United States Court of Appeals

for the

District of Columbia Circuit

No. 03-1336

EMR NETWORK,

Petitioner,

-against-

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents,

ON APPEAL FROM THE FEDERAL COMMUNICATIONS COMMISSION

PETITION FOR REHEARING *EN BANC*

WHITNEY NORTH SEYMOUR, JR.
Counsel of Record
425 Lexington Avenue, Room 1721
New York, New York 10017-3954
(212) 455-7640

Attorney for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PETITION FOR REHEARING *EN BANC*

This is a petition by EMR Network, a citizens' advocacy organization, for rehearing *en banc* of the panel's decision of December 7, 2004, affirming the FCC's dismissal of EMR's Petition for Inquiry into public health effects of the FCC's ongoing regulation and approvals of wireless communications at higher and higher frequencies. A copy of the panel's decision is attached as Addendum A.

Pursuant to FRAP Rule 35, petitioner requests *en banc* rehearing on the twin grounds that (1) *en banc* consideration is necessary to maintain uniformity of the Court's decisions because the panel's decision disregards and conflicts with a principal holding in this Court's decision in Michigan Consolidated Gas Co. v. Federal Power Commission; and (2) this proceeding involves a public health question of exceptional importance affecting present and future generations of Americans – and potentially people around the globe – because of the ongoing rapid expansion of high frequency wireless transmissions authorized by pending actions and existing regulations of the FCC.

FACTUAL BACKGROUND

This is an "innocent bystander" case. EMR Network represents the interests of members of the general public who, as innocent bystanders, are continuously bombarded by ever-increasing amounts and higher and higher frequencies of wireless transmissions in workplaces, homes and schools, generating growing layers of RF radiation with the potential of long-term adverse human health effects that may not be discovered and diagnosed until long after it is too late to do anything to prevent them.

Numerous scientific studies around the world have identified biologic effects resulting from exposure to high frequency wireless radiation, many of them potentially harmful to human health. The researchers have repeatedly called for more comprehensive and reliable research – which the FCC itself is best able to initiate, presumably in cooperation with the Environmental Protection Agency (EPA). Yet these studies are uniformly rejected by the Federal Communications Commission as "inconclusive" and the EPA's expertise has been sidelined.

Most recent scientific studies have been conducted by academic researchers, often hampered by limited resources. The growing chorus from these researchers calling for more thorough studies cannot responsibly be ignored by the one agency with Congressionally-mandated sole responsibility for setting wireless RF radiation safety standards and with the ability to request help from other agencies and to seek Congressional funding to conduct that research. (See 47 U.S.C. § 332(c)(7)(B)(iv).) That agency is the FCC. However, the FCC has repeatedly stonewalled these calls for research by responsible researchers not only in the U.S. but also in places like the U.K., Sweden, The Netherlands, Spain, Italy, Austria and other nations around the globe. It has done so in this very proceeding.

The members of this Court can take judicial notice of the steady flow of relevant scientific studies that have been published even during the time this case has been pending on this Court's docket.[1]

Possibly the most dramatic of these studies is a July 2004 report from Sweden, indicating the possibility that RF radiation produced by frequency modulated FM radio

[1] A complete list of RF radiation studies published between October 2003 and January 2005 will be found at: http://www.emrpolicy.org/science/research/docs/2003_2005_research.pdf

transmissions has increased the incidence and mortality of skin cancers (i.e., melanomas) in human populations in Sweden, France and Spain. The study concludes that these high frequency radio transmissions may neutralize protective cells in the skin that otherwise would combat and repair sun damage. The official summary of this study [full text available on the internet at http://www.MedSciMonit.com/pub/vol_10/no_7/4321.pdf] is attached as Addendum D.[2] :

