ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 21-1075

CHILDREN'S HEALTH DEFENSE, DR. ERICA ELLIOT, GINGER KESLER, ANGELA TSIANG, JONATHAN MIRIN
PETITIONERS

V.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
RESPONDENTS

MOVANTS' REPLY TO OPPOSITION TO EMERGENCY MOTION FOR STAY PENDING REVIEW OR IN THE ALTERNATIVE EXPEDITED REVIEW

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REPLY TO OPPOSITION

I. INTRODUCTION

The Commission does not deny that Movants will suffer grievous injury if a newly-protected OTARD base station is located near their homes. It is therefore established that (1) Movants (or family members) are already sick; (2) from exposure within FCC-authorized limits; and (3) exposure from a new OTARD system will make them sicker, over their objection and despite extraordinary efforts to avoid exposure. It will utterly destroy their lives and may even kill them. This is clearly irreparable harm. The FCC Opposition ("Oppos.") insists this shocking outcome is of no matter; Movants' basic civil rights–indeed their lives–must be sacrificed because they are "barriers" to deployment.

Children's Health Defense is not challenging the Commission's general population emission limits in this matter.[1] The Motion seeks a stay of the effective date for amendments to completely different rules that preempt local and state laws that currently benefit Movants by providing notice and a venue for due process when a project is planned near them and eliminate substantive and procedural rights flowing from the ADA, FHHA and state equivalents. Movants challenge a rule change that will subject them, individually, to undisputed physical harm. It is

[1] Oppos. pp. 7 n.4, 12. *But see* Oppos. p. 20.

reasonably likely wireless providers will soon take action near the Movants' homes. If the rule becomes effective Movants immediately lose all rights to notice and objection before any venue.

Oppos. p. 7 n.4 contends CHD raised "many of the same arguments" in the other case. What the FCC fails to grasp is that the other case is a facial challenge to generally-applicable rules, whereas to the extent the standards are relevant this matter is an "as-applied" challenge. This case involves "review of further Commission action applying" or at least relying on the general limits. *Murphy Expl. & Prod. Co. v. United States DOI*, 270 F.3d 957, 958 (2001) *citing Functional Music, Inc. v. FCC*, 274 F.2d 543, 546-547 (D.C. Cir. 1958). If the FCC promulgates a rule it knows will grievously harm individual people, it cannot object when some of them challenge the latest outrage.

The FCC incorrectly asserts the amendment is "modest" and "limited." Oppos. pp. 3, 8. The expansion of "protected" equipment and use is significant and will lead to widespread implementation and harm. The current rule allows only "consumer grade" equipment "primarily" used to serve users on the same property. Although the same size criteria apply the change allows it to now be "base station" or "carrier" grade and it can now be used to "primarily" serve users on different properties so long is there is one user on the property containing the fixed wireless arrangement. *Order* ¶¶ 19, 26, 32. The equipment will be newly eligible for "high

power" radiation (far more than "consumer equipment[2]) that supports a very wide service area. A change allowing closer and stronger radiation that will immediately injure nearby people is neither "modest" nor "limited."

II. Movants have shown a genuine and concrete risk of injury that is fairly traceable to the rule amendment.

A. Likelihood.

Movants (and many like them) are already sick. They will be made worse from involuntary exposure in their home when a compliant but powerful OTARD supported antenna suddenly appears nearby. The Commission claims, however, that Movants have not sufficiently proven a fixed wireless provider will indeed take advantage of the amendment and install an antenna near their home. Oppos. pp. 8-11, 19-20).[3]

This Court generally requires a "substantial probability" or "non-trivial" risk that the petitioners will be injured. They must "take a suit out of the category of the hypothetical." *NRDC v. EPA*, 464 F.3d 1, 6 (D.C. Cir. 2006)(citations omitted). "The more drastic the injury that government action makes more likely, the lesser the increment in probability to establish standing." *Mountain States Legal*

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[2] To take a single example compare "base station" limits with "consumer" "mobile" and "portable" station limits in 47 C.F.R. §90.1321(a) and (c).

