

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
Updating the Commission’s Rule for) WT Docket No. 19-71
Over-the-Air Reception Devices (OTARD))

Written Ex Parte by Children’s Health Defense

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 to increased sickness in children. Children’s Health Defense (CHD) advocates on children’s behalf and seeks science-based safeguards to help the injured and prevent harm to others. This written *ex parte* is submitted pursuant to that mission.

SUMMARY

The *NPRM*¹ proposes to allow a service provider to place an antenna on one property and “serve” “multiple customer locations” or users on entirely different properties. This antenna, however, will not just “serve” properties with “users” that want the service. It will also extend pulsed and modulated radiofrequency and microwave electromagnetic radiation (“wireless radiation”) over and through properties of owners that affirmatively **do not want** any such intrusion. It will irradiate people who have not consented to exposure and **do not want** to be irradiated. It will frustrate the choices and expectations of people who chose their home location because it was located in an area with little to no wireless radiation.

The rule change will violate the Constitution and upend long-standing common law personal and property rights. The Commission does not have the power or authority to override

¹ Notice of Proposed Rulemaking, *In the Matter of Updating the Commission’s Rule for Over-the-Air Reception Devices*, WT Docket No. 19-71, 34 FCC Rcd 2695, 2696 ¶3 (Apr. 12, 2019)(“*NPRM*”).

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people's right to bodily autonomy or their property-based right to "exclude" wireless radiation emitted by third parties from their home. The FCC does not have the power to allow a person to send noxious emissions past his or her property line and "serve" a property where the owner does not want to be "served" with toxic wireless radiation. The same limitation applies to wireless radiation, which are also a nuisance. The FCC cannot preempt state, common law or constitutional rights that protect those who seek to avoid harmful wireless radiation in their own home.

Among those who wish to be left alone and to exclude involuntary irradiation in their own homes is a significant population that has developed cancer or other ailments as a result of exposure. Many have developed and suffer from "Microwave Sickness," also known as "Radiation Sickness," or "Electromagnetic Hypersensitivity Syndrome" ("EHS"). These individuals, and especially children, experience adverse health effects when exposed to wireless radiation; exposure makes them sick and often exacerbates other underlying conditions. Microwave Sickness is a disability under the ADA and a handicap under the FHA. The proposed rule will violate disabled individuals' legal rights under the Constitution, federal law and many state equivalent laws that protect disabled and handicapped individuals from discrimination and ensure access to housing.

The fact is lots of people, for various reasons, do not want an antenna next door or nearby emitting radiation that intrudes on their own property and invades their bodies against their will. They have the right to oppose this invasion whether the Commission likes it or not. Many have Microwave Sickness and demand that they not be exposed to emissions that will make them even sicker, experience tortuous pain or even kill them. Approval of this rule will lead to massive suffering, extensive litigation and likely public protest. It will expose the providers and public

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treasury to liability for the damages inflicted on those who object to being forced to experience radiation authorized under purported color of law and who physically suffer from the exposure that will follow.

If the Commission persists it must first provide for more meaningful and fair due process procedures than is presently contemplated by Rule 1.400(a)(4). It must at least require notice and an opportunity to object and/or seek accommodations. The Commission cannot be the exclusive venue. Injunctive or other interlocutory relief must be available. There must be the possibility of fee-shifting.

The proposed rule cannot be adopted in its present form.

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I. Introduction

The *NPRM*² proposes to allow “hub or relay” antennas “on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership or leasehold interest in the property.” If the rule is changed, that antenna will be able to operate as a hub, relay or mesh and serve “multiple customer locations” or users on entirely different properties.³ The owner or tenant on Property A will be able to install a hub, relay or mesh antenna that can support service to potential users in Properties B, C and D; indeed it will be able to “serve” any “user” in any property within the reach of the antenna. But what the *NPRM* fails to acknowledge is that the hub or relay antenna will not just “serve” properties with “users” that want the service. It will also extend pulsed and modulated radiofrequency and microwave electromagnetic radiation (wireless radiation) over and through properties of owners that affirmatively **do not want** any such intrusion. It will irradiate people who have not consented to exposure and **do not want** to be irradiated. It will negate the conscious choices of people who selected their home location because it had low levels of this radiation. It will irradiate people who must avoid exposure. It will inflict severe pain and injuries and even lead to deaths.

