

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Children’s Health Defense, Michele
Hertz, Petra Brokken, Dr. David O.
Carpenter, Dr. Paul Dart, Dr. Toril H.
Jelter, Dr. Ann Lee, Virginia Farver,
Jennifer Baran, Paul Stanley, M.Ed.
Petitioners

Petition for Review of Order
by the Federal Communications
Commission

v.

Federal Communications Commission
and United States of America,
Respondents

PETITION FOR REVIEW

Children’s Health Defense (“CHD”), Michele Hertz, Petra Brokken, Dr. David O. Carpenter, Dr. Paul Dart, Dr. Toril H. Jelter, Dr. Ann Lee, Virginia Farver, Jennifer Baran and Paul Stanley, M.Ed. (henceforth collectively “Petitioners,” “Children’s Health Defense” or “CHD”), hereby petition the court for review of Federal Communications Commission (“FCC”) “agency action” and inaction. The Commission has failed to promulgate rational, science-based radiofrequency emissions (“RF”) rules that adequately protect the public’s health and safety.¹

¹ The FCC order for which review is sought is identified below, as required by 28 U.S.C §2344 and Federal Rules of Appellate Procedure Rule 15(a)(2)(C).

Radio frequencies can transmit information through the air. Wi-Fi, cell towers and phones, smart meters and satellites exploit this capability. RF transmissions, however, emit radiation. The FCC established its first wireless emission standards in 1996. The guidelines' entire premise is that radio frequencies are "non-ionizing" and do not create an immediate change in molecules so they are not harmful, unless the radiation is so intense it has a "thermal effect" and changes the temperature in living tissue.

Radiation from wireless systems and their associated user devices now surrounds everyone and permeates our lives and our bodies. RF is invisible and silent to most people, but the science and human evidence strongly shows that RF exposure at currently authorized "non-thermal" levels is devastatingly harmful. The FCC stubbornly maintains its thoroughly debunked assumption that "non-thermal" radiation is safe, but the record below conclusively proves significant biological and adverse effects also occur from exposure to "non-thermal" radiation levels well below current FCC emission limits.

"[E]ach person should enjoy a healthful environment," (42 U.S.C. §4331(c)), and the FCC is therefore supposed to promulgate rules and standards to protect health, safety and the environment. The question before the Court is whether the FCC has adequately ensured that the RF radiation emissions it authorizes and regulates are not harmful to humans, especially children. The FCC

miserably failed in this important duty and committed other substantive and procedural errors along the way. The FCC refused to acknowledge or adequately address strong evidence that serious biological effects and adverse health consequences occur from exposure at levels at and below the FCC's present thermal based limits. Its recent decision to maintain the current rules must be overturned.

Electromagnetic fields and radiation affect us in ways having nothing to do with temperature change. Man-made pulsed and modulated RF radiation levels reach levels millions of times higher than what our bodies evolved to tolerate. The FCC has the burden of proving its standards protect against injury. It tries to carry its burden through assumptions, and steadfastly resists meaningful consideration of all the evidence demonstrating the assumptions have no biological basis.

Not all of us experience the adverse effects (yet), but the Petitioners surely do. The Petitioners and others like them are as invisible to the FCC and other policymakers as the electromagnetic toxicant they actively facilitate, despite growing patient complaints and extensive evidence documenting the harm inflicted on an ever-increasing number of sufferers.

The Petitioners themselves and their patients constitute the evidence of the very harm the FCC assumes away. Petitioner Children's Health Defense ("CHD") sees examples every day. CHD is a non-profit organization dedicated to ending

children's chronic health conditions by eliminating harmful toxic exposures, including exposure to wireless radiation, and interacts with sufferers every day. Petitioner Petra Brokken's daughter became sick from the Wi-Fi in her school. Petitioner Michele Hertz developed Microwave Sickness. She contacted the FCC to tell her story and seek help. The man she spoke to responded "*we don't deal with humans, only frequencies*" and hung up.