Other significant studies of the biologic effects of radio frequency RF radiation that have been published while this case has been pending (See footnote 1) include a Korean report on leukemia, and a joint European study on DNA breaks. Attached as Addendum E is a press release of January 11, 2005, announcing a comprehensive new report on mobile phones and base stations issued by the UK's National Radiological Protection Board headed by Sir William Stewart. The Executive Summary of this report ends with a discussion of "Health-related research," and says:

> The Board particularly supports the need for further research, in the following areas:
> ***
> (c) effects of RF exposure on children,***
> (f) studies of RF effects on direct and established measures of human brain function and investigations of possible mechanisms involved,
> (g) complementary dosimetry studies focused on ascertaining the exposure of people to RF fields.
>
> Executive Summary, par 89

Members of the Federal Radiofrequency Interagency Work Group in the U.S. that includes representatives of EPA, FDA, NIOSH and OSHA, also have urged the FCC to review the human health impact of wireless RF radiation. (A-22 – A-29). The FCC has rejected all of these calls for further research into health effects of RF radiation notwithstanding the overwhelming evidence from all over the world, as well as within this country, that such research is absolutely necessary to protect the public interest.

[2] The members of this Court may take judicial notice of legislative facts (as opposed to "adjudicative facts") at any time. See Advisory Committee notes following Rule 201 of the Federal Rules of Evidence.

WHY REHEARING *EN BANC* SHOULD BE GRANTED

I. Congress Directed the FCC to Encourage Advanced Wireless Services "In a Manner Consistent with the Public Interest;" However the Panel Refused to Require the FCC to Consider "Public Interest Factors" and in Doing So Disregarded the Clear Congressional Mandate and Overruled this Court's Square Holding in *Michigan Consolidated Gas Co. v. Federal Power Commission*, 283 F.2d 204 (1960), Jeopardizing Uniformity of Decisions in This Circuit and Others That Rely on That Case as Precedent.

The Michigan Consolidated Gas case held that where an agency ignores factors "relevant to the public interest" the Court will order the agency to give proper consideration of those public interest factors. 283 F.2d 205, 226 (D.C. Cir. 1960), cert. denied, 364 U.S. 913, 81 S.Ct. 276 (1960).

In the Michigan Consolidated Gas case, this Court set aside orders of the Federal Power Commission and remanded the case for further proceedings to consider public interest factors raised by the parties. The Commission protested that the Court was intruding into areas of the agency's exclusive responsibility. The Court responded:

> Where, as here, a regulatory agency has ignored factors which are relevant to the public interest, the scope of judicial review is sufficiently broad to order their consideration. These limits are not to be confused with the narrower ones governing review of an agency's conclusions reached upon proper consideration of the relevant factors.
>
> (*Id.* at 226) (Emphasis added)

That decision was cited and followed by the Second Circuit Court of Appeals in Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F.2d 608, 620 (2d Cir. 1965):

> This court cannot and should not attempt to substitute its judgment for that of the Commission. But we must decide whether the Commission has correctly discharged its duties, including the proper fulfillment of its planning function in deciding that the "licensing of the project would be in the overall public interest."

> The Commission must see to it that the record is complete. The Commission has an affirmative duty to inquire into and consider all relevant facts.
>
> (Emphasis added.)

In support of this statement the Second Circuit cited this Court's decision in Michigan Consolidated Gas Co. v. Federal Power Comm. The reliance on this Court's holding that an agency has a duty to consider all aspects of the public interest in proceedings before it caused Scenic Hudson to become a landmark in the field of environmental law.

The panel decision has now rejected that principle in this Circuit.

The Public Interest Mandate

Congress explicitly directed the Federal Communications Commission to encourage deployment of advanced telecommunications technology "in a manner consistent with the public interest." (47 U.S.C. § 157.)

> **(a) In general.** – The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the pubic interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.
>
> (Emphasis added.)

The obligation of the FCC to act in the public interest is especially relevant to its current headlong rush to authorize digital, high speed, broadband wireless transmissions, particularly in regard to the potential health impact on schoolchildren. The "public interest" plainly includes public health considerations in addition to technological advancement.