The rule change will violate the Constitution and upend long-standing common law personal and property rights. The Commission does not have authority to override people's right

² Notice of Proposed Rulemaking, *In the Matter of Updating the Commission's Rule for Over-the-Air Reception Devices*, WT Docket No. 19-71, 34 FCC Rcd 2695, 2696 ¶3 (Apr. 12, 2019)(“*NPRM*”).

³ See Statement of Chairman Pai, 34 FCC Rcd at 2711. The First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, *Promotion of Competitive Networks in Local Telecommunications Markets, et al.*, 15 FCC Rcd 22983 (2000) excluded hub and relay antennas from “protection” under the OTARD rule. A hub antenna can “transmit signals to and/or receive signals from multiple customer locations.” *Id.* at 23028, ¶ 99. A relay antenna is basically a repeater, akin to a Wi-Fi range extender. The rule did “protect” “mesh” antennas, but only insofar as the equipment “was “installed in order to serve the customer on [its] premises” and otherwise complied with all of the limitations in the OTARD rule (e.g., antenna size).” *NPRM* ¶4 (emphasis added). The current OTARD rule does not “protect” antennas used to serve users on a different property; it applies only insofar as all users occupy the same property. The proposed rule would eliminate the “same property” restriction.

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to bodily autonomy and their property-based right to “exclude” wireless radiation emitted by third parties from their home. The FCC does not have the power to allow a person to send noxious emissions past his or her property line and “serve” a property where the owner does not want to be “served” with toxic radiation.

The Commission could not pass a rule purporting to allow a person to place loudspeakers outside and constantly play extremely loud obnoxious music all hours of the day merely because it regulates FM radio stations. That would be a nuisance under most municipal or county ordinances, and the FCC does not have preemptive authority over noise ordinances based on its statutorily-delegated powers over “wireless” matters. The same limitation applies to RF emissions, which are also a nuisance. The FCC cannot preempt state, common law or constitutional rights that protect those who seek to avoid RF emissions in their own home.

Among those who wish to be left alone and to exclude involuntary irradiation in their own homes is a significant population that suffers from “Radiation Sickness” also known as “Microwave Sickness,” or “Electromagnetic Hypersensitivity Syndrome” or “EHS.” These individuals, including children, have developed and suffer from a recognized disability (or handicap), one which has been acknowledged by the Architectural and Transportation Barriers Compliance Board. *See* Architectural and Transportation Barriers Compliance Board, ADA Accessibility Guidelines for Recreation Facilities, 68 FR 56351 (Sept. 3, 2002) (“The Board recognizes that ...electromagnetic sensitivities may be considered disabilities under the ADA if they so severely impair the neurological, respiratory or other functions of an individual that it substantially limits one or more of the individual’s major life activities.”). The proposed rule will violate their legal rights under federal law and many state equivalent laws that protect disabled and handicapped individuals from discrimination and ensure access to housing.

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The Commission has already been directly informed by many people who submitted comments indicating that they object to forced irradiation and the invasion of their rights. They do not want an antenna next door or somewhere nearby that emits radiation that intrudes on their own property and invades their bodies against their will.⁴ Over 40 individuals objected to the proposed rule based on their opposition to wireless radiation, and specifically mentioned the adverse impact on disabled individuals.⁵ They, and many others, objected to additional and forced exposure in their homes. Children's Health Defense is collecting statements by additional people who expressly object to intrusions on their property, consider non-consensual irradiation to be a battery on them and their family and a form of child endangerment. Many of those have Microwave Sickness and will demand that they not be exposed to emissions that will make them even sicker. Those statements will be provided in a subsequent filing. The Commission is and will be on notice that this proposed rule would unreasonably interfere with recognized personal and property rights and violate disabled and handicapped individuals' legal rights.