Petitioner David O. Carpenter, MD is the Director of the Institute for Health and Environment, University of Albany, a collaborating center for the World Health Organization ("WHO"). He is the co-editor of the "Bio-Initiative Report." This report – the most extensive review of the science on this topic – analyzed 1,800 peer reviewed scientific studies on harmful RF radiation. The Bio-Initiative Report concludes that bio-effects from wireless technology can occur within minutes of exposure. Petitioners Toril Jelter, MD and Paul Dart, MD are medical practitioners who regularly see wireless-related afflictions in their clinics. Petitioner Ann Lee, MD, is a physician whose twelve-year-old son has a heart condition aggravated by RF. When exposed to Wi-Fi his symptoms become worse and he feels that his heart "is about to explode like a volcano." Petitioner Virginia Farver's son died from Glioblastoma, a brain tumor caused by the radiation emitted from a nearby cell tower antenna. Petitioner Jennifer Baran's two minor children suffer various symptoms when exposed. Petitioner Paul Stanley is a middle-school

technology teacher and a professional musician who developed Microwave Sickness, had to quit his job, sell his home, live in his car and has spent many tens of thousands of dollars trying to get better.

Petitioners, their children, their patients and many others have developed Microwave/Radio-wave Sickness, a condition recognized by the International Code of Diseases and courts. They experience various symptoms and adverse physiological injuries when exposed to wireless devices and infrastructure. Symptoms may include headaches, pain in the head or tingling when using wireless, difficulty sleeping, cognitive and memory problems, heart palpitations, fatigue, persistent flu-like symptoms, skin rashes, auditory effects, nausea, noise sensitivity and nosebleeds and many other symptoms. RF radiation can cause or contribute to increased harmful free radicals and cancer risks, cellular stress, genetic damage, structural and functional changes of the reproductive system, learning and memory deficits and neurological diseases, along with negative impacts on general well-being.

Microwave Sickness is a spectrum condition. Some experience manageable symptoms, but for others the effects are debilitating. Those acutely injured cannot go out in public, or walk on the streets. They suffer at work, cannot use public transportation, fly or even go to a hospital. Children face ridicule and rejection and many have to withdraw from school. Being home provides no solace: neighbors

have Wi-Fi hotspots and wireless companies install powerful transmitters right outside or just down the street. Those charged with protecting the public, and especially children, hide behind the FCC's casuistic rules to claim this radiation is safe and there can be no harm.

The Petitioners asked the FCC for relief, but it abjectly refused. The Commission prioritizes the well-being of the industry that it is obligated to regulate over the people's health and safety, and it is willing to sacrifice the entire citizenry at the altar of that industry. This misguided policy ignores the economic and social costs of this growing widespread sickness. As noted in an appeal to the United Nations by over 200 scientists, “[i]naction is a cost to society and is not an option anymore....”

The Commission and its partners have been misleading the public with false assurances based on scientifically refuted standards and measures. The FCC's refusal to responsibly fulfill its health and safety role consigns the Petitioners and their children to tortuous pain, misery and hopelessness and forces parents and health care professionals to continue watching helplessly as their children and patients wither and sometimes die. Avoiding exposure is the cure but in this wireless world that is becoming impossible.

Petitioners are not a marginal group of the population whose reactions are abnormal. The scientists' appeal to the United Nations noted a “*pan-epidemic*” of

sickness resulting from wireless-related radiation, which has been “*proven to be harmful to humans and the environment.*” Wireless related sickness, including Microwave Sickness and brain tumors, is widespread and rapidly growing. Wireless intolerance in a wireless world is already a nightmare, but it will soon get even worse. Hundreds of thousands of highly powerful 5G “small” cellular antennas are being deployed near homes and schools, and tens of thousands of satellites in space will beam this toxic radiation all over the earth. There will be no escape for the Petitioners, or to all others who will soon fall victim. Parents, children or entire families are already getting sick soon after a “small cell” shows up near their homes. The Petitioners and others like them have little to no redress. Absent relief, the Petitioners will be permanently consigned to misery and what scientists and doctors already claim is a global pan-epidemic is going to get even worse.

