(93)

COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2276CV00127

COURTNEY GILARDI and others,[1]

Plaintiffs,

vs.

ROBERTA ORSI and others,[2] as members of and collectively the PITTSFIELD BOARD OF HEALTH,

Defendants.

ORDER ON DEFENDANTS' RENEWED MOTION TO DISMISS

The plaintiffs, six residents of the City of Pittsfield, brought this action against the Pittsfield Board of Health ("Board"), seeking judicial review of the Board's rescission of an order requiring Pittsfield Cellular Telephone Company d/b/a Verizon Wireless ("Verizon") to cease operation of a wireless tower. The Board now moves to dismiss[3] on the ground that the Telecommunications Act of 1996 ("TCA") preempts the Board from regulating the tower for health concerns related to radio frequency emissions ("RF emissions"). Therefore, the Board asserts, its decision to rescind the cease-and-desist order was based on substantial evidence and was not arbitrary and capricious. After a hearing and careful review of the parties' submissions,[4] the Board's motion is **allowed**.

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[1] Charlie Herzig, Judy Herzig, Mark Markham, Angela Markham, and Elaine Ireland.

[2] Brad Gordon, Stephen Smith, Kimberly Loring, and Dr. Jeffrey Leppo.

[3] Though styled as a Rule 12(b)(6) motion to dismiss, the court construes the Board's motion as a motion for judgment on the pleadings under Mass. R. Civ. P. 12(c), as the core issue presented is legal, not factual.

[4] The court has reviewed the amicus curiae letters from Dr. Paul Heroux, Dr. Kent Chamberlin, and local cell tower victims. The court agrees with the Board that these letters primarily address the health effects of RF emissions and

BACKGROUND

The plaintiffs are six residents of Pittsfield's "Shacktown" neighborhood. In 2017, Verizon obtained a local land use permit from the City of Pittsfield for the construction of a wireless cell phone tower on land at 877 South Street. Construction of the tower was completed and the facility began transmitting in August 2020. Shortly after the tower became operational, the plaintiffs and other residents of the Shacktown neighborhood began reporting a range of health symptoms, which they contend are symptoms of a condition called electromagnetic sensitivity ("EMS") and result from exposure to RF emissions coming from the Verizon tower.

The Board conducted a lengthy investigation into the residents' complaints, culminating in the issuance of an emergency order ("Order") on April 2, 2022, requiring Verizon to show cause as to why the Board should not issue a cease-and-desist order to discontinue operation of the tower based on public health concerns. The Order contained a detailed summary of the evidence presented to the Board regarding the negative health effects of RF emissions, even when such emissions were compliant with the standards set by the Federal Communications Commission ("FCC"), and ultimately concluded that the tower was a public nuisance and cause of sickness to surrounding residents. The Order gave Verizon seven days from the date of issuance to request a hearing; if Verizon failed to do so, the Order would convert into a "notice of discontinuance," requiring Verizon to cease operation of the tower at its own expense within a further seven days after the expiration of the deadline to request a hearing (i.e., fourteen days after issuance of the Order). The Board issued the Order in an effort to bring Verizon to the table

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the technical aspects of electromagnetic radiation; they are not pertinent to the legal issue of preemption. The Massachusetts Association of Health Boards ("MAHB") also submitted an amicus letter, arguing the Board had authority to issue the order under state law and taking issue with the Board's citation to the MAHB's Legal Handbook in light of subsequent developments in the case law. The court has considered MAHB's statement, but finds the Board acknowledged the recent developments and provided adequate context in its motion such that the citation to the MAHB Legal Handbook was not misleading. In any case, the MAHB letter is also immaterial to the preemption analysis.

to mediate a solution. The effort, however, was unsuccessful and Verizon did not request a hearing.

On May 10, 2022, after expiration of both consecutive seven-day periods set forth in the Order, Verizon filed suit in federal court seeking a declaratory judgment stating the Board lacked legal authority to issue the Order because such action was preempted by the TCA. On June 1, 2022, the Board voted to rescind the Order and Verizon voluntarily dismissed the federal litigation as moot the following day.