The proposed rule cannot be adopted.

II. Constitution

This Commission – like all governmental entities – is bound by the federal Constitution and Supreme Court precedent on constitutional issues. There are limits to the FCC's authority and this proposed rule would exceed those limits.

⁴ A few examples are Roberta Anthes June 17, 2019 comment, <https://www.fcc.gov/ecfs/filing/10618852930266>; Alexis Schroeder June 17, 2019 comment, <https://www.fcc.gov/ecfs/filing/10618618300992>; Community Associations Institute Reply Comments, June 17, 2019 https://ecfsapi.fcc.gov/file/10618133852975/Community%20Associations%20Institute_WT%20Docket%20No.%2019-71%20Reply%20Comments.pdf; Larry Trivieri, Jr. June 17, 2019 comment, <https://www.fcc.gov/ecfs/filing/10617773608127>; John Frink June 3, 2019 comment <https://www.fcc.gov/ecfs/filing/106040853928052>; Virginia Cottone June 3, 2019 comment, <https://www.fcc.gov/ecfs/filing/10603183726745>.

⁵ Number obtained by using search utility on ECFS and searching for “disability” using this proceeding as a filter.

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1. Property rights

The proposed rule contemplates a taking and would purport to authorize a nuisance. The Supreme Court has consistently recognized common law property rights when assessing whether “property” has been taken. “The hallmark of a protected property interest is the right to exclude others. That is ‘one of the most essential sticks in the bundle of rights that are commonly characterized as property.’” *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673, 119 S. Ct. 2219, 2224 (1999), citing *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 62 L. Ed. 2d 332, 100 S. Ct. 383 (1979).

Government-authorized interference with enjoyment and use of the land is a compensable taking. *United States v. Causby*, 328 U.S. 256, 66 S. Ct. 1062 (1946) (non-physical intrusion of airport noise).⁶ *Kyllo v. United States*, 533 U.S. 27, 32 (2001) involved government agents that directed thermal energy at the defendant’s home to obtain heat signatures allowing them to discern activity inside the home. The Court held this was a search for Fourth Amendment purposes. It so held because the energy waves intruded on the defendant’s property.⁷ Although the method used in that case merely detected heat emitted from outside walls the Court observed

⁶ RF intrusion on property is akin to the release of loud noises. It may not be aural but it still has a biological effect on the body. There are some who can, in effect, “hear” emissions or at least sense them. Others may not sense the constant impact of these emissions hitting their body, but their body does. RF emissions, for example, have been shown to negatively impact sleep by, among other things, causing a reduction in melatonin production. *See, e.g.*, Altpeter ES, Roosli M, Battaglia M, Pfluger D, Minder CE, Abelin T., Effect of short-wave(6-22 MHz) magnetic fields on sleep quality and melatonin cycle in humans: the Schwarzenburg shut-down study. *Bioelectromagnetics* (2006); 27(2):142-150; Abelin T, Altpeter E, Roosli M., Sleep Disturbances in the Vicinity of the Short-Wave Broadcast Transmitter. *Schwarzenburg. Somnologie* (2005); 9:203-209. The effect is qualitatively similar to loud noises that prevent someone from getting a good night’s rest.

⁷ The intrusion will not be physical, so it will likely be a “nuisance” rather than a “trespass” under most state property laws. For example, California. Civ. Code §3479 defines a “nuisance” as “Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.” (emphasis added). Sections 3480, 3481 and 3493 go on to distinguish between a public nuisance and private nuisance, and address when a private action can be maintained.

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that more modern directed beam surveillance could penetrate walls,⁸ thereby becoming an illegal invasion of people’s most protected spaces. 533 U.S. at 34-40. “In the home, our cases show, all details are intimate details, because the entire area is held safe from prying government eyes.” 533 U.S. at 37.

