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File in ET Docket 93-62 Original

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The Secretary
Federal Communications Commission
1919 M. Street N.W. Room 222
Washington, DC 20554

In the Matter of

Complaint of Discrimination on the Basis of Handicap Filed by the Cellular Phone Taskforce on February 2, 1997	)	Handicapped Coordinator Office of Managing Director
	)	ET-Docket No. 93-62
Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation	)	

To: The Secretary:

Dear Mr. Secretary,
Re: - o a Complaint of Discrimination on the Basis of Handicap (Original + 2 copies)
o ET-Docket 93-62 (Duplicate original + 2 copies)

Enclosed please find an original and 2 copies of an ex parte presentation pertaining to a Complaint of Discrimination on the Basis of Handicap and duplicate original and 2 copies of same ex parte presentation pertaining to ET-Docket 93-62, and all pertaining to the same complaint action, being submitted in accordance with 47 CFR §1.1202, 1.1203, and 1.1206(a).

Please assure these are put in the official record of ET-Docket 93-62 and in the official record of the proceeding pertaining to the Complaint of Discrimination on the Basis of Handicap.

Thank you

Philip G. O'Reilly

Philip G. O'Reilly
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Seattle, WA 98118

Dated: December 3, 1997

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Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, DC 20554

In the Matter of

Complaint of Discrimination on the Basis of Handicap Filed by the Cellular Phone Taskforce on February 2, 1997	)	Handicapped Coordinator Office of Managing Director
	)	ET-Docket No. 93-62
Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation	)	

To: The Secretary and to the Commission:

<u>Ex Parte</u> Comments Supporting Appeal of Cellular Phone Taskforce per Complaint of Discrimination of February 2, 1997

Submitted by:

Philip G. O'Reilly
6321 51st South
Seattle, WA 98118

Dated: December 3, 1997

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C.5. Because the Commission may justify preemption on the basis of 47 USC section 332(c)(3), Regulatory treatment of mobile services: State Preemption, it should recognize that for the above reasons, this section is likewise be unconstitutional. 10

C.6. The Commission exceeded its statutory authority by rejecting the request of the Ad-Hoc Association that it put in the Commission's standard that exposures from its facilities be "kept as low as reasonably achievable", ("ALARA"). 11

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Summary

The Commission should reverse its decision concerning its authority to preempt the operations of personal wireless service facilities or that of other radio facilities. It should also report that it does not have the authority to preempt the health and safety regulations of states and local jurisidictions pertaining to the placement, construction, modification, or operation of any of its radio facilities, as to do so would either exceed the Commission's statutory authority or would result in the statute being interpreted as unconstitutional. It also should adopt the "as low as reasonably achievable" standard which is essentially already statute [47 USC section 324]. In this way those in the population at especially high risk of being electrically injured due to Commission licensed facilities may find relief by seeking protective regulations that states or local jurisdictions may enact.

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, DC 20554

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Complaint of Discrimination on the Basis of Handicap Filed by the Cellular Phone Taskforce on February 2, 1997	)	Handicapped Coordinator Office of Managing Director
	)	ET-Docket No. 93-62
Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation	)	

To: The Secretary and to the Commission:

Ex Parte Comments Supporting Appeal of Cellular Phone Taskforce per Complaint of Discrimination of February 2, 1997

A. Introduction:

The following comments are in support of the Appeal of the Cellular Phone Taskforce ("Appeal") submitted October 6, 1997, to the Secretary, Federal Communications Commission, 1919 M Street NW, Room 222, Washington, D.C. 20554, and pertaining to a Complaint of Discrimination ("Complaint") filed February 2, 1997 with the Handicapped Coordinator, Office of Managing Director, Federal Communications Commission, 1919 M Street NW, Room 852, Washington, D.C. 20554, and in accordance with 47 CFR 1.1870.

Subsequently, in a letter of July 14, 1997, Mr. Richard M. Smith reported that a response to the above complaint would be addressed in a, then, forthcoming decision, subsequently reported as the Commission's Second Memorandum Opinion and Order("2nd MO&O"), Adopted and Released August 25, 1997, with public notice in the Federal Register on September 12, 1997 at 62 FR47960.