The plaintiffs subsequently filed this action,[5] challenging the Board's rescission of the Order as arbitrary, capricious, and not supported by substantial evidence. The Board now defends the rescission based on the same argument advanced by Verizon in the federal litigation: that issuance of the Order was preempted by the TCA, and the vote to rescind was therefore a decision based on substantial evidence that was not arbitrary or capricious. The parties agree preemption is a threshold issue that, if applicable, is dispositive of this action.

DISCUSSION

The doctrine of preemption is rooted in the Supremacy Clause of the United States Constitution, which "invalidates state laws that 'interfere with, or are contrary to,' federal law." *Hillsborough Cnty.* v. *Automated Med. Labs., Inc.*, 471 U.S. 707, 712 (1985), quoting *Gibbons* v. *Ogden*, 22 U.S. 1, 211 (1824). Consistent with our federalist system of government, analysis under the Supremacy Clause begins with "the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Dunn* v. *Genzyme Corp.*, 486 Mass. 713, 718 (2021), quoting *Cipollone* v. *Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992). See also *Arthur D. Little, Inc.* v. *Comm'r of Health*

[5] The complaint also asserted claims against Linda Tyer as Mayor of the City of Pittsfield, Stephen Pagnotta as City Solicitor, Verizon, and Farley White South Street, LLC. On June 8, 2023, the court granted those defendants' motions to dismiss, leaving only the claims against the Board.

& Hosps. of Cambridge, 395 Mass. 535, 549 (1985) (same). The "ultimate touchstone" of preemption is congressional intent, which is discerned from the language of the relevant statute and its framework. *Cipollone*, 505 U.S. at 516 (citations omitted).

Preemption may be either express or implied. Express preemption occurs when Congress explicitly states its intent to displace state law in the language of a federal statute. See *Consumer Data Indus. Ass'n* v. *Frey*, 26 F.4th 1, 5 (1st Cir. 2022). Preemption may be implied where "the Federal law so thoroughly occupies a legislative field such that it is reasonable to infer that Congress left no room for the State to supplement it (field preemption)" or where state law is in conflict with the federal law (conflict preemption). *Marsh* v. *Mass. Coastal Railroad LLC*, 492 Mass. 641, 648 (2023). Further, there are two general types of conflict preemption: when "it is impossible for a private party to comply with both state and federal requirements," or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at n.18 (alterations, quotations, and citations omitted). After careful consideration, the court concludes obstacle conflict preemption applies here.

Broadly speaking, the TCA was enacted "to provide a pro-competitive, de-regulatory national policy framework designed to accelerate private sector deployment of advanced telecommunications and information technologies and services . . . by opening all telecommunications markets to competition." *Cellular Telephone Co.* v. *Town of Oyster Bay*, 166 F.3d 490, 493 (2d Cir. 1999), quoting H.R. Conf. Rep. No. 104-458, at 1 (1996). In order to accomplish this objective, the TCA sets forth a robust regulatory scheme that the First Circuit has described as "an exercise in cooperative federalism," and which "represents a dramatic shift in the nature of telecommunications regulation." *Nat'l Tower* v. *Plainville Zoning Board of Appeals*, 297 F.3d 14, 19 (1st Cir. 2002).

Specifically, Congress delegated broad authority to the FCC to create uniform rules for telecommunications, including the task of setting RF emissions levels. See *Bennett* v. *T-Mobile USA, Inc.*, 597 F. Supp. 2d 1050, 1053 (C.D. Cal. 2008). The TCA also grants broad preemption authority to the FCC. See *Cellular Phone Taskforce* v. *FCC*, 205 F.3d 82, 96 (2d Cir. 2000). While state and local governments retain primary control over the siting of wireless tower facilities, that authority is itself significantly limited by the statute. See *T-Mobile S., LLC* v. *City of Roswell*, 574 U.S. 293, 300 (2015). In pertinent part, the statute permits state and local governments to make "decisions regarding placement, construction, and modification of personal wireless services facilities," 47 U.S.C. § 332(c)(7)(A), but prohibits any such regulation on the basis of the environmental effects of RF emissions "to the extent that such facilities comply with the [FCC's] regulations concerning such emissions." *Id.* § 332(c)(7)(B)(iv).

