

Local Governments Cannot Regulate Environmental Effects of Cellular Telephone Towers

The United States Court of Appeals for the Second Circuit has upheld guidelines issued by the Federal Communications Commission (FCC) setting health and safety standards on radio frequency radiation (RFR) emissions and prohibiting local governments from considering health effects of cellular tower radiation in zoning decisions.

In 1996 and 1997, the FCC issued guidelines for use in evaluating environmental effects of RFR emissions from cellular towers. The new guidelines incorporated maximum permitted exposure (MPE) limits established by the Congressionally-chartered National Council on Radiation Protection (NCRP). In addition, FCC decided to exempt certain types of towers from environmental reviews based on a presumption that these towers comply with MPEs.

While the FCC was finalizing its 1996 MPE guidelines, Congress passed the Telecommunications Act of 1996. One provision of the Telecommunications Act prohibits state and local governments from denying permit applications for cellular towers based upon the environmental effects of RFR if the FCC's guidelines are followed. The FCC then issued a rule consistent with the Telecommunications Act:

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 regulations contained in this chapter concerning the environmental effects of such emissions.

This provision alarmed local citizens groups because it effectively stymied local community objections to tower siting based on health and safety concerns.

The petitioners, Cellular Phone Taskforce and a large number of other citizens groups, sued the FCC in federal court to challenge the guidelines. The petitioners challenged both the health and safety aspects of the rule and the preemption provision. Among the arguments made by the citizens groups were the following:

- The Agency failed to give due consideration to new scientific evidence of low level (“non-thermal”) RFR hazards;
- The FCC did not heed all of the advice from other government agencies and standards setting organizations: the Environmental Protection Agency (EPA); the Food and Drug Administration (FDA), the Occupational Health and Safety Administration, (OSHA), the National Institute for Occupational Safety and Health (NIOSH); and the American National Standards Institute (ANSI);
- The exemption of certain categories of towers, such as lower power rooftop antennae and antennae over 10 meters above ground, from demonstrating safe RFR exposure levels did not

take into account the additive effects of other nearby towers or that persons in nearby tall buildings could be overexposed;

- The FCC allegedly did not fulfill its obligations under the National Environmental Protection Act (NEPA) to conduct and prepare an Environmental Impact Statement on the rules; and
- The FCC exceeded its authority in preempting state and local governments from regulating wireless tower operation based on environmental concerns.

Health Effects of Low-Level RFR

The citizens groups complained that the FCC ignored new evidence of harmful effects of low RFR levels. Because ANSI and NCRP had noted some conflicting evidence of low-level “non-thermal” effects of RFR but had not incorporated that evidence into their standards, the petitioners felt that the FCC should have independently evaluated this evidence. The court disagreed. It was reasonable, the court concluded, for the FCC to rely on ANSI and NCRP expertise unless there was new evidence that the fundamental understanding underlying these standards was invalid.

The petitioners also argued that FCC should have adopted a policy used by the Nuclear Regulatory Commission (NRC) called the “principle against uncertainties.” According to NRC rules, exposure to certain types of radiation must be well below levels known to be harmful. Under this principle, the citizens groups asserted, the FCC should create greater safety margins in the guidelines to account for uncertainties in available data on health effects of RFR exposure.

The court noted, however, that the FCC’s mission was to “balance between the need to protect the public and workers from exposure to potentially harmful RFR electromagnetic fields and the requirement that industry be allowed to provide telecommunications services to the public in the most efficient and practical manner possible.” Thus, requiring exposure to be kept as low as reasonably achievable in the face of scientific uncertainty would be inconsistent with the FCC’s mandate.

Failure to Heed Other Agencies’ Advice

The citizens groups objected to failure by FCC to heed a number of recommendations by various regulatory and standards-setting organizations:

- EPA, NIOSH, and OSHA expressed concern about a two-tiered exposure system allowing higher exposures in the workplace than in the general population;
- ANSI made recommendations on evaluating induced currents in metal objects near cellular towers;
- FDA expressed concern about the possibility of effects on certain medical devices such as pacemakers; and,
- NIOSH criticized certain licensee self-certification procedures.

The court was satisfied, however, that FCC had considered all of the agencies' expressed concerns, and gave reasoned responses to each. In large part, the FCC concluded that state of knowledge and experience with many of the issues raised by the agencies was insufficient to allow for practical solutions. Thus, the court concluded that the FCC's approach was not arbitrary and capricious.

Categorical Exclusions for Certain Installations Were Reasonable

The final FCC guidelines require environmental assessments only when building-mounted antennae exceed 1000 Watts or tower-mounted antennae are less than 10 meters tall and total power exceeds 1000 Watts.

The citizens groups objected to these "categorical exclusions" because, they argued, persons could be overexposed to RFR, even when transmitter power is low or the tower is tall. For example, a person in a building next to tower could be very close to the antenna, and receive excessive levels of RFR. In addition, the citizens groups were concerned that there could be additive effects and "hot spots" where several low-power transmitters were located in close proximity to each other.

In response, the court pointed out that the FCC conducted worst-case analyses considering the effects of multiple antennae located on the same tower, and found that exposure levels would still be many times below allowed levels. As an added protection, the court noted, the FCC rules permit any interested person to petition the FCC for review if a site is believed to exceed maximum permissible exposure levels.

NEPA Was Not Violated

Under the NEPA, federal agencies must consider the environmental effects of their actions. Whenever an agency takes an action that may impact the environment, NEPA requires the agency to either prepare an environmental impact statement ("EIS") or make the determination that there is no significant impact by conducting an environmental assessment ("EA"). The plaintiffs in this case contended that the FCC should have complied with NEPA and prepared either an EIS or an EA.

The court responded that the rulemaking process was functionally equivalent to compliance with NEPA. The FCC consulted with and received comments from many experts and other federal agencies in preparing the FCC guidelines. The rulemaking record showed ample evidence that FCC carefully considered the environmental impacts of the guidelines. The FCC found that the maximum permissible exposure levels would be safe, and that some facilities could be categorically be excluded from conducting EAs based on their physical designs. Thus, no EIS was required.

FCC's Preemption Rule Was Valid

Finally, the citizens groups compared the language of the preemption provision of the Telecommunications Act with FCC's published interpretation of the Act. In addition to preempting local governments from regulating "placement, construction, and modification of personal wireless service facilities," the FCC prohibited local governments from regulating the *operation* of such facilities based on RFR emissions. The plaintiffs complained that the FCC interpretation was not consistent with the plain meaning of the Act.

The court agreed that a person reading the statute could reasonably infer that local governments are not preempted from regulating operation of personal wireless service facilities. However, because the Act does not explicitly preserve for local governments the power to regulate the operation of these facilities, the statute was, at most, ambiguous on this point. In keeping with a long tradition of deference to reasonable agency interpretations of statutes under the U.S. Supreme Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, the FCC was entitled to deference from the court on the scope of the FCC's preemption of RFR facility regulation.

Conclusion

The court of Appeals affirmed the guidelines promulgated by the FCC, finding that the agency acted within its authority in establishing RFR exposure limits, categorical exclusions from EA requirements, and preempting local regulation of personal wireless service facilities on the basis of environmental effects.

Cellular Phone Taskforce v. Fed. Communications Comm'n, 2000 WL 228230 (2nd Cir. 2000) (Feb. 18, 2000).

This article was prepared by Stuart J. Weiss, an associate in our Environmental Department, and previously appeared in the April, 2000 edition of the Michigan Environmental Compliance Update, a monthly newsletter prepared by the Environmental Department and published by M. Lee Smith Publishers.