The Commission does not have the power to override the property rights protected by the Constitution by purporting to allow others to intrude on someone’s land and send noxious radiation into their home. This rule is not about a “viewer’s ability to receive video programming,” so it does not derive from §207 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. Nor is this particular proposed rule reasonably necessary to the effective performance of the FCC’s various responsibilities. But even if the Communications Act can somehow be read to allow this, it cannot override fundamental rights guaranteed by other Federal laws and by the Constitution.

If the FCC proceeds with this rule it will open itself to an extraordinary amount of litigation and a potential huge drain on the federal budget due to claims under the Tucker Act (28 U.S.C §1346). Every homeowner whose property is “served” by an antenna located on someone else’s property could potentially have a claim. The D.C. Circuit has already twice found that FCC action can lead to potential Tucker Act liability in an “as applied” case. One such decision related to a previous OTARD decision. *Bldg. Owners & Managers Ass’n Int’l v. FCC*, 254 F.3d 89, 99 (D.C. Cir. 2001), denying facial challenge to Second Report and Order, *In the Matter of Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-*

⁸ See 533 U.S. at 36, n. 3, describing radar, ultrasound and “devices emitting “low levels of radiation (presumably within FCC “safe” limits) that can travel “through-the-wall.” There are already systems that can detect activities inside a home by sending Wi-Fi signals through external walls and interpreting the reflected signals. See [Using WiFi to see through walls](#), Anthony, Extreme Tech (Aug. 3, 2012), available at <https://www.extremetech.com/extreme/133936-using-wifi-to-see-through-walls>. This is exactly the type of “through-the-walls” technology the *Kyllo* court held violated the defendant’s property rights and his right to privacy.

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Air Reception Devices: Television Broadcast, Multichannel Multipoint Distribution and Direct Broadcast Satellite Services, 13 FCC Rcd 23874 (Oct. 1998) (“*Second OTARD Order*”). See also Randolph Concurrence, 254 F.3d at 99-102 and *Bell Atl. Tel. Cos. v. FCC*, 24 F.3d 1441, 1445-1446 (D.C. Cir. 1994). This Commission should not cavalierly run roughshod over non-consenting landowners’ constitutionally-protected property rights. If the rule change is affirmed in the face of a facial challenge under the Hobbs Act, a flood of Tucker Act claims for the as-applied taking will follow.

2. Bodily autonomy and Informed consent

The proposed rule will violate individuals’ right to bodily autonomy and purport to authorize battery on non-consenting citizens. It will lend color of law to activity that is cruel and inhumane. “Bodily autonomy” and “autonomy privacy” derive from the “negative” individual liberty rights embodied in the Constitution. U.S. Supreme Court decisions starting in the 1950s held that the people have a right to privacy relating to personal choice, personal access to information and to associate with others. *United States v. Rumely*, 345 U.S. 41 (1953); *NAACP v. Patterson*, 357 U.S. 449 (1958); *Stanley v. Georgia*, 394 U.S. 557 (1969). The court also found that the Constitution protected privacy in “marital relations” (*Griswold v. Connecticut*, 381 U.S. 479 (1965)), and – for couples in general or women in particular – the right to decide whether to have children (*Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Roe v. Wade*, 410 U.S. 113 (1973)). In each of these instances the Court interpreted multiple parts of the “individual liberty” provisions in the Bill of Rights to collectively provide a “penumbral” constitutional right to privacy and bodily autonomy as against federal and state government action. Citizens have a “right to be let alone.” The Constitution proscribes government-sanctioned interference with bodily autonomy.

