (9th Cir. 1983) (citing Warm Springs Dam, 621 F.2d at 1023-24); see also Price Road Neighborhood Ass'n, Inc. v. DOT, 113 F.3d 1505, 1509 (9th Cir. 1997) (“NEPA also imposes a continuing duty to supplement previous environmental documents.”) The Court in Stop H-3 Ass'n reasserted the standard from Warm Springs Dam that “[w]hen new information comes to light the agency must consider it, evaluate it, and make a reasoned determination whether it is of such significance as to require implementation of formal NEPA filing requirements.” 1463-64 (citing Warm Springs Dam, 621 F.2d at 1024); see also, Friends of the Clearwater v. Dombeck, 222 F.3d 552, 558 (9th Cir. 2000). In evaluating the agency’s decision whether to act on the new information, a court should consider

the environmental significance of the new information, the probable accuracy of the information, the degree of care with which the agency considered the information and evaluated its impact, and the degree to

which the agency supported its decision not to supplement with a statement or explanation or additional data.

Stop H-3 Ass'n, 740 F.2d at 1464 (Warm Springs Dam, 621 F.2d at 1024).

Most recently, in Friends of the Clearwater v. Dombeck, the Ninth Circuit emphasized that “an agency that has prepared an EIS cannot simply rest on the original document.” 222 F.3d 552, 557 (9th Cir. 2000):

The agency must be alert to new information that may alter the results of its original environmental analysis, and continue to take a ‘hard look at the environmental effects of [its] planned action, even after a proposal has received initial approval.’

Id. (quoting Marsh, 490 U.S. at 374)

The court echoed the approach in place since Marsh and followed by the Fourth and Tenth Circuits that an agency decision not to prepare an SEIS should be evaluated for whether the agency took a hard look at the new information and whether its decision to forego an SEIS was arbitrary and capricious. Id. at 556 (quoting Marsh, 490 U.S. at 377). In Friends of Clearwater, the Forest Service’s decision not to prepare an SEIS for a ten-year-old forest plan was found to fail this inquiry. Id. at 558. The Forest Service “failed to timely prepare, or even sufficiently to consider and evaluate the need for, an SEIS in light of the seven new sensitive species designations and its recognition that the old

growth and snag standards on which the original Wing Creek-Twenty mile EIS relied was inadequate.” Id.

Judicially Noticed Legislative Facts Further Support Reversal of the FCC Order

EMR’s 2001 petition supplied five factual developments warranting initiation of an inquiry into the environmental effects of the FCC’s radiation guidelines (*supra*, p. 18-19). The scientific world has not been standing still in the interim. Now, early in 2004, this Court can look out its chambers windows onto the world outside and take judicial notice of legislative facts that bear on this question.² Attached as Addenda A and B to this brief are two very recent reports of

2 See 1972 Advisory Committee Notes following Rule 201 of the Federal Rules of Evidence:

Note to Subdivision (a). This [Rule 201] is the only evidence rule on the subject of judicial notice. It deals only with judicial notice of “adjudicative” facts. No rules deal with judicial notice of “legislative” facts.***

The omission of any treatment of legislative facts results from fundamental differences between adjudicative facts and legislative facts. Adjudicative facts are simply the facts of the particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the law-making process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body.

The Advisory Committee quoted the following comment by Prof. Morgan from the Harvard Law Review:

published studies that give a good picture of the significant environmental health concerns that warrant consideration by the FCC as a basis for ordering studies by its staff or consultants.

Addendum A is a study done in Italy by F. Marinelli *et al.*, published in the *Journal of Cellular Physiology*, 198:324-332 (2004) on the effects of low-intensity emissions – presently unrestricted under the FCC Radiation Guidelines – on the proliferation of cancer cell growth. The findings of the study itself are significant, but the paper also includes an instructive current bibliography on many other studies of biological effects caused by electromagnetic fields.