Impact on Schoolchildren

Congress directed the FCC to focus "in particular" on the wireless transmission of advanced telecommunications to "elementary and secondary schools and classrooms."

EMR's Reply Brief called the panel's attention to the FCC's currently pending plans to expand wireless transmissions to the "broadband" level and the agency's emphasis on transmitting these higher frequency radio signals into schools (See FCC 99-5). EMR pointed out that:

> The FCC has never reviewed, questioned or altered its obsolete 1985 Radiofrequency Radiation Guidelines based on the potential environmental impact of the new advanced broadband communications services on students at elementary and secondary schools. The FCC's order of August 14, 2003, which is the subject of this appeal, has now closed the door to any FCC-initiated research to determine whether guideline changes are required to protect schoolchildren from harm caused by broadband RF radiation.
>
> (Emphasis added.)

The panel's action wholly repudiates the Michigan Consolidated Gas decision. The FCC's pending expansion of high frequency broadband wireless transmissions plainly should not be allowed to proceed without initiating an adequate study of the potential public health effects on innocent bystanders – especially school children, the primary target of the FCC's broadband initiative. Children, as the British NRPB has recognized (*supra*), are biologically different from adults and the same exposure standards for adults do not apply to them. Children's skulls, for instance, are thinner and absorb radiation more efficiently with deeper RF penetration. They will also be around longer than adults to accumulate long-term effects from years of additional exposure.

The concerns of parents of elementary school children over potential long-term harm to their children from wireless RF radiation is dramatically articulated by a recent

statement by the spokesperson for PS 122 in New York City [available at http//www.emrpolicy.org/public_policy/schools/gonzalez_11jan05.pdf].

UK's "Precautionary Approach"

The NRPB (Stewart) reports issued in 2000 and 2004 (see Addendum E) urged a "precautionary approach" particularly in relation to exposure of small children to RF radiation – a "public interest" concern the FCC has totally failed to address or consider.

II. This Proceeding Involves a Public Health Question of Exceptional Importance Relating to the Effects of Continuous Exposure to RF Radiation from Telecommunications Infrastructure on Schoolchildren and Present and Future Generations of Americans -- A Question the Panel Refused to Address Based on Its Obvious Misreading of the Supreme Court's 2004 Decision in *Norton v. Southern Utah Wilderness Alliance*, 124 S.Ct. 2373 (2004).

The panel cited the Supreme Court's 2004 decision in Norton as the basis for rejecting any continuing FCC obligation to examine relevant scientific studies under NEPA:

> EMR accordingly focuses on agencies' NEPA duties when new evidence turns up after completion of an EIS (or equivalent), citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989). *Marsh* considered a claim that the Corps of Engineers had neglected its NEPA duties when, one third of the way through construction of a dam, it received information arguably suggesting that the dam would cause more severe environmental harm than had been supposed at the time the EIS had been completed and construction approved. Regulations require an agency to prepare a Supplemental Environmental Impact Statement when "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts," 40 C.F.R. § 1502.9(c)(1)(ii), and the parties agreed that agencies were required to take a "hard look" at evidence suggesting that this standard had been met. *Marsh*, 490 U.S. at 370-74. The Court rejected plaintiffs' view that a reviewing court should examine the evidence afresh, ruling instead that the usual "arbitrary and capricious" standard should apply. *Id.* at 375-78. EMR suggests that the current circumstances are a "fair parallel" to those in *Marsh*. Petitioner's Br. at 36.
>
> The FCC argues strenuously that it satisfied the "hard look" requirement, but we need not resolve that issue. In *Norton v. Southern Utah Wilderness Alliance*, 124

> S.Ct. 2373 (2004), the Court declined to apply *Marsh* were the federal action in question was approval of a land use plan. Unlike the dam in *Marsh*, that "action" was complete when the new information was received. *Id.*, at 2384-85. Presumably later actions pursuant to the plan might be significant enough to requires NEPA filings, just as some FCC actions relating to RF radiation will need new environmental studies – including, for example, the circumstances where the current regulations call for such studies. But the regulations having been adopted, there is at the moment no "ongoing" federal action, *id.* at 2385, and no duty to supplement the agency's prior environmental inquiries.
>
> (Slip opinion, at pp. 4-5.) (Emphasis added.)