* * *

The FCC’s “thermal based” guidelines were misguided and obsolete at the time of initial adoption: the “non-thermal equals safe” construct did not comport with already-existing evidence from studies and reports by military and government agencies. Since then, thousands more peer reviewed scientific studies have clearly demonstrated that the FCC’s myopic focus on thermal effects irrationally ignores the risks presented by “non-thermal” radiation. Profound

adverse effects, including damage to the DNA, occur after exposure to radiation at levels well below those causing a “thermal effect.” Entirely different mechanisms, such as ‘oxidative stress,’ cause continuous and pernicious biological damage.

Radiation levels are only part of the problem. The network-user communications path uses modulation and pulsation to transmit data (session control, voice, text, media). Many studies conclude pulsation and modulation are bio-active and potentially cause more harm than merely the RF carrier wave and its radiation.

The FCC carefully crafted its guidelines to exclude consideration and measurement of the very activity that directly harms living things. The Commission wants to keep them despite the overwhelming evidence its standards do not protect the public and lead to direct, ongoing and widespread injuries, especially to children.

Most recently, the FCC and the FDA recklessly dismissed the results of the FDA funded National Toxicology Program (“NTP”) Study. NTP is the federal expert agency for evaluation of toxins. Its determinations represent the scientific gold standard. The NTP \$30 million, 10-year study, the biggest of its kind, found clear evidence non-thermal RF radiation causes cancer and damages DNA. These conclusions, however, were not surprising or novel; they simply confirmed earlier studies’ findings, including epidemiological studies that show increased risk of

brain tumors from cell phone use. Incredibly, the FDA, which funded the study, thereafter summarily declared that the NTP “findings should not be applied to human cell phone usage.” FDA disregarded the NTP finding of biological harm at non-thermal levels and advised the FCC that the “available scientific evidence to date does not support adverse health effect in humans due to exposures at or under the current limits.”

The FCC rushed to accept the FDA recommendation despite overwhelming and conclusive contrary scientific and human evidence in the record below. The *Order* under review states “[a]fter reviewing the extensive record ... we find no appropriate basis for and thus decline to propose amendments to our existing limits at this time.” FCC 19-126, ¶2. The FCC also declined to “revisit our RF exposure policy as it pertains to children.” Similarly, the agency found “no reason to revisit our equipment authorization procedures.” *Id.* ¶15. It therefore terminated its 2013 Notice of Inquiry. The Second Report and Order portion of the same order went on to “streamline” criteria for determining whether exposure evaluations are required, and implemented “a set of formulas for situations in which the risk of excessive RF exposure is minimal” and granted even more “flexibility for licensees to establish compliance with our RF exposure limits.” *Id.* ¶3.² In other words, the Commission

² The Commission also initiated a Further Notice of Proposed Rulemaking (“FNPRM”) and invited comments on certain proposed rules. The FNPRM portion of the order is not final or

fecklessly maintained its current exposure limits and proceeded to change the rules so industry can even more prodigiously inflict harm on an unsuspecting and vulnerable public captured by their electronic devices and without any knowledge of the problem or its scope. For so long as the government willfully disregards and abandons its public safety mandate, the public will remain blissfully ignorant and exposed to serious harm. That will continue until sickness overwhelms them or someone they love, just as it has the Petitioners.

* * *

The Commission has statutory authority over RF related matters pursuant to its organic statute. Other enactments, including but not limited to the National Environmental Policy Act (“NEPA”), 42 U.S.C. Ch. 55, the Americans With Disabilities Act (“ADA”), 42 U.S.C. Ch. 126 and the Federal Food, Drug and Cosmetic Act (“FDA Act”), 21 U.S.C. Ch. 9, directly or indirectly require FCC evaluation and consideration of its RF related rules to ensure compliance and consistency with specific procedural or substantive mandates.