An appeal was submitted on October 6, 1997 pertaining to the Commission's denial of the relief sought in the above complaint, such appeal being made in accordance with 47 CFR 1.1870(h).

B. Mention of possible oversights:

(1) In the above Complaint, the Cellular Phone Taskforce references the Commission's Report and Order in ET-Docket 93-62 as being "adopted" on August 6, 1996. Instead of the word *"adopted"* it is expected the Cellular Phone Taskforce likely intended *"reported in the Federal Register at 61 FR41006"*.

(2) The last paragraph of the Cellular Phone Taskforce appeal of October 6, 1997 includes the phrase,

"by virtue of the Radiofrequency Safety Guidelines adopted by the Commission on August 6, 1997."

Instead of the above phrase, it is expected the Cellular Phone Taskforce likely intended to state,

"by virtue of the Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, as finalized in the Commission's Second Memorandum Opinion and Order, adopted August 25, 1997, with public notice in the Federal Register on September 12, 1997 at 62 FR47690."

C. The Commission's recognizing certain statutory and Constitutional limitations on its authority will afford an alternative means for the Cellular Phone Taskforce to seek the relief requested in its above Complaint.

Insofar as the Commission seems set on a course to maintain the exposure levels it has recommended, in order for handicapped persons who are subject to being electrically injured by exposure levels as describe in the Complaint, it will be important to be able to seek relief from State and local jurisdictions by means of health and safety, land use, zoning, and other regulations pertaining to the placement, construction, modification and operation of radio facilities licensed by the Commission.

To avoid unnecessary confusion, delays, or unlawful assertion of the Commission's authority which is exceeds its delegated authority or which is based upon unconstitutional statutes, the Commission should provide some relief to the Cellular Phone Taskforce by clarifying that States and local jurisdictions may regulate by means of health and safety, land use, zoning and

other regulations pertaining to the placement, construction, modification and operation of radio facilities licensed by the Commission, including those regulations which are made on the basis of the health and safety impacts of radiofrequency emissions from radio facilities licensed by the Commission. In this way, the relief sought by the Cellular Phone Taskfroce and which may not be offered by the Commission, may be sought from each of the several States and their local jurisdictions.

To recognize the above, the Commission should consider the following:

C.1. No authority to preempt health and safety regulations of personal wireless services operations.

The Ad-Hoc Association of Parties Concerned About the Federal Communications Commission Radiofrequency Health and Safety Rules ("Ad-Hoc Association") in its Petition for Reconsideration dated Seat. 6, 1996, requested the Commission clarify that local jurisdictions can regulate the monitoring of personal wireless service facilities, even when the Commission does not require it [Ad-Hoc Association Petition at 8,9]. Also, David Fichtenberg commented on the request of Ameritech that the Commission also preempt State and local jurisdiction regulation of the operation of personal wireless services facilities. [Ameritech Mobile Communications, Inc. Petition for Reconsideration of Sep.. 1996, pages 9-10]. In the its comments to the request of Ameritech, focuses explicitly on the issue of regulation of operation which pertain to public health and safety, and in particular to regulating radiofrequency exposure limits, and stated,

"Congress was aware that many states and local jurisdictions had at the time of the Act (TCA) and prior to it set established radio frequency exposure limits which affected the operations of telecommunications facilities, and yet, after considering the concerns and efforts of parties to the proceeding, Congress chose to exclude 'operation' from the preempted list of function, leaving matters in this area as they were." [David Fichtenberg Comments Oct. 8, 1996, page 17].

Thus, by denying the requests of the Ad-Hoc Association and Fichtenberg, the Commission has clearly asserted that it can preempt health and safety regulations based upon the health and safety impacts of radiofrequency emissions of its facilities.