Addendum B is a Reuters new dispatch dated September 30, 2003 [two weeks after the FCC Order dismissing EMR’s petition below] summarizing double-blind laboratory studies conducted by three Dutch government ministries, finding significant human physical responses (headaches, dizziness and nausea) from base station signals for the new third generation (3G) networks for fast

“In determining the content or applicability of a rule of domestic law, the judge is unrestricted in his investigation and conclusion. He may reject the propositions of either party or of both parties. He may consult the sources of pertinent data to which they refer, or he may refuse to do so. He may make an independent search for persuasive data or rest content with what he has or what the parties present.)*** {T]he parties do no more than to assist; they

electronic data transfer. [The full official text of the September 2003 Dutch study can be seen at http://www.ez.nl/beleid/home_ond/gsm/docs/TNO-FEL_REPORT_03148_Definitief.pdf³

These recent scientific studies, and others that will undoubtedly appear before this appeal is decided, clearly require that the FCC initiate an inquiry to assemble and assess updated data on the environmental effects of emissions permitted under its present RF Radiation Guidelines, pursuant to the “continuing responsibility” imposed on the agency by NEPA.

control no part of the process.” Morgan, Judicial Notice, 57 Harv.L.Rev. 269-270-271 (1944).

3 The principal industrial supplier of base stations supporting third generation (3G) networks has already installed or upgraded 40,000 such base stations around the world as of the date this brief is being written. See www.lucent.com/solutions/high_speed_data.html.

POINT III

THE FCC'S INCONSISTENT APPROACH TO REVIEWING ITS RF RADIATION HUMAN EXPOSURE GUIDELINES IS ARBITRARY AND CAPRICIOUS AND SUGGESTS A PRO-INDUSTRY AGENCY BIAS WITH LITTLE REGARD FOR PUBLIC HEALTH AND SAFETY

The FCC's current published strategic plan stresses promotion of competition, innovation, and investment in Broadband services and facilities – without any mention of protecting public health or safety:⁴

The FCC's strategic goal for Broadband is to establish regulatory policies that promote competition, innovation, and investment in Broadband services and facilities while monitoring progress toward the deployment of broadband services in the United States and abroad. (Emphasis added.)

4 See www.fcc.gov. The FCC's description of Broadband is:

Broadband technologies, which encompass all evolving high-speed digital technologies that provide consumers integrated access to voice, high-speed data, video-on-demand, and interactive delivery services, are a fundamental component of the communications revolution. Fully-evolved broadband will:

Virtually eliminate geographic distance as an obstacle to acquiring information, and

Dramatically reduce the time it takes to access information.

Licensing new telecommunication industry facilities is clearly a valid part of the Commission's work. However, the FCC's present approach is unbalanced, essentially disregarding public health and safety, and helps to explain the FCC's flat refusal to initiate an inquiry into the potential harm its aggressive support of innovation and investment may be causing.

It is self-evident that if the FCC were to adopt more restrictive RF radiation regulations limiting the constant flow of low-intensity RF emissions in residential, school, hospital and other potentially vulnerable areas the result could increase the cost of new Broadband base stations as well as upgrading existing cell transmitters to meet revised standards.

The question raised by this appeal is whether, nevertheless, 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.

Ironically, at the very moment the FCC was preparing its Order below rejecting EMR's petition to take a fresh look at scientific evidence regarding possible human harm caused by RF radiation, the Commission was itself proposing

to adopt changes to those very regulations – but only with respect to compliance procedures – not the exposure guidelines themselves. The text of the FCC press release of June 26, 2003, and opening pages of the accompanying Notice of Proposed Rule Making are attached as Addendum C to this brief.

Accompanying the FCC’s announcement is a statement by its Chairman that one of the purposes of the proposed RFR rule revisions was “accelerating the process of deploying necessary communications infrastructures.” (Emphasis added.) The new revisions, the FCC Chairman said, will ensure compliance by licensees “in a more practical, reasonable and efficient manner.”