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In common law and most state statutes, non-consensual irradiation is a “battery.” The basic elements are: (1) the defendant touched the plaintiff, or caused the plaintiff to be touched, with the intent to harm or offend the plaintiff; (2) the plaintiff did not consent to the touching; (3) the plaintiff was harmed or offended by the defendant’s conduct; and (4) a reasonable person in the plaintiff’s position would have been offended by the touching. *See, e.g., Carlsen v. Koivumaki*, 227 Cal. App. 4th 879, 890, 174 Cal. Rptr. 3d 339, 351 (2014). RF radiation “touches” the body and penetrates the skin. The people who are touched and suffer penetration after enunciating a lack of consent will be both harmed and offended. The defendant will or should know there is an objection to the touching, but will intentionally still cause the touching. The defendant who unleashes non-consensual touching of anyone who has presented an objection it will be committing a battery. Non-consensual irradiation of children is “child endangerment” under the criminal and civil laws,⁹ and there is usually a civil action for those who suffer at the hands of the criminal.¹⁰

At common law, even the touching of one person by another without consent and without legal justification was a battery. *See* W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 9, pp. 39-42 (5th ed. 1984). Before the turn

⁹ For example, California Penal Code §2073a(a) and (b) provide:

(a) Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, ... or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered, shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison for two, four, or six years.

(b) Any person who, under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, ... or willfully causes or permits that child to be placed in a situation where his or her person or health may be endangered, is guilty of a misdemeanor.

¹⁰ ... [U]nder *Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1224 (*Angie M.*), any injured member of the public for whose benefit a criminal statute has been enacted may bring a civil suit. In *Angie M.*, the court found that “[v]iolation of a criminal statute embodying a public policy is generally actionable even though no specific civil remedy is provided in the criminal statute.” (*Id.* at p. 1224.) A presumption of negligence may arise from a statutory violation if (1) the defendant violated a statute; (2) the violation proximately caused injury to the plaintiff; (3) the injury resulted from an occurrence which the statute was designed to prevent; and (4) the plaintiff was one of the class of persons for whose protection the statute was adopted. (Evid. Code, § 669; *Nowlon v. Koram Ins. Center, Inc.* (1991) 1 Cal.App.4th 1437, 1444-1445.) *Pagarian v. Greater Valley Med. Grp.*, B172642, 2006 Cal. App. Unpub. LEXIS 7445, at *52 (Aug. 23, 2006).

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of the century, this Court observed that “no right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.” *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251, 35 L. Ed. 734, 11 S. Ct. 1000 (1891). This notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment...The logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is, to refuse treatment. *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 269-70 (1990).

Every person or parent has the constitutional right of “informed consent” prior to any lawful bodily intrusion, and they can absolutely refuse a bodily insult, although they may be required to pay a fine. In *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S. Ct. 358 (1905) (involving an individual’s assertion of a variety of liberty interests, including substantive due process, in the context of a public emergency), the Court ruled that a state may impose mandatory vaccines on penalty of fine in the interest of the general public health and safety, even over an individual’s conscience or religious objection. Individual rights must by necessity sometimes yield to a state’s police power, subject to the general requirements of equal protection and nondiscrimination. The Court closed its opinion, however, with an important caveat: if the individual can show a *special sensitivity due to a medical condition* because the immunization may be unduly hazardous, there **must** some process for case-by-case exceptions before a fine can be imposed for the refusal. Further, the Court held that *judicial relief* is and must be available (not some administrative process in a far-away venue) when the requirement would lead to “wrong or oppression.” This is necessary to avoid the ultimate liberty deprivations – denial of life itself or cruelty. 197 U.S. at 38-39, 25 S. Ct. at 366-67.¹¹

Jacobson involved a state’s exercise of police power in the context of a medical emergency. This proposed rule is not related to or justified by any claim of a medical emergency,

¹¹ “It is easy, for instance, to suppose the case of an adult who is embraced by the mere words of the act, but yet to subject whom to vaccination in a particular condition of his health or body, would be cruel and inhuman in the last degree.”