However, the Commission does not have the authority under 47 U.S.C. 332(c)(7)(B(iv)-(v) to preempt State and local jurisdiction regulations based upon health and safety impacts of the effects of radiofrequency emissions from the Commission's personal wireless services facilities. The Commission states that it finds this claim "illogical and absurd"; yet this claim only indicates that Congress chose that all regulation of operations of personal wireless service facilities, whether or not based upon the "environmental effects" of radiofreqency emissions, should be subject to review by the court of competent jurisdiction, and not by the Commission, as provided for by Congress in 47 U.S.C. 332(c)(7)(B). It is unclear to the Cellular Phone Taskforce on what basis the Commission finds this provision by Congress "illogical or absurd," [2nd MN&O, para. 89] and in any case, the Commission must not exceed its statutory authority whether the balance and compromise of Congress seems reasonable or not. Moreover, to claim that certain remarks in the Conference report of the Telecommunications Act of 1996, Pub. Law 104-104 ("TCA")[H. Rep. No. 104-458, 94th Cong. 2nd Sess. 208-209 (1996)] imply the Commission may preempt operations, while not expressly stating so, is contrary to statute which states that,

"This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments." [TCA, Section 601(c)(1)]

Accordingly, the above statute, TCA, Section 601(c)(1) explicitly prohibits the Commission from preempting "operation" on the basis of an implication. Moreover, such implication is inappropriate since the Senate/House Joint Conference explicitly removed all reference to "operate" and "operation" from the House version, H.R. 1555 of the TCA.

C. 2. The Commission has no authority to preempt State or local jurisidictio regulation of the placement, construction, modification, or operation of personal wireless services facilities on the basis of potential health and safety effects of radiofrequency emissions from such facilities.

The "environmental effects" referred to in 47 SC Section 332(c)(7)(B)(iv) are vague and do not explicitly indicate that Congress intends that health and safety regulations of States and local jurisdictions may be preempted.

Indeed, the courts have ruled that Congressional intent to supercede a state safety measure must be clearly manifested. [see Maurer v. Hamilton 309 U.S. 598,; 60 S.Ct. 726; 84 L.Ed. 969 (1940); H.P.Welch Co. v. New Hampshire, 306 U.S. 79, 85; 59 S.Ct. 438, 441; 83 L.Ed. 500, 505 (1939)]. Indeed, the courts tend to give greater deference to regulation that is traditionally parochial, i.e. health and safety measures [see Inlandboatmen's Union of the Pacific v. Department of Transportation, 119 Wn2d 697, 703; 836 P.2d 823 829 (1992); Bravman v. Baxter Healthcare Corp. 842 F.Supp. 747, 753 (S.D.N.Y. 1994).

Rather, the Commission must understand that the "environmental effects" referred to in 47 332(c)(7)(B)(iv) only pertain to those 'environmental effects' about which the Commission has expertise, i.e. the effects of radiofrequency of a certain power to interfere with broadcasts from other facilities.

For example, the courts have ruled,

"the FCC does not have the responsibility for public safety with regard to cellular telephones as its responsibilities lie in regulating frequency standards...Accordingly, since Congress has not empowered the FCC to regulate cellular telephones with regard to health effects and public safety, it has not regulated so pervasively as to preclude state action on that subject." [Verb v. Motorola, Inc. et al 672 N.E. 2nd (Ill.App. 1 Dist 1996).]

Furthermore, in the TCA section 253 on "Barriers to Entry", Congress further establishes that States may regulate any radio facilities *"to protect the public safety and welfare"* [47 U.S.C section 253(b)], even when it may effect the ability of companies to provide telecommunications services

Therefore, the Commission erroneously implies that regulations based upon "environmental effects" includes public health and safety regulations based upon potential public health and safety effects of radiofrequency emissions from any of the Commission's licensed radio facilities. Indeed, since to preempt health and safety regulations the Commission must imply such preemption as included in regulations based upon the "environmental effects" of radiofrequency

emissions, the Commission is violating statute, since the TCA Section 601(c)(1) prohibited any preemption of State or local law by implications derived from the TCA but not explicitly stated.