The matter below was part of a long-running inquiry whether the Federal Communications Commission (“FCC” or “Commission”) should change its rules to prevent adverse health effects from exposure to radiofrequency (“RF”) emissions by transmitters and facilities such as base stations, space stations and

presently subject to review.

end user devices insofar as they subject to regulation by the FCC. *See, Proposed Changes in the Commission's Rules Regarding Human Exposure to Radiofrequency Electromagnetic Fields*, First Report and Order, Further Notice of Proposed Rulemaking, and Notice of Inquiry, 28 FCC Rcd 3498 (2013).

The agency action for which review is sought is the Resolution of Notice of Inquiry, Second Report and Order, Notice of Proposed Rulemaking and Memorandum Opinion and Order, *In the Matter of Proposed Changes in the Commission's Rules Regarding Human Exposure to Radiofrequency Electromagnetic Fields Reassessment of Federal Communications Commission Radiofrequency Exposure Limits and Policies Targeted Changes to the Commission's Rules Regarding Human Exposure to Radiofrequency Electromagnetic Fields*, FCC 19-126, __ FCC Rcd __, (rel. Dec. 4, 2019). A copy of the challenged order is contained in Attachment "A" hereto in compliance with 28 U.S.C §2344 and Federal Rules of Appellate Procedure Rule 15(a)(2)(C).

Petitioners seek review of the declination to initiate a rulemaking concerning the issues covered by the NOI and the promulgation of rule amendments in the Second Report and Order. Those matters are administratively final and subject to timely review pursuant to 5 U.S.C §702, 47 U.S.C. §402(a), 28 U.S.C. §2342(1) and 28 U.S.C. §2344. Venue is proper in this Court pursuant to 28 U.S.C. § 2343.

The Petitioners and their state of residence are:

Children’s Health Defense is a 501(c)(3) nonprofit advocacy organization dedicated to ending children’s chronic health conditions by eliminating harmful toxic exposures. Wireless technology radiation is a toxin and a major contributory factor in the exponential increase in sickness in children. CHD advocates on children’s behalf and seeks science-based safeguards to help the injured and prevent harm to others. CHD did not file comments in its own name, but several members, including but not limited to the named individual Petitioners, did participate. CHD has “Article III” organizational standing to bring and maintain this case.

Other named individual Petitioners participated below or otherwise sought relief from the FCC. Each is aggrieved and harmed by the agency action and has standing to seek review in this court. The agency action (and inaction) challenged herein directly threatens the Petitioners’ health, safety and personal and financial well-being, or negatively affects their professional activities and endeavors.

The Petitioners seek relief from this Court because the challenged agency action, including the determination to withhold or delay action, was:

- (A) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (B) Contrary to constitutional right, power, privilege, or immunity;
- (C) In excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- (D) Without observance of procedure required by law;

- (E) Unsupported by substantial evidence; and
- (F) Unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

The Petitioners respectfully request that this Court hold unlawful, vacate, enjoin, and set aside the challenged order, find the agency unlawfully or unreasonably withheld action and then remand the matter to the agency for further consideration and action. The Petitioners further request such additional relief as may be appropriate, necessary or proper under the circumstances.

Respectfully Submitted

/s/
Robert F. Kennedy, Jr.*
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Attorneys for Petitioners

*Not Admitted. An Application for Admission to the Court has been filed consistent with Federal Rule of Appellate Procedure 46(a) and Ninth Circuit Rule 46-1.

Dated: February 2, 2020

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Children's Health Defense states that it is a national, nonpartisan, nonprofit organization with no parent corporation and no publicly held corporation owning 10% or more of its stock or other interest in the organization.