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and the federal government does not have “police powers” in any event. *United States v. Lopez*, 514 U.S. 549, 566, 115 S. Ct. 1624, 1633 (1995) (Constitution withheld from Congress a plenary police power); *id.*, at 584-585, (Thomas concurrence) (“We always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power”). But even if the effort to force radiation on non-consenting citizens can be sourced to some power granted to the federal government, as a general matter the Court’s ultimate limitation has direct application here. With the growing exposure to RF and Microwave radiation, more and more people, including children, are directly harmed by non-consensual RF emissions. The Commission may prefer science denial and purposeful evasion of facts, but no reasonable person can insist that RF radiation, even within the Commission’s guidelines, never has and never will cause severe medical problems to anyone. It has, it does and it will. Children in particular are uniquely affected by exposure. Some have pre-existing conditions that are exacerbated by exposure. The FCC may not think Microwave Sickness is a real condition and is only a figment of someone’s imagination, but the Commissioners are not doctors, and this agency is incompetent to determine by *fiat* the condition does not exist. Microwave Sickness is a horrible and impossible reality for far too many adults and children.

For many adults and children government-sanctioned exposure to RF radiation can rise to the level of cruelty and inhumane treatment described in *Jacobson*. For some it is effectively a death sentence. Some have died or committed suicide because constant RF exposure was torturing them beyond their ability to survive or cope. The FCC’s previous callous disregard for their situation has caused them to lose hope of ever being able to participate in society or appear in public spaces because of the pervasive radiation that already exists. Approving this rule change and allowing further non-consensual exposure in peoples’ homes – their last sanctuary –

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will sentence many to an impossible situation and turn their lives into a living hell from which there is no escape. The Communications Act simply cannot be read to give the FCC the power to authorize death, cruelty or inhumane treatment.

Thus, *Jacobson* applies and the Commission must at least make some provision for exceptions for those who need one on account of a disability or handicap. The proposed rule will violate the people's constitutional right to bodily autonomy and privacy. The FCC must build in a mechanism for advance notice and a way to obtain accommodations, perhaps like those afforded under the Americans with Disabilities Act, before moving forward with any regulation that allows a provider to place an antenna on one property and then flood other people's property with harmful and toxic radiation, irradiating people against their will when they are sheltering in their own home.

III. Americans with Disabilities Act

The proposed rule will violate the ADA. The Americans with Disabilities Act, 42 U.S.C. §§12101 *et seq* protects persons with a disability¹² in the area of employment, public services and public accommodations operated by private entities. The "service" provided by the hub or relay antennas contemplated by the proposed rule will be a "public accommodation" as defined by 43 U.S.C. §12131(7)(f) because it is a "service establishment." The Communications Act did

¹² 42 U.S.C. §12102(1) defines "disability":

- (1) Disability. The term "disability" means, with respect to an individual—
 - (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
 - (B) a record of such an impairment; or
 - (C) being regarded as having such an impairment (as described in paragraph (3)).

Subsections (2) and (3) define "major life activities" and "Regarded as having such an impairment." Subsection (4) provides further rules of construction, and expressly requires a "broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter." It also prohibits consideration of potential mitigating measures like medication, assistive technology or adaptive neurological modifications when determining whether an impairment substantially limits a major life activity.

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not impliedly repeal the requirements of the ADA, and the Commission cannot repeal the ADA through a legislative rule.

As noted, the Architectural and Transportation Barriers Compliance Board expressly recognizes that “electromagnetic sensitivities may be considered disabilities under the ADA if they so severely impair the neurological, respiratory or other functions of an individual that it substantially limits one or more of the individual’s major life activities.” The Commission lacks the power and medical expertise to decide the Access Board got it wrong, there is no such thing as Microwave Sickness, that it cannot be a disability, or that the ADA does not require accommodations.

It is true those who developed Microwave Sickness *do not want* wireless service so the issue will not be about “denial” of service or unequal services. They want the relentless advance of overwhelming exposure to end at least at their property line, and they most definitely want it to stop at the walls of their home. The cross-property radiation contemplated by the proposed rule will invade many homes with unwanted and harmful emissions. That is a form of discrimination. The plaintiffs want, and must be allowed, the possibility of not being constantly irradiated against their will and with dire consequences to their health. They have the right to have and enjoy life, peace and security in their home. They have every right to object to, and avoid, being tortured by radiation in their own home that interferes with their ability to think, breath and function and causes them torturous pains.