Furthermore, when Congress enacted 47 USC 332(c)(3) pertaining to commercial mobile services and facilities, while Congress removed State and local jurisdiction over economic regulation, specifically rate or entry regulation, it specifically authorized continued State and local regulation of the "terms and conditions of such services" including facilities siting issues such as zoning and stated, as follows,

> "It is the intent of the Committee that the States still would be able to regulate the terms and conditions of the services. By 'terms and conditions,' the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters; facility siting issues (e.g. zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state's lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under 'terms and conditions' " H.R. Rep. No. 111, 103rd Cong., 1st Sess. 261 (1993) [emphasis added]. [noted by Concerned Communities and Organizations ("CCO") in its Sep.. 10, 1997 Comments in Docket DA 96-2140, pertaining to public notice FCC 97-264.

C.3. For the Commission to maintain that the reference in 47 USC 332(c)(7)(B)(iv) to regulations based upon "environmental effects" of radiofrequency includes regulations of health and safety regulations would render the statute unconstitutional; and in any case, there are reasons to find all of the 47 USC (c)(7)(B)(i) to (v) unconstitutional.

This is because:

C.3(1) Separation of Powers provisions would not followed in 47 USC 332(c)(7)(B)(iv) providing preemption authority to the FCC. The checks and balances structure of the Constitution requires Congress to put forth a proper criteria when delegating authority to an executive agency. Yet the aforementioned statute provides no criteria to the Commission, but only states that whatever regulations based on the environmental effects the Commission may make, these may not be preempted. It may also be argued that a proper delegation of authority requires the agency being given preemption authority to have expertise in the field being preempted; yet the FCC does not have expertise in health and safety matters, and has acknowledged this [e.g. see FCC 96-326 at para. 28]

C.3(2) The 5th Amendment due process provisions are violated. Due process requires agencies with preemption authority have expertise in preempted area. If health and safety regulations are to be preempted, due process requires Congress explicitly provide for this. Moreover, if a reasonable knowledgeable person would be fearful of living or working in areas exposed at the allowed exposure limits, this will render such areas unfit for the purposes intended and be a 'taking' of property without due compensation. Furthermore, since the Food and Drug Administration ("FDA") has told the FCC that allowed limits *"can cause injury or death"* due to interference with medical devices, [see FDA letter of July 17, 1997 from E. Jacobson to R. Smith, Chief of the Commission's Office of Engineering and Technology], persons being put at such risk are also having their 5th amendment rights violated.

C.3(3) The First Amendment free speech rights are violated insofar as by preempting land use decisions based upon the health and safety effects of radiofrequency emissions, there is a 'chilling effect' or attempt to regulate the content of speech on allowing public comment of its concerns on this issue during land use hearings and related proceedings. For example, in Seattle, Washington, a hearing officer dismissed an appeal by a local neighborhood association requesting reconsideration of a decision that the installation of a personal wireless services facility will result in "no probable significant environmental impacts."; the dismissal was based upon 47 USC Section 332(c)(7)(B)(iv). [see dismissal of Appeal of the Rainier Valley Association For Safe Wireless Technology in Appendix to this Comment] This lack of even allowing an opportunity for public comment on the health and safety impacts of a Commission facility is an example of the chilling effect this statute has on free speech.

C.3(4) The 10th Amendment, which the Supreme Court has recently given greater weight [see New York vs. U.S. 112 S.Ct.2408 (1992)] reserves to the States the traditional role of land use zoning and other regulations, especially for health and safety considerations.

Moreover, the Supreme Court has held,

"States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed

organizational chart. The Constitution instead 'leaves to the several States a residuary and inviolable sovereignty' [The Federalist No. 39. p. 245, C. Rossiter ed. 1961)]....Whatever the outer limits of that sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program." [see New York v. U.S. 112 S.Ct. 2408, 2435 (1992), and citations therein]

In New York v. US above, the Supreme Court also ruled,

"Low-Level Radioactive Waste Policy Act's 'take title' provision [in 42 U.S.C.A. section 2021 et seq.] offering states choice of either accepting ownership of waste generated within their borders or regulating according to instructions of Congress, neither of which options could be constitutionally imposed as freestanding requirement, was outside Congress' enumerated powers and infringed upon state sovereignty in violation of Tenth Amendment." [New York vs U.S at 2410], and "either accepting ownership of waste or regulating according to Congress' instructions - the provision lies outside Congress' enumerated powers and is inconsistent with the Tenth Amendment" [New York v. U.S. at 2413]

But now we have the same situation regarding personal wireless services facilities under 47 USC section 332(c)(7)(B)(iv) if we interpret regulations based upon "environmental effects of radiofrequency emissions" to imply including regulations based upon the health and safety effects of radiofrequency emissions. For under this interpretation Congress would be compelling states to incorporate into its zoning laws and proceedings regulations for the placement, construction, and modification of such facilities, and in effect commandeering part of the administration of state and local governments to carry out the will of Congress.