Dated: February 2, 2020

Respectfully submitted,

/s/ _____
W. Scott McCollough

CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2020, I filed the foregoing Petition for Review via the Court's ECF filing system. I further certify that I caused one copy to be served on the following counsel by First Class Mail (and email to the FCC):

Thomas M. Johnson, Jr.
General Counsel
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
LitigationNotice@FCC.gov

William Barr
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

The proceeding below was an informal rulemaking and as such the requirement in Rule 15(c) of the Federal Rules of Appellate Procedure to serve "each party admitted to participate in the agency proceedings" does not apply. For courtesy purposes I will cause one copy of the Petition for Review to be delivered by First Class Mail to each commenter identified by the FCC in Appendix E to the *Order* along with other commenters that do not appear in Appendix E but are cited in the challenged portions of the *Order*. See Attachment B hereto.

/s/ _____
W. Scott McCollough

ATTACHMENT “A” TO PETITION FOR REVIEW

Resolution of Notice of Inquiry, Second Report and Order, Notice of Proposed Rulemaking and Memorandum Opinion and Order, *In the Matter of Proposed Changes in the Commission’s Rules Regarding Human Exposure to Radiofrequency Electromagnetic Fields Reassessment of Federal Communications Commission Radiofrequency Exposure Limits and Policies Targeted Changes to the Commission’s Rules Regarding Human Exposure to Radiofrequency Electromagnetic Fields*, FCC 19-126, ET Docket Nos. 03-137, 13-84 and 19-226, ___ FCC Rcd ___, 2019 FCC LEXIS 3622 (rel. Dec. 4, 2019)

ATTACHMENT “B” TO PETITION FOR REVIEW

Commenters identified by the FCC in Appendix E to the *Order* along with other Commenters that do not appear in Appendix E but are cited in the challenged portions of the *Order*.

Commenters identified by the FCC in Appendix E to the Order

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| Alarm Industry Communications Committee (AICC) | 2120 L Street NW, STE 300 Washington, D.C. 20037 |
| American Radio Relay League (ARRL) | 1629 K Street NW, STE 300 Washington, D.C. 20006 |
| AT&T Services Inc. (AT&T) | 601 Massachusetts Avenue, N.W. Washington, DC 20001 |
| B. Blake Levitt & Henry C. Lai | P.O. Box 2014 New Preston, CT 06777 |
| Benjamin Walters on Behalf of City of Portland | 1221 SW 4th Ave, Suite 430 Portland, OR 97204 |
| Blooston, Mordkofsky, Dickens, Duffy & Prendergast for Part 90 licensees | 2120 L Street, N.W., Suite 300 Washington, D.C. 20037 |
| Cardiac Rhythm Management Device Committee/Working Group WG02 on EMC Protocols of the Association for Advancement of Medical Instrumentation | 4301 N. Fairfax Dr., Suite 301 Arlington, VA 22203 |
| City of Boston, Massachusetts and City of Philadelphia, Pennsylvania | 2000 Pennsylvania Avenue N.W., Suite 4300 Washington, D. C. 20006 |
| Cohen, Dippell and Everist, P.C. | 1420 N Street, NW, Suite One Washington, D.C. 20005 |
| Consumer Electronics Association (CEA) | 1919 South Eads Street Arlington, VA 22202 |
| Consumers for Safe Cell Phones (CSCP) | 520 Ridgeway Dr. Bellingham, WA 98225 |
| CTIA – The Wireless Association (CTIA) | 1400 16th Street, N.W. Suite 600 Washington, DC 20036 |
| David Hubert | 306 Pitt Ave. Sebastopol, CA 95472 |
| Department of Health and Human Services Food and Drug Administration Center for Devices and Radiological Health | HHS/FDA Silver Spring MD 20993 |
| EMF Safety Network | P.O. Box 1016 Sebastopol, CA 95473 |
| Fixed Wireless Communications Coalition, Inc. | 1300 N 17th St., Suite 1100 Arlington, VA 22209 |
| Hammett & Edison | 470 3rd St W Sonoma, CA 95476 |
| Hewlett-Packard Company | 1501 Page Mill Road, MS 510101 Palo Alto, CA 94304 |
| International Brotherhood of Electrical Workers (IBEW) | 900 Seventh St., NW Washington, D.C. 20001 |
| International Committee on Electromagnetic Safety of the IEEE (IEEE-ICES) | 170 Fairview Drive P.O. Box 386 Bedminster, NJ 07921 |