This concern for the reasonableness of the requirements for telecommunications company compliance contrasts starkly with the agency’s lack of concern for the effectiveness of its standards for protection of public health and safety.

The same FCC Notice of Proposed Rule Making also reaffirms the microwave-oven mentality behind its present two-decades-old RF Radiation Guidelines:

The Commission originally adopted rules for protecting workers and members of the public from potentially harmful exposure to RF energy almost twentyseveral [sic] years ago, and we have, on occasion, updated our rules as more relevant information has become

available. The potentially harmful effects of RF energy are well characterized as the result of excessive heating of biological tissue.

(Addendum C, Notice, page 2) (Emphasis added.)

Other evidence of the FCC's present apparent lack of awareness or concern for the environmental impact of its cell transmitter expansion program can be seen in its April 30, 2003 response in a companion proceeding in this Court seeking a Writ of Mandamus to require the FCC to protect migratory birds from the high mortality rates produced by telecommunications towers. (In re Forest Conservation Council, Inc. et al., Docket No. 03-1034). The Commission promised the Court in that case "to devote more institutional time and effort" to the dangers communications towers may pose to migratory birds, but only after a year-and-a-half of inaction and only when faced with the prospect that the Court might order the Agency to do so. (FCC Response to Petition dated April 30, 2003, page 20):

On April 9, FCC Chairman Powell's senior legal adviser explained that "in the near future" the FCC would seek input on scientific evidence pertaining to the impact of communications towers on migratory birds.*** In addition, he stated that the FCC would reach out to FWS and could obtain the services of a biologist as part of its efforts to address migratory bird issues. As the FCC gathers more information, it then will have a basis to decide whether to take any

action with respect to its existing environmental regulations.
(Emphasis added.)⁵

If the FCC is able to “seek input on scientific evidence” pertaining to migratory birds, including the services of a biologist, then certainly the Commission can do no less in regard to the impact of its radiation guidelines on human health – starting by seeking input on scientific evidence, including obtaining the services of medical experts..

Public Concerns Over Close Ties of FCC to Private Industry

In evaluating the *bona fides* of the FCC’s order in this case, the Court can take judicial notice of Congressional concern over close relationships between the Commissioners and FCC staff and telecommunications industry representatives. On June 13, 2003, Senator John McCain, Chairman of the Senate Commerce, Science and Technology Committee, introduced a bi-partisan measure banning industry-sponsored travel by FCC commissioners and staff. The bill followed a report by The Center for Public Integrity that FCC officials have taken more than 2,500 trips paid for by companies and trade groups from the telecommunications and broadcasting industries. These trips have included junkets

5 The writ of mandamus was subsequently denied without prejudice to renewal “in the event of significant additional delay.” 2003 WL 21544013 (D.C. Cir.)

to such exotic destinations as Paris, Hong Kong and Rio de Janeiro. Las Vegas has been the destination for 330 industry-sponsored trips. The Center for Public Integrity has also issued fact-filled reports on the industry's employment of former FCC employees and on the FCC's reliance on non-government industry private data.⁶ These are all further reasons why this Court should forcefully remind the FCC of its responsibility to the American public.

POINT IV

NEPA DOES NOT PERMIT THE FCC TO ABDICATE ITS STATUTORY DUTIES AND VEST THEM IN THE INSTITUTE OF ELECTRICAL AND ELECTRONICS ENGINEERS (IEEE) OR ANY OTHER PRIVATE OR PUBLIC BODY

The FCC does not dispute that it is subject to the provisions of the National Environmental Policy Act (NEPA). It also concedes that its RF Radiation Guidelines were adopted in order to comply with NEPA requirements and that the FCC Guidelines incorporated guidelines developed by IEEE [a constituent group of the American National Standards Institute (ANSI)]. (FCC Order, par. 9 (A - 115)) The FCC also acknowledges that its 1996-7 revisions of the Guidelines were

6 See www.publici.org/dtaweb/

“based on the work and recommendations of an expert group of the Institute of Electrical and Electronics Engineers (IEEE).” (A-113)

The FCC takes the position here that it will not act on initiating or conducting any inquiry until one of the “expert” bodies, including IEEE, recommends that it do so. (FCC Order, pars. 4, 5 (A - 113)).