Yet, *"Constitution does not give Congress authority to require states to regulate, no matter how powerful the federal interest involved..."* [New York v. U.S. at 2410]

Moreover, the above consideration applies to all of 47 USC section 332(c)(7)(B), for therein Congress is compelling states and local governments to allow the placement of personal wireless communication facilities with their corresponding non-ionizing radiation, and with the necessity to establish regulatory measures to address zoning, construction and other regulations required by law of jurisdictions to be prudent in the zoning, placement, construction, and

operation, and related regulations of any structure according to the particular issues and risks associated with each structure.

Therefore, just as certain Low-Level Radioactive Waste Policy Act provisions commandeer states and local jurisdictions to establish a regulatory program, such commandeering being found unconstitutional, so too are 47 332(c)(7)(B) provisions unconstitutional.

C.4. Because the Commission may justify preemption on the basis of 47 USC section 253, it should recognize that for the above reasons, this section is likewise be unconstitutional.

Section (a) states, "IN GENERAL-No state or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

Section (b) includes the provision that, "Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to ..protect the public safety and welfare."

[section 254 pertains to Universal Service]

Section (d) provides for the Commission to preempt regulations which violate (a) or (b).

The above implies that if the Commission finds State or local law requirements to "protect the public safety and welfare" are inconsistent with the provisions for Universal Service in Section 254, then the Commission may preempt such public health and safety regulations.

However, provisions in section 254 provide for such all encompassing goals as "Quality services should be available at just, reasonable, and affordable rates," [253(b)(1), and "access to advanced telecommunications and information services should be available in all regions of the Nation." [253 (b)(2)]. These seemingly positive goals may provide a basis for arguing that any restrictions on allowed levels of radiofrequency exposure will affect the strength of the signal on the edge of a service area, and thus adversely affect the quality of service there. Similarly, in defense of a 'fast roll-out' of high quality Digital TV, to provide "quality services" the Commission may argue that State and local zoning regulations interfere with the pace of the construction, and so must be preempted.

Thus the restriction on state authority that regulations be "consistent" with the Universal Service section" or otherwise be preempted create the same problems here as above.

C.4(1) There is an inadequate separation of powers. Due to lack of a clear standard of what "consistent with Section 254" allows, the Commission is given essentially unlimited preemption authority, including, presumably preempting public health and safety regulations so that someone can get a better TV reception. Thus, there is an inadequate delegation of authority, and no clear standard from Congress upon which the Commission can derive its regulations.

C.4(2) 5th Amendment due process provisions apply for the same reasons here as above. The provision "consistent with Section 254" is vague, providing no clear standard for developing agency regulations, and thus deprives persons of rights which would have been protected by preempted laws, or laws that would have been prepared .

C.4(3) For the same reasons as above there can be a chilling effect on free speech, for the same reasons as above.

C.4(4) By allowing the Commission to preempt state regulations and by compelling the allowance of "any entity to provide any interstate or intrastate telecommunications service" necessarily results in states and local jurisdictions being commandeered to establish any and all telecommunications facilities in their midsts. As noted, the Supreme Court finds this commandeering of state and local administrations unconstitutional [New York v. U.S.112 S.Ct. 2408 (1992)]

One way of interpreting "consistent with section 254 (Universal Service)" is that with the present development of satellite communications, the goals of Universal Service have, or soon will be reached, so that the condition under which 253(d) preemptions may apply, in fact are no longer relevant, so that no Commission preemptions are in fact allowed.

C.5. Because the Commission may justify preemption on the basis of 47 USC section 332(c)(3), Regulatory treatment of mobile services: State Preemption, it should recognize that for the above reasons, this section is likewise be unconstitutional.