[3] The FCC conflates irreparable harm and "imminence." Those are separate questions. The Commission has conceded irreparable harm and rests only on "imminence."

Foundation v. Glickman, 92 F.3d 1228, 1234-1235 (D.C. Cir. 1996). "[E]ven a small probability of injury is sufficient to create a case or controversy–to take a suit out of the category of the hypothetical." *Id.* Nor does one "have to await the consummation of threatened injury to obtain preventive relief." *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 298 (1979).

The FCC's argument that Movants lack standing because the harm depends on third parties' actions is inconsistent with this Court's precedent, which "requires only that the injuries be 'fairly traceable' to the defendant." *Attias v. CareFirst, Inc.*, 865 F.3d 620, 629 (D.C. Cir. 2017) and cases cited therein. The injury can be the result of a causal chain–FCC rule change allowing provider activity that harms the Petitioner. *Competitive Enter. Inst. v. FCC*, 970 F.3d 372, 383 (D.C. Cir. 2020). The wireless providers will obviously rush to take advantage of the rule change they sought. *Order* ¶¶1, 11-18 (and associated notes) predict significant provider response.[4] The rule change is therefore "fairly traceable" to the injury. The only question is whether Movants have plausibly demonstrated a "substantial"

[4] One provider ("Starry") predicted it soon serve "more than 1 million additional households." Starry Comments at 5.

or "non-trivial" possibility a hub/relay system will be activated near them as a direct response to the rule change.

Movants' Affidavits were not "conjectural" and are not based on "generalized fears." *C.f.* Oppos. p. 19. Each Affiant, many of whom live in the rural areas targeted by the rule,[5] testified from personal knowledge about nearby fixed wireless installations that would likely be converted. Mirin@31, 41, 45; Elliot@25-27, 41-42; Kesler@42-43; Hoffman@9, 32; Tsiang@7; Hertz@ 9, 32; Baran@8; Tachover@52. Mirin@41 expressed "no doubt" the provider in his area would "promptly act." Elliot@25-27, 41-42 explains she was already exposed and harmed by a similar system, although it was intended to serve only users on the premises.

FCC's imminence argument is an embarrassment. The rule amendment expressly precludes even a "simple notice"[6] that would alert someone a project is planned near their home. The rule eliminates access to the very information necessary to show likelihood, effective March 29, 2021. This looming denial of

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[5] *Order* ¶¶1, 7, 12, 15, 17.

[6] *Satellite Broadcasting & Commc'ns Assn.*, 33 FCC Rcd 3797, 3817 ¶47 (2018), (cited FCC Oppos. p. 17 n.6) reaffirmed that a local jurisdiction can require "simple notice" of an OTARD placement.

necessary and life-saving information by itself demonstrates imminent and actual harm.

B. CHD has organizational standing.

Oppos. p. 11 contends CHD lacks organizational standing.[7] The Tachover affidavit does present impacts beyond just "legal counseling, referral, and advocacy activities in response to the rule change." For example, Tachover@66-74 cites to educational activities and emotional support to troubled teens. As noted in Tachover@13, 55, 80, 82, 86 CHD will be unable to gather the information it needs to help people learn the systems' location, oppose their installation, help people get accommodation and find "safe" areas. The rule change "deprive[s] the organization key information on which its public educational activities depends[]." *Am. Lung Ass'n v. EPA*, 985 F.3d 914, 989 (D.C. Cir. 2021)(citations omitted).

II. Movants/Petitioners Are Likely to Succeed on the Merits.

A. Substantive and Procedural Due Process

To show that the government has violated a right to bodily integrity, a plaintiff need not "establish any constitutional significance to the means by which the harm occurs[.]" *Boler v. Earley*, 865 F.3d 391, 408 n.4 (6th Cir. 2017). That is because "individuals possess a constitutional right to be free from forcible

[7] The Commission appears to not contest CHD's representational standing..

intrusions on their bodies against their will, absent a compelling state interest." *Guertin v. Michigan*, 912 F.3d 907, 919 (6th Cir. 2019)(citations omitted).