OET’s fundamental premise – our reliance on the expertise of health and safety agencies in this area – is our sound guiding principle, and EMR has failed to advance any argument that persuades us otherwise.

(Par. 6, fn omitted.) (A - 114)

The FCC has made it crystal clear that it has no intention of taking any action on its own initiative except possibly in the face of “compelling” evidence (fn. 14 (A - 114)).

As outlined above, this Commission has carefully and assiduously developed RF guidelines to protect the public according to the best science available, as interpreted by the agencies most expert in the pertinent fields. As aptly recognized by OET in reaching its determination to dismiss EMR’s petition, we will continue to rely on just such expertise in evaluating the continued propriety of our RF guidelines. When there is an appropriate indication by such agencies, or other expert sources, whether self-initiated or in response to outside petition or activities, we could consider the need for an investigative effort in support of possible exposure rules revisions. (Emphasis added.) (Order, par. 8 (A - 115))

The legal issue here is whether NEPA prohibits this hiding behind the skirts of other federal agencies who have no direct responsibility for the FCC Guidelines, or behind the skirts of IEEE, an industry group that was the draftsman of both the original 1985 Guidelines and the 1996-7 revisions adopted by the FCC.

The case law clearly holds that FCC may not evade its statutory duties under NEPA by palming them off to other public or private bodies. So held the Fifth Circuit Court of Appeals in Sierra Club v. Lynn, 502 F.2d 43, 59 (5th Cir. 1974), rehearing denied 504 F.2d 760 (1974), cert. denied 421 U.S. 994 (1975):

There is no NEPA prohibition against a state agency, financially interested private contractor or a new community applicant providing the federal agency, which must of necessity work closely with these parties, data, information, reports, groundwork environmental studies or other assistance in the preparation of an environmental impact statement. See Iowa Citizens for Environmental Quality, Inc. v. Volpe, 487 F.2d 849 (8th Cir. 1973); Citizens Environmental Council v. Volpe, 484 F.2d 870 (10th Cir. 1973), cert. denied, 416 U.S. 936, 94 S.Ct. 1935, 40 L.Ed.2d 286 (1974). NEPA demands only that “the applicable federal agency must bear the responsibility for the ultimate work product designed to satisfy the requirement of § 102(2)(C).” Life of the Land v. Brinegar, 485 F.2d 460, 467 (9th Cir. 1973), cert. denied, 416 U.S. 961, 94 S.Ct. 1979, 40 L.Ed.2d 312 (1974). 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. See Greene County Planning Board v. F.P.C., 455 F.2d 412

(2d Cir.), cert. denied, 409 U.S. 849, 93 S.Ct. 56, 34 L.Ed.2d 90 (1972). (Emphasis added.)

Likewise, the First Circuit stated in Essex County Preservation Association v. Campbell, 536 F.2d 956, 960 (1st Cir. 1976):

We must stress that when project consultants are also used in preparation of the EIS considerable caution should be exercised by the federal agency. The agency clearly may not substitute a private firm's efforts and analysis for its own, and it must bear responsibility for the ultimate work product designed to satisfy the requirement of 42 U.S.C. § 4332(2)(C).(Emphasis added.)