In 47 USC section 332(c)(3) it states,

"no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this

paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services."

If we interpret "regulate the entry" to a narrowly defined economic regulation special to newcomers, then there appears to be no constitutional problem. However, if the Commission broadly interprets "regulate the entry" to pertain to preempting zoning, land use, associated health and safety regulations including those due to the health and safety impacts of radiofrequency emissions, and other regulations, then the same constitutional problems noted above exist.

For should the Commission broadly interpret "regulate the entry" to mean almost any regulation, and permits the above preemptions in order to speed the implementation of, say, Digital TV, or to preempt moratoria, then the Commission's interpretation would render this section unconstitutional for the same reasons as above. This is:

C.5(1) In adequate separation of powers due to improper delegation of authority, with vague or absent criteria for implementing regulations.

C.5(2) 5th amendment due process violations

C.5(3) 1st amendment free speech violations

C.5(4) 10th amendment violations, especially encroaching upon the traditional land use, zoning, and health and safety regulations traditionally reserved to states and local jurisdictions. Since 332(c)(3) does not explicitly provide for preempting zoning and health and safety regulations violates both TCA section 601(c)(1) and historical precedent requiring such explicit preemption. Likewise the violations in New York v. US 112 S.Ct. 2408 (1992) described above also occur.

Also, any other sections of 47 USC 151 et seq. that may be interpreted by the Commission as giving it authority to preempt state and local zoning, land use, and health and safety regulations are unconstitutional.

Moreover, it should be noted that the Commission has actually made the above interpretations of sections 253 and 332(c)(3) in proposing to preempt state and local jurisdiction laws [see public notice FCC 97-264 and FCC 97-182

C.6. The Commission exceeded its statutory authority by rejecting the request of the Ad-Hoc Association that it put in the Commission's standard that exposures from its facilities be "kept as low as reasonably achievable", ("ALARA"). As noted by the Ad-Hoc

Association, this is essentially the directive of the National Institute of Occupational Safety and Health to the Commission in its letter of January 10, 1994 [see Ad-Hoc Reply comments of Oct. 8, 1996 page 9, and see Ex parte comments dated June 10, 1997, page 38-41]. But moreover, Congress also requires it of the Commission stating,

"In all circumstances, except in case of radio communications or signals relating to vessels in distress, all radio stations, including those owned and operated by the United States, shall use the minimum amount of power necessary to carry out the communication desired." [47 USC Section 324].

Inclusion of this statute, which is essentially the same as the Ad-Hoc ALARA in the Commission's rules will give appropriate direction to states and local jurisdictions to seek ways regarding placement, appropriate transmitters, and other criteria to achieve the objectives of the Congressional statute, NIOSH, and the Ad-Hoc Association ALARA request. This will provide additional means for those who are at risk to becoming electrically injured to seek relief.

Conclusion: Because of the above, the Commission should reverse its decision concerning its authority to preempt the operations of personal wireless service facilities or that of other radio facilities. It should also report that it does not have the authority to preempt the health and safety regulations of states and local jurisdictions pertaining to the placement, construction, modification, or operation of any of its radio facilities, as to do so would either exceed the Commission's statutory authority or would result in the statute being interpreted as unconstitutional. It also should adopt the "as low as reasonably achievable" standard which is essentially already statute [47 USC section 324]. In this way those in the population at especially high risk of being electrically injured due to Commission licensed facilities may find relief by seeking protective regulations that states or local jurisdictions may enact.

Respectfully submitted,

Philip G. O'Reilly

dated: December 3, 1997

Philip G. O'Reilly
6321 51st South
Seattle, WA 98118

Exhibit Illustrating the chilling effect 47 USC Section 332(c)(7)(B)(iv) has on free speech

Exhibit is the dismissal of an appeal to hear discussion on the environmental impacts of a proposed personal wireless services facility. Prior to the enactment of 47 USC Section 332(c)(7)(B)(iv) this appeal would automatically, by right, have been heard.