The FCC brazenly claims Movants have no legally-protected interests. The Commission asserts that the Movants and all others suffering debilitating and life-threatening adverse reactions from exposure to a specific toxin have no right to object to involuntary exposure in their home, no right to even "simple" notice of the threat, and no remedy for the harms that flow from that exposure. Oppos. pp. 15-17.[8] The FCC admits it is willing, even anxious, to sacrifice a large group of vulnerable adults and children in the name of removing "barriers" to wireless "deployment." *Order* ¶13; FCC Oppos. p. 6. The Commission unabashedly claims the right to sentence people to homelessness and death, after purposefully denying them *all* notice, due process and accommodation even in their home, their last refuge.

The Commission's action was purposeful, knowing,[9] calculated and deliberate. The rule deprives Movants' "indispensable" and "first among equals" common law right–enshrined in the Constitutional guarantees of substantive and

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[8] Movants are not asserting a generalized right to a healthful environment, or even a constitutional right to good health. *Cf.* Oppos. p. 15-16. They contest a governmentally-authorized nonconsensual and deadly bodily integrity intrusion. Movants have a protected interest and therefore due process is due.

[9] CHD and many others advised the FCC of the catastrophic consequences that would follow from amendment. Motion pp. 24-25.

procedural due process–"to be free from unjustified intrusions." *Guertin*, 912 F.3d at 917-921 and cases cited therein.

Oppos. pp. 12-13 mischaracterize CHD's arguments. CHD is not "raising tort claims." CHD is seeking review of the FCC's decision to completely preempt all state and federal laws the FCC deems barriers to deployment, thereby consigning Movants and all like them to torture, misery, homelessness, and hopelessness without any remedy. The Commission's only answer to the *actual* claims is that Movants are unreasonable "barriers" to deployment and have no rights or interests deserving judicial intervention. This deliberate indifference to the suffering and intentional removal of rights "is so egregious, so outrageous" that it "shocks the contemporary conscience." *Ali v. Trump*, 959 F.3d 364, 369 (D.C. Cir. 2020); *Guertin*, 912 F.3d at 922.

B. Statutory Rights – ADA/FHHA and state law equivalents

The FCC does not deny Movants are disabled. Oppos. pp. 14-15 includes *post-hoc* rationalization[10] to assert that the ADA/FHHA do not apply. Regardless, the first argument is off-point: CHD is not claiming these statutes apply to the FCC. Rather, CHD argues the FCC lacks authority to preempt rights and remedies afforded by other laws.

[10] None of this appears in the *Order*.

Oppos. pp. 14-15 claim these statutes do not apply since Movants do not seek "equal access" to the service but instead want accommodations that will shield them from nonconsensual exposure. It is true those made sick do not want omnidirectional wireless service. They want to avoid nonconsensual and life-threatening intrusions inside their homes and bodies. The newly-authorized, close-proximity and high-powered radiation will destroy their already-fragile health and ultimately evict Movants from their homes–their last refuge. The wireless providers are engaging in discrimination, because they are not constructively evicting all others in the area. The ADA and FHHA do apply and require accommodations.

Oppos. p. 14 argues that fixed wireless service is not an ADA "public accommodation" despite the *Order* ¶¶12, 18 express finding that it routinely supports video. The providers do offer modern-day public accommodations, Movants are disabled and suffer a discriminatory effect in violation of the ADA.

The FHHA also applies. The wireless providers are akin to utility companies. Several cases have held that utility services are subject to 42 U.S.C. §3604, and thus §3617. *E.g.*, *Ga. State Conference of the NAACP v. City of LaGrange*, 940 F.3d 627 (11th Cir. 2019). The difference here is that the "service" is what renders the home uninhabitable for those who are sickened by radiation. Nonetheless, Movants' homes will be "actually made unavailable" by the new

systems.[11] *Cooke v. Town of Colo. City*, 934 F. Supp. 2d 1097, 1112 (D. Ariz. 2013); *see also 2922 Sherman Ave. Tenants' Ass'n v. District of Columbia*, 444 F.3d 673 (D.C. Cir. 2006)(placarding qualifies as making unavailable).