The Fifth Circuit in Sierra Club v. Sigler stated that the “rubberstamping of a consultant-prepared FEIS” would be illegal, and that “an agency may not delegate its public duties to private entities.” 695 F.2d 957, 962 n. 3 (5th Cir. 1983) In Save Our Wetlands v. Sands, the Court held that “[i]n reviewing the role of outside consultants in the preparation of environmental impact statements, this court has specifically ruled that an agency may not reflexively rubber stamp a statement prepared by others.” 711 F.2d 634, 642 (5th Cir. 1983) (citing Lynn, 502 F.2d at 58-59. While consultants outside of the agency may be sued for such NEPA determinations, the agency is still responsible for the accuracy of the final decision, requiring “proof of actual agency review.” Id. at 641.

The IEEE – which is obviously in the forefront of the FCC’s mind, since it prepared both the original 1985 Guidelines and the 1996-7 revisions – presents a particular problem. The IEEE is primarily composed of engineers employed by the telecommunications and related industries. Every such employee has to be conscious that recommending stricter (and more costly) environmental protections will be looked at askance by his or her employer. Our knowledge of human nature tells us that when we evaluate the likelihood of IEEE recommending stricter guidelines to the FCC, we must remember that it would only require one articulate industry spokesperson on the IEEE committee to find strategies to delay any recommendations for Guideline revisions that might increase his or her employers’ costs and jeopardize his or her employment. The IEEE’s Vision Statement acknowledges that possibility in a nutshell:

VISION

To advance global prosperity by fostering technological innovation, enabling members’ careers and promoting community world-wide.

(Emphasis added.)⁷

The FCC cannot rely on IEEE to initiate NEPA-required changes. The agency must shoulder its own statutory responsibility and stop trying to pass it off

7 www.ieee.org

to others. The FCC can issue inter-agency requests; hire qualified staff; engage consultants; and do whatever else is needed to perform its duties to advance and protect the public interest. But it must get started, and stop looking for excuses for its inaction.⁸

8 An obvious place to start is for the FCC to request the EPA to conduct a review of current scientific literature and to provide guidance on updating RF standards for the FCC to consider. Reorganization Plan No. 3 of 1970 provides EPA with a broad mandate to provide such guidance for all Federal agencies. (42 U.S.C. 2021(h)):

***The Administrator [of the Environmental Protection Agency] shall advise the President with respect to radiation matters, directly or indirectly affecting health, including guidance for all Federal agencies in the formulation of radiation standards and in the establishment and execution of programs of cooperation with the States. (Emphasis added.)

The EPA's literature review should cover the explosive growth in digital technologies which have created more RF/MW radiation sources close to people:

- base station networks
- analog cell phones
- PCS digital cell phones
- wireless LANs in classrooms, offices, and restaurants
- digital/high resolution TV transmitters
- home wireless LANs
- increased use of cell phones by children to stay in contact
- higher, pulse-modulated, non-thermal exposures – especially to head and eyes.

CONCLUSION

The Petitioner requests that the Court reverse the Order below and require the FCC to issue a Notice of Inquiry to gather information and opinion about the need to revise Parts 1 and 2 of the FCC's Rules concerning the environmental effects of radiofrequency radiation.

Respectfully submitted,

Whitney North Seymour, Jr.
425 Lexington Avenue, Room 1721
New York, New York 10017
Telephone: (212) 455-7640
Fax: (212) 455-7721

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Attorney for Petitioner

The assistance of Stephanie Hogan, a law student at NYU, in updating the legal authorities cited in Points II and IV is gratefully acknowledged.

The review of scientific literature should include biological and adverse health effects reported from pulse modulated, non-thermal exposures, including

- eye damage in primates
- single and double strand DNA breaks
- increased lymphoma incidence
- blood-brain barrier weakening
- increases in heat shock proteins.

CERTIFICATE OF COMPLIANCE

I, Whitney North Seymour, Jr., attorney for Petitioner, hereby certify that this brief is in compliance with the type-volume limitation under FRAP 32(a)(7)(B). The brief contains 12,071 words counted by the word-processing system used to prepare the brief.

Whitney North Seymour, Jr.
Attorney for Petitioner