The statute does not expressly retain for the states the power to regulate, on the basis of health effects of RF emissions, the *operation* of wireless tower facilities that are in compliance with the FCC's RF emissions standards. See *Cellular Phone Taskforce*, 205 F.3d at 96 (holding "absence of the word 'operation' from subsection (B)(iv)" does not preserve "for the states the right to regulate *operations* of wireless service facilities as well" because subsection (A) does not "preserve their authority to regulate such facilities' operations" in the first instance; "Therefore, the absence of the word 'operation' from the subsequent limitation on their authority under subsection (B)(iv) does not grant such power."). To the contrary, the FCC, as part of its rulemaking, has long interpreted the TCA as implicitly preempting state and local regulation of the operation of such facilities based on RF emissions that conform to the FCC's guidelines. See *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation* ("*Guidelines*"), 12 FCC Rcd. 13494, 13529 ¶ 89 (1997), citing H.R. Conf. Rep. No. 104-458, at

209 (1996) ("The limitations on the role and powers of the Commission . . . relate to local land use regulations and are not intended to limit or affect the Commission's general authority to regulate the . . . operation of radio facilities."). See also *Cellular Phone Taskforce*, 205 F.3d at 96 (upholding FCC's interpretation that preemption extends to the operation of facilities based on RF emission considerations, observing there is "no doubt that Congress may preempt state and local governments from regulating the operation . . . of personal wireless communications facilities").

With these background principles in mind, the court concludes the Board's issuance of the Order impairs the goals of the TCA and conflicts with the TCA's careful allocation of authority between the FCC and state and local governments.[6] See *Town of Amherst, N.H.* v. *Omnipoint Comms. Enterprises, Inc.*, 173 F.3d 9, 13 (1st Cir. 1999) (describing § 332(c)(7) as a delicate and "deliberate compromise"). The Board's action in this case inescapably stems from the premise that the RF emissions standards set by the FCC are inadequate to protect public health and safety. But "[b]y delegating the task of setting RF emissions levels to the FCC, Congress authorized the federal government—and not local governments—to strike the proper balance between protecting the public from RF emissions exposure and promoting a robust telecommunications infrastructure." *Robbins* v. *New Cingular Wireless PCS, LLC*, 854 F.3d 315, 320 (6th Cir. 2017).

Conflict preemption frequently arises in regulatory situations, such as this, "in which an agency is required to strike a balance between competing statutory objectives." *Farina* v. *Nokia*

[6] Because the court's decision is based on conflict preemption, the plaintiffs' arguments concerning express preemption need not be addressed. Specifically, although § 332(c)(7) refers to land use and zoning decisions and pertains to the siting of wireless facilities, subsequent policing of the operation of such facilities based on RF emissions by local boards of health nevertheless stands in conflict with the goals of the TCA. Further, the court is unpersuaded by the plaintiffs' characterization of the Order as a mere effort to mediate, as it fails to acknowledge that the Order converted to an order to discontinue operation of the tower.

Inc., 625 F.3d 97, 123 (3d Cir. 2010). This is so because "[w]hen Congress charges an agency with balancing competing objectives, it intends the agency to use its reasoned judgment to weigh the relevant considerations and determine how best to prioritize between these objectives." *Id.* To allow state and local entities "to impose a different standard permits a rebalancing of those considerations." *Id.*

In adopting specific guidelines regarding RF emissions, the FCC explicitly weighed "the need to protect the public and workers from exposure to potentially harmful RF electromagnetic fields and the requirement that [the] industry be allowed to provide telecommunications services to the public in the most efficient and practical manner possible." *Guidelines*, 12 FCC Rcd. at 13496 ¶ 2. See also *CTIA – The Wireless Ass'n* v. *City of Berkeley*, 487 F. Supp. 3d 821, 831 (N.D. Cal. 2020) (competing considerations of protecting health and public safety and ensuring rapid development of an efficient and uniform network"); *Farina*, 625 F.3d at 125 (FCC weighed safety and efficiency); *Robbins*, 854 F.3d at 320 (same). To allow local boards of health to issue orders concerning the operation of wireless tower facilities based on the health effects of RF emissions, where those emissions comply with the FCC's guidelines, would upset the balance struck by the FCC and shift the power to regulate RF emissions away from the FCC.[7] Upholding a board's determination that towers in compliance with the FCC's guidelines are still unreasonably dangerous would, in essence, permit local governments to second-guess the FCC's conclusion on how to balance its objectives. See *Robbins*, 854 F.3d at 320; *Bennett*, 597 F. Supp. 2d at 1053; *Fontana* v. *Apple Inc.*, 321 F. Supp. 3d 850, 854-855 (M.D. Tenn. 2010); *Farina*,