IV. Fair Housing Act

The proposed rule will violate the Fair Housing Act. Handicapped¹³ individuals have the right to avoid exposure in their own homes. Any person that exposes them against their will

¹³ 42 U.S.C. §3602(h) defines a “handicap”:

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interferes with their “exercise or enjoyment of rights granted or protected by” 42 U.S.C. §3617. That is so because the placement of an antenna is an “improvement” of the dwelling and is thus, a “residential real estate-related transaction” under 42 U.S.C. §3605(b)(1)(A). Anyone placing an antenna that irradiates handicapped persons in their own home will violate the Fair Housing Act.

The Communications Act did not impliedly repeal the requirements of the Fair Housing Act, and the Commission cannot repeal the FHA through a legislative rule. If a provider does not adhere to the FHA’s proscriptions and requirements, the injured person can file a civil action and recover actual, punitive and injunctive relief, along with attorneys’ fees. 42 U.S.C. §3613(c). 42 U.S.C. §3631(a) and (a)(1) provide that “whoever, whether or not acting under color of law, willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with” “any person because of his ... handicap ... and because he is “occupying ... any dwelling” is subject to a fine of up to \$1,000 or up to one year imprisonment. If bodily injury results, the penalty increases to up to \$10,000 or up to 10 years’ imprisonment. Any person that irradiates a handicapped person in his or her home will plainly lead to bodily injury, since irradiation is what causes them to be sick or makes their conditions worse. It is a form of violence.

If this rule is approved, the Commission will run afoul of the prohibition as well. They are acting under color of law, and they will be encouraging and providing “color of law” authority under which countless horrible injuries will be inflicted on innocent people who just want to enjoy their God-given and constitutionally-protected right to enjoy life, peace and security in their home. These people’s rights have already been taken in most public spaces.

(h) “Handicap” means, with respect to a person—

(1) a physical or mental impairment which substantially limits one or more of such person’s major life activities,

(2) a record of having such an impairment, or

(3) being regarded as having such an impairment,

but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 802 of title 21).

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Many already cannot go on the streets, access medical care, obtain public services, use public transportation, drive on the road, fly, stay at a hotel or have a job. Their children are ridiculed, forced out of schools and into social isolation. They must be home schooled in an environment that has less harmful radiation. Finding a home has become almost impossible: they cannot live in an apartment and most houses are already intolerable because of emissions from macro-cells and small cells.

People live in fear of waking up in the morning with a new “small cell” installed near their home or a booster antenna in their neighbor's home. Many try to move to rural areas, but the FCC is making sure that even rural areas will not be safe for them. These citizens literally have almost nowhere to go to have a tolerable existence, let alone peace and comfort. The Commission cannot authorize yet another invasion of disabled or handicapped people's homes through this proposed rule.

V. Notice, Opportunity to Contest, Venue for disputes

If the rules are changed, the Commission must require advance notice to all who would be exposed, provide a method for those who want to assert their rights to contest the invasion of their rights, and provide a *fair, affordable and unbiased* forum for resolving disputes.

The providers operating these facilities – if this expansion of authority to place and operate them is allowed – must at least be required to grant reasonable accommodations to those who request them. And that means everyone within reach of the emissions that will flow from the antenna must receive advance written notice so they can know to send a request for accommodation, and where to send it. If the Commission moves forward with this rule change, it must provide for notice to all who will be irradiated and an opportunity for them to assert their property and autonomy rights. Those who are disabled or handicapped from Microwave Sickness

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must be allowed a process for seeking and obtaining request accommodations and a reasonable process and venue for dispute resolution.

While notice and opportunity to object is the bare minimum required by basic due process, it would still be unreasonable and unfair. People should not have to beg for security in their own home, or go through an arcane, expensive and extensive process in some distant, unfamiliar and hostile forum to protect their already-vested rights. If a provider fails to abide by an objection or request for accommodations, they cannot suffer torture while the case winds its way through to “justice.” For that reason, the Commission must also materially amend the current language in §1.400(a)(4).