Oppos. p. 15 mentions §3605 but did not address the Motion p. 17 contention that the FCC and wireless providers' actions will have discriminatory effects and violate the §3617 protection against "interference" with disabled persons' exercise of their right to live in the neighborhood of their choice. *See, e.g.*, *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc*., 576 U.S. 519 (2015); 47 C.F.R. 100.500; *Oxford House-Evergreen v. Plainfield*, 769 F. Supp. 1329, 1344 (D.N.J. 1991).

C. APA Claims – arbitrary/capricious/reasoned decisionmaking/ response to material comments

Oppos. pp. 18-19 contend that *Order* ¶34 adequately responded to CHD and other commentors who raised similar issues. Not so. Reliance on the general emissions limits does not respond to the concerns of those who, for whatever reason, cannot tolerate FCC-compliant radiation. They are the exception, not the rule. Nor did *Order* ¶34 provide any rationale for its assertions that the revision did not violate bodily integrity or the ADA and FHHA. It contains summary

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[11] J*ersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 192 (4th Cir. 1999) (Oppos. p. 15) did not involve "official decisions" and private party actions that rendered the plaintiffs' home uninhabitable.

conclusions that provide no help to a reviewing court. It fails every reasoned decisionmaking requirement for rule changes.

D. Statutory Interpretation Claims; Commission Authority

The Opposition does not respond to the Movants' contention that the Commission lacks statutory authority to adopt these amendments. Motion pp. 25-26. They have therefore conceded the point. *Garza v. Hargan*, 874 F.3d 735, 737, n.1 (D.C. Cir. 2017); *United States v. North*, 920 F.2d 940, 949 (D.C. Cir. 1990). Thus, Movants have demonstrated a likelihood of success on this issue.

III. Petitioners Satisfy the Other Requirements for a Stay.

Oppos. pp. 20-21 imply there are some who completely lack broadband but would have access if wireless providers implement the rule change. That is false. The FCC found in 2020 that 100% of the US population already has direct access to some form of fixed wireless with speeds up to 25 Mbps upload and 3 Mbps download. *Deployment of ATC to All Americans in a Reasonable and Timely Fashion*, 35 FCC Rcd 8986 at Appendix 8 (Apr. 24, 2020). The rule change will merely provide another competitive alternative.

The balance is between additional sources for broadband in any given neighborhood and the shocking harm it would cause to those in that area who cannot tolerate exposure. The FCC did not advise the Court why it is not possible

to both deploy these systems and accommodate those who must avoid exposure. That would properly balance and serve all interests.

Oppos. pp. 21-22 claims a stay would constrain FCC's ability to ensure "new and innovative technologies are readily available." The stay will be temporary so it will not be disruptive. But a stay is necessary because the FCC has steadfastly refused to honor its equal duty to protect people's safety. *See* 47 U.S.C. §§151, 154(n), 254(c)(1)(A), 324, 332(a)(1), 336(h)(4)(B), 925(b)(2)(C), 1455(a)(3). All it had to do was maintain some process that will protect those who are intolerant. It rudely and cruelly refused. The Commission cannot complain about the consequences of its abject lack of concern for the individuals its rules purposefully crush.

CONCLUSION

The amended OTARD Rule is unlawful, will irreparably harm Petitioners, and is contrary to the public interest. Movant's lives hang in the balance. This Court must stay the Rule pending review.

Respectfully Submitted

_/s/_____
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Dated: March 24, 2021

CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)

Movant's Reply to Opposition to Emergency Motion for Stay complies with the type-volume limitation and typeface requirements of FRAP 27(d)(2) and 32(a)(5) and (6) because the portions subject to length limits contain 2,551 words and has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font size and Times New Roman type style.

_/s/_____
W. Scott McCollough

Dated: March 24, 2021

CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2021, I electronically filed the foregoing Petitioners' Emergency Motion for Stay and exhibits in support with the Clerk of the Court by using the appellate CM/ECF System, hand-delivered four copies to the Court, and served copies of the foregoing via the Court's CM/ECF system on all ECF-registered counsel.

_/s/_____
W. Scott McCollough