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of

RAINIER VALLEY ASSOCIATION FOR SAFE WIRELESS TECHNOLOGY

from a decision of the Director, Department of Construction and Land Use

Hearing Examiner File No.:
MUP-96-038 (CU, W)

Council File No.
CF 301494

DCLU File No.
9603542

ORDER OF DISMISSAL

This matter involves property located at 4213 South Orcas Street. Under application 9603542, the applicant (the Walter Group) proposed the construction on the property of a minor communication utility consisting of 12 panel type antennae. On October 10, 1996, DCLU published notice of its decision, in which it recommended that the required Council Conditional Use be granted, and in which it entered a Determination of Non-significance (DNS). The effect of a DNS is to relieve the applicant of the need to prepare an Environmental Impact Statement (EIS).

On October 24, 1996 David Fichtenberg filed an appeal on behalf of the Rainier Valley Association for Safe Wireless Technology, challenging the failure of DCLU to require an EIS. That appeal was based on the possible environmental impacts of the radiofrequency radiation that would be associated with the proposed facility.

On October 31, 1996, the applicant (the Walter Group) filed a motion with the Hearing Examiner seeking dismissal of the appellant's SEPA appeal. In this motion, the applicant argued that the federal government had preempted the ability of State or local government to regulate wireless service facilities on the basis of the environmental effects of radio frequency emissions.

A response to the applicant's motion was filed by the appellant on November 12, 1996. In that response, the appellant contested whether the federal government had, indeed, preempted local control over questions of radio frequency emissions. The appellant also argued that even if there was preemption, an EIS should still be prepared.

As to the first issue, the Telecommunications Act of 1996 added the following paragraph (iv) to 47 USC sec. 332(c):

> No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communication] Commission's regulations concerning such emissions.

In August of 1996, the FCC issued its "Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation [ET Docket No 93-62 (FCC 96-326)]. That order adopted Maximum Permissible Exposure (MPE) standards.

The proposed facility complies with the FCC's MPE standards. Accordingly, the City of Seattle is preempted from regulating the proposed minor communications utility on the basis of the environmental impacts of its radio frequency emissions.

The second issue then is whether, in the face of this preemption, the Hearing Examiner retains the ability to require an EIS in this case. The answer to that question is "no".

SMC 25.05.340(A) provides that a DNS is appropriate when the responsible official determines that "there will be no probable significant environmental impacts from a proposal. . ." SMC 25.05.400 sets forth the purpose of an EIS; Paragraph B provides that an EIS "shall inform decisionmakers and the public of reasonable alternatives, including mitigation measures, that would avoid or minimize adverse impacts or enhance environmental quality."

The appellant's appeal is based entirely on the possible environmental effects of RF radiation. Therefore, to reverse the Department in this case, the Examiner would have to determine that environmental impacts of RF radiation, the very thing over which the City has no jurisdiction, creates a "probable significant environmental impact." Moreover, because the City is preempted from regulating the proposed facility on the basis of the environmental impacts of RF radiation, any EIS prepared to explore those impacts could not be used to regulate or mitigate whatever adverse impacts were revealed. This would be an absurd result.

This is not to suggest that the construction of a minor communications utility could never require the preparation of an EIS. Such a requirement could still be appropriate when other impacts of the placement of the utility, such as construction related impacts, view impacts from protected City viewpoints, etc. were at issue. However, such concerns were not raised by this appeal.

On the basis of the above, this appeal from the Determination of Non-significance entered by DCLU in this case should be, and hereby is, **DISMISSED.** The public hearing on November 26, 1996 will be limited to testimony and evidence regarding the proposal's compliance with the requirements for a council conditional use.

Entered this 14th day of November, 1996.

Guy E. Fletcher, Deputy Hearing Examiner
Office of Hearing Examiner
Room 1320 Alaska Building
618 Second Avenue
Seattle, WA 98104
(206) 684-0521
(206) 685-0536 (FAX)

Certificate of Service

I, Philip G. O'Reilly, hereby certify that I have on this 3rd day of December, 1997, sent by first class mail, postage pre-paid, a copy of the foregoing ex parte comment to the following parties:

Chairman William E. Kennard
Federal Communications Commission
1919 M Street, N.W. Room 814
Washington, D.C. 20554

Commissioner Michael Powell
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