The "Ongoing" Federal Action

The panel's major factual error is the statement that "there is at the moment no 'ongoing' federal action." The panel plainly overlooked the facts provided in EMR's Main Brief (at pp.46-47) on the FCC's pending plans to expand radio frequencies for wireless broadband transmissions:

> 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.[3]
>
> > 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.)

The factual reference to pending FCC action to authorize expanded RF broadband transmissions also appeared in petitioner's Reply Brief (at pp. 2-3):

[3] [Original footnote] 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.

> The legal obligation of the FCC to act in the public interest is especially relevant to the current head-long rush by telecommunications companies to invest in digital, high speed, broadband technology.

Most significantly, the panel overlooked the pendency of the proposed new regulations announced by the FCC just before oral argument in this case, explicitly called to the panel's attention in the "Recent Developments" document dated September 27, 2004 handed up to the Court during the oral argument itself. That document clearly and accurately described the FCC's ongoing federal action:

> September 9, 2004:
>
> The FCC announced that it has designated an expanded spectrum for advanced wireless services. Official FCC press release stated:
>
> > Washington, DC – The Federal Communications Commission today provided an additional twenty megahertz of spectrum that can be used to offer a variety of broadband and advanced wireless services (AWS), potentially including "third generation" (3G) wireless services. The Commission allocated and paired five-megahertz blocks of spectrum at 1915-1920 MHz with 1995-2000 MHz, and 2020-2025 MHz with 2175-2180 MHz for AWS use. This will benefit the public by fostering the development of new wireless services that will provide American consumers with additional communications options and capabilities. [News media contact: Bruce Romano]
>
> September 20, 2004:
>
> The Washington Post reported:
>
> > Officials at the Federal Communications Commission said research has shown that it is safe to live or work in the shadow of a wireless phone antenna, provided the structure meets federal standards. Bruce Romano, associate chief at the FCC's office of engineering and technology, said government experts keep up with the latest research, adding: "We haven't seen anything that raises any concerns."

A copy of the FCC Press Release of September 9, 2004 is attached as Addendum F, headed:

FCC DESIGNATES SPECTRUM FOR ADVANCED WIRELESS SERVICES AND PROPOSES LICENSING AND SERVICE RULES

Particularly noteworthy is the misleading statement by the FCC's press representative to The Washington Post that "research has shown that it is safe to live and work in the shadow of a wireless phone antenna, provided the structure meets federal standards." No research into biologic effects of RF radiation supports that claim. Much of the current research shows exactly the contrary. The FCC's irresponsible lulling of the public's concerns about these health issues emphasizes the urgency for this Court to exercise its power to direct the FCC to consider public interest factors where "a regulatory agency has ignored factors which are relevant to the public interest" as this Court held in 1960 in the Michigan Consolidated Gas case (See I, *supra*).

CONCLUSION

The Court should grant rehearing *en banc* to review the arbitrary and capricious action of the Federal Communications Commission in refusing to initiate or to request accurate up-to-date RF radiation scientific research into the biologic health effects of continuous exposure of innocent bystanders, particularly children, to the rapidly expanding quantity and range of RF radiation from high-frequency wireless transmissions currently being authorized by the FCC on a continuing and ongoing basis with no concern for the harm it may be doing to the general public.

Respectfully submitted,

_____
WHITNEY NORTH SEYMOUR, JR.
Counsel of Record
425 Lexington Avenue, Room 1721
New York, New York 10017-3954
(212) 435-7640

January 13, 2005

Attorney for Petitioner