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| James Edwin Whedbee | 5816 N Buttonwood Tree Lane Gladstone, MO 64119 |
| Mark Douglas/IT'IS Foundation | 1101 K St NW 610 Washington, D.C. 20005 |
| Marv Wessel/Global RF Solutions | 1900 W Chandler Blvd, Suite 15-228 Chandler, AZ 85224 |
| Medtronic, Inc. | 8200 Coral Sea Street, NE, MVS11 Mounds View, MN 55112 |
| Mobile Manufacturers Forum (MMF)/Mobile and Wireless Forum (MWF) | Bergbosstraat 115 9829 Merelbeke Belgium |
| Motorola Solutions, Inc. | 1455 Pennsylvania Ave, NW Washington, D.C. 20004 |
| National Association of Broadcasters (NAB) | 1771 N Street, NW Washington, D.C. 20036 |
| Nickolaus E. Leggett | 1432 Northgate Square, #2° Reston, VA 20190 |
| Nokia Corporation | 1100 New York Avenue, NW Suite 705 West, Washington, D.C. 20005 |
| Occupational Safety and Health Administration (OSHA) | U.S. Department of Labor, (OSHA) 200 Constitution Avenue, N.W. Washington, D.C. 20210 |
| PCIA – The Wireless Infrastructure Association | 500 Montgomery St., Suite 500 Alexandria, Virginia, 22314 |
| Qualcomm Incorporated | 1730 Pennsylvania Avenue, NW Suite 850 Washington, D.C. 20006 |
| RF Check, Inc. | 1919 M Street NW, 8th Floor Washington, D.C. 20036 |
| Richard A. Tell Associates | 1872 E. Hawthorne Ave Colville WA 99114 |
| Robert Johnson on Behalf/Narda-East | 435 Moreland Road Hauppauge, NY 11788 |
| Site Safe, Inc. | 200 N Glebe Rd Suite 1000 Arlington, VA 22203 |
| Telecommunications Industry Association (TIA) | 1320 N. Courthouse Rd Arlington, VA 22201 |
| The EM Radiation Policy Institute (EMRPI) | P.O. Box 117 Marshfield VT 05658 |
| The HetNet Forum (PCIA) | 500 Montgomery St. Suite 500 Alexandria, VA 22314 |
| Utilities Telecom Council (UTC) | 1129 20th Street, NW, Suite 350 Washington, D.C. 20036 |
| Verizon and Verizon Wireless (Verizon) | 1300 I Street N.W., Suite 400 West Washington, D.C. 20005 |
| Wi-Fi Alliance | 701 Pennsylvania Ave, NW, Suite 900 Washington, DC 20004 |

Commenters not appearing in Appendix E but cited in the challenged portions of the *Order*

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| Center for Devices and Radiological Health, Food and Drug Administration, Department of Health and Human Services, | Food and Drug Administration Silver Spring, MD 20993 |
| City of Portland | Benjamin Walters 1221 SW 4th Ave, Suite 430, Portland, OR 97204 |
| Environmental Health Trust | P.O. Box 58 Teton Village WY 83025 |
| Gil Amelio | 5940 Lake Geneva Drive Reno NV 89511 |
| Grassroots Environmental Education | 52 Main Street Port Washington, NY 11050 |
| mmWave Coalition | 8026 Cypress Grove Lane Cabin John, MD 20818 |
| Montgomery County, Maryland | Gerard Lavery Lederer, Isiah Leggett Montgomery County, Maryland 2000 Pennsylvania Avenue N.W., Suite 5300 Washington, DC , 2006 |
| Parents for Safe Technology | 6 Hillside Greenbelt, MD, 20770 |
| Wireless Infrastructure Association | 2111 Wilson Blvd., Suite 210 Arlington Virginia 22201 |