Section 1.400(a)(4) was clearly written with the expectation that a local siting or zoning authority would be the one trying to enforce a “restriction.” But that is not what would happen if a homeowner or disabled person is contesting a provider’s rejection of an objection or request for accommodation. These will be real people; human beings in fear of their life and opposing a deprivation of vested rights.

The Commission cannot require those objecting to exposure to litigate the issue only before the Commission, which is notoriously hostile to citizen complaints.¹⁴ The providers have deep pockets, and their industry associations (like WISPA) have lobbyists constantly schmoozing staff and Commission offices or at swank social events in Washington D.C. The Commission’s complaint process is impenetrable, complicated and full of traps for the unwary.¹⁵ The unfairness of requiring simple homeowners to expend legal fees to protect their home and

¹⁴ The ones likely to most need relief are RF sensitive, so they cannot physically go to the Commission since it is chock-full of wireless radiation from Wi-Fi, cellular transmitters and cell phones and probably many other kinds of emissions.

¹⁵ WISPA’s August 27, 2018 letter that led to this proceeding correctly points out on page 4 that they are not telecommunications carriers. Thus the complaint process in 47 C.F.R. Part 1, Subpart E does not apply. A new complaint process would be necessary.

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defend their rights only at the Commission in Washington, D.C. is flatly unreasonable. Disabled individuals already cannot travel or go in public, and they cannot fly or stay in hotels. Mandated venue at the Commission is imposes an impossible burden.

The Declaratory Ruling process is equally “fairness challenged.” Lawyers that can run the gauntlet of a Commission proceeding are not plentiful in many local areas, and their rates are often completely unaffordable to the average middle-class citizen. Many of those who developed this sickness are plainly poor. The Commission has, so far, flatly denied there is any such thing as Microwave Sickness¹⁶ so it is fatally biased. The FCC has already made it patently obvious that it cannot be and will not be a neutral adjudicator of cases where an individual seeks to prevent unwanted radiation in their own home. If the Commission has been sued under the Tucker Act, it will be disqualified from hearing such cases in any event.

Judicial remedies in a court near the location must be available. There must be a way to obtain fee-shifting if the objecting citizen prevails. Further, there must be a way to obtain interlocutory injunctive relief so a disabled or handicapped person can avoid being irradiated – and suffering torture or even dying from exposure – while the case proceeds. The Commission must, at minimum, create a different set of challenge rules since those in 1.400(a)(4) are clearly unreasonable and deny due process in this context.

VI. Conclusion

The FCC should abandon this contemplated course of action. If it proceeds, the Commission will unleash a citizens' revolt and a tide of litigation against the wireless providers and the Commission. This recklessness must end before there is no place anyone that has developed or will develop Microwave Sickness can go to avoid non-consensual exposure. You

¹⁶ See, e.g., Letter from Julius P. Knapp, Chief Office of Engineering and Technology, to The Honorable Doris Matsui, U.S. House of Representatives (May 2, 2019) (“While we recognize EHS symptoms may be real, numerous scientific studies have failed to demonstrate that they are associated with EMF exposure.”)

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have already taken away most public spaces. Leave our homes alone so we might have a small measure of peace.

Adoption of the proposed rule will further extend the ongoing harm to numerous adults and children that has already been allowed under the FCC's prior actions. They have been chased from public spaces, and home is their last refuge. Do not take that away too, and consign them to misery, torture and perhaps even death with no possibility of avoidance or escape. Try to serve the interests of the public, and especially those that are the most vulnerable, rather than the industry that so often controls what happens at the Commission. Any further FCC action that threatens citizens lives' and even further expands the ongoing onslaught on individual rights will have severe consequences for society, the public treasury and the Commission.

The Commission must not adopt the proposed rule. If it insists on proceeding, it must at least make the changes described above to ensure due process rights.

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Respectfully Submitted

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