[7] Other courts that have considered the issue with respect to ongoing RF emissions from already-operational facilities have reached the same conclusion. See, e.g., *Stanley* v. *Amalithone Realty, Inc.*, 94 A.D.3d 140, 146 (N.Y. App. Div. 2012). See also *Ruisard* v. *Village of Glen Ellyn*, 406 Ill. App. 3d 644, 667 (Ill. App. Ct. 2010) (claim that tower's RF emission levels violated ordinance that permitted construction and operation of the tower preempted); *Santa Fe Alliance for Pub. Health & Safety* v. *City of Santa Fe*, 2020 WL 2198120, at *7 (D.N.M. May 6, 2020), citing *Abraham* v. *Town of Huntington*, 2018 WL 2304779, at *8 (E.D.N.Y. May 21, 2018) (plaintiffs' claims alleging injury from RF emissions from facilities near their homes preempted where emissions fell within FCC guidelines); *Goforth* v. *Smith*, 338 Ark. 65, 73-75 (Ark. 1999) (nuisance claims based on RF emissions preempted).

625 F.3d at 126 ("Allowing [local boards] to perform their own risk-utility analysis . . . would disrupt the expert balancing underlying the federal scheme" and the resulting, potentially varying, state-law standards would "eradicate[e] the uniformity necessary to regulat[e] the wireless network.").

As previously alluded to, the absence of the word "operation" from § 332(c)(7)(B)(iv) does not persuade the court that preemption does not apply. The court's decision is premised on obstacle conflict preemption, rather than express preemption via the language of the statute. But see *Cellular Phone Taskforce*, 205 F.3d at 96. Indeed, to permit state and local governments to regulate a tower on the basis of FCC-compliant RF radiation and order the cessation of its operations would essentially allow them to circumvent the limitations imposed by § 332(c)(7)(B)(iv). A locality could dutifully follow the law by ensuring it does not prevent the siting and construction of a tower on the basis of such emissions, yet turn around and prevent its operation on the same basis. See *Guidelines*, 12 FCC Rcd. at 13527-13529. That is undoubtedly not what Congress intended. In sum, to endorse state and local governments' authority to act in such a manner would present "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hillsborough Cnty.*, 471 U.S. at 713.

The court is mindful that the plaintiffs' complaint in this action raises serious concerns about the health effects of RF emissions from wireless telecommunications facilities. However, the court's analysis and decision is necessarily focused only on the legal issue at hand. Because the Board's Order effectively substituted its own risk-utility analysis for the FCC's and treated the tower as unreasonably dangerous despite compliance with the FCC's guidelines, the Order conflicts with the TCA and the FCC's regulations. Because the Board is preempted from regulating the operation of the tower due to health concerns from RF emissions that are within

FCC guidelines, its decision to rescind the Order on that basis was neither arbitrary nor capricious, and was supported by substantial evidence. To the extent the plaintiffs seek to challenge the adequacy of the RF emissions limits articulated by the FCC,[8] the Board is not the proper forum and lacks the authority to address such claims. Though the plaintiffs may of course raise those concerns directly with the FCC, the Board is preempted from second-guessing the FCC's judgment with respect to RF emissions standards.

ORDER

For the foregoing reasons, the Board's Renewed Motion to Dismiss, construed as a motion for judgment on the pleadings, is **ALLOWED**. This action is hereby dismissed.

Francis E. Flannery
Justice of the Superior Court

Dated: September 3, 2024

ENTERED
THE COMMONWEALTH OF MASSACHUSETTS
BERKSHIRE S.S. SUPERIOR COURT
SEP 04 2024

[8] The *Environmental Health Trust* case provides no guidance on the issues before this court. See *Env't Health Tr.* v. *FCC*, 9 F.4th 893 (D.C. Cir. 2021). The D.C. Circuit did not reach the merits as to whether the FCC's limits for RF radiation exposure adequately protected against the health effects to the public. Instead, it merely concluded that the FCC failed to provide a reasoned explanation for its conclusion that the limits articulated in 1996 did not need to be amended and therefore remanded an FCC order back to the Commission. The case does not affect either the guidelines currently in effect or the preemption analysis.