

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Environmental Effects of Radiofrequency)
Radiation: Petition for Inquiry to Consider)
Amendment of Rules in Parts 1 and 2,)
Petition for Inquiry of EMR Network)

APPLICATION FOR REVIEW
OF EMR NETWORK

James R. Hobson
Miller & Van Eaton, P.L.L.C.
1155 Connecticut Avenue, N.W., #1000
Washington, D.C. 20036 (202) 785-0600

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ITS COUNSEL

SUMMARY

The Acting Bureau Chief of the FCC's Office of Engineering and Technology has dismissed, without legally sufficient reasons, a Petition for Inquiry of EMR Network concerning whether to revise the radio frequency radiation ("RFR") rules at Sections 1.1307, 1.1310, 2.1091 and 2.1093. On review, the full Commission should reverse the action and open the inquiry.

The Administrative Procedure Act, as implemented in the Commission's rules, entitles any interested person to petition an agency for revision of its rules. Federal courts have held that petitioners are entitled to a response on the merits. The staff Dismissal Letter expressly declined to opine on the merits of the Petition. The refusal to do so is unlawful.

In fact, by giving no plausible reason whatever for the dismissal of EMR Network's Petition, the Acting Bureau Chief failed to follow FCC rules governing dismissals and denials of such requests. The Dismissal Letter did not say whether the Petition was moot, premature, repetitive or frivolous, nor did it state why the Petition otherwise did not warrant consideration.

What the Dismissal Letter seemed to be saying is: "We can't help you here. Go somewhere else." The Acting Bureau Chief said that since the FCC is not an expert agency in the field of health research on RFR issues, it could not initiate an inquiry on the topic or even decide whether such a proceeding would be appropriate. This understatement of the Commission's authority and responsibility for its own rules is an astonishing departure from the agency's practice and precedent. Three times in less than three decades, the FCC has taken the very initiative on adoption or revision of RFR regulations it now disclaims.

The field of RFR research in the United States is now essentially occupied by the radio service and equipment companies and the single remaining standards body, IEEE, in which these

companies wield dominant influence. It is precisely because the IEEE is now considering revising its RFR protection standards, on which the current FCC regulations are substantially based, that the Commission should, as it did in 1979, open a public proceeding to parallel the private and more restricted investigations conducted by the standards organization.

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ATTACHMENT 1

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APPLICATION FOR REVIEW

EMR Network hereby applies for review by the full Commission, pursuant to Section 1.115 of the Rules, of the letter of December 11, 2001 (“Dismissal Letter”), by which the Acting Chief of the Office of Engineering and Technology (“OET”) dismissed the EMR Network’s Petition for Inquiry (“Petition”) filed September 25, 2001.¹ The Dismissal Letter violates the Administrative Procedure Act (“APA”) by failing to provide even a brief statement of the grounds for the action.² Alternatively, the attempted explanation conflicts with law, precedent or established policy within the meaning of Section 1.115(b)(2)(i) of the Rules. In either view, the dismissal of the EMR Network Petition was arbitrary and unlawful.³

In seeking the opening of an inquiry that might lead to proposals for revising the current⁴ RF radiation (“RFR”) protection rules at Sections 1.1307, 1.1310, 2.1091 and 2.1093, EMR Network chiefly relied on a letter of June 17, 1999 from members of the Radiofrequency Interagency Work Group (“IWG”), including Robert Cleveland of the FCC, to the chair of the

¹ Letter from Bruce A. Franca to James R. Hobson, Counsel to EMR Network.

² 5 U.S.C. §555(e).

³ 5 U.S.C. §706(2)(A).

⁴ Although adopted in 1996, the regulations are substantially based on recommended standards 10 to 15 years old, for which the supporting scientific studies are even older.

Risk Assessment Working Group (“Subcommittee 4) of SCC 28, a committee of the Institute of Electrical and Electronic Engineers (“IEEE”) currently considering possible revision of its recommended RFR protective standards last issued in 1991. Careful to explain that the views in the 1999 letter were those of the IWG members and not the “policy or position of the respective agencies,”⁵ the IWG nonetheless identified and discussed no fewer than 14 issues “that we believe need to be addressed to provide a strong and credible rationale to support the RF exposure guidelines.” *Id*

In describing the basis for the Petition, the Dismissal Letter omits any mention of the 1999 IWG letter. Confessing that “the FCC is not an expert agency in health-related issues,” the Dismissal Letter acknowledges the Commission’s reliance on other agencies such as EPA and FDA, but ignores the IWG letter signed by staff experts from those two agencies as well as the Occupational Safety and Health Administration (“OSHA”) of the Department of Labor, the National Institute for Occupational Safety and Health (“NIOSH”) of the Department of Health and Human Services, the National Telecommunications and Information Administration (“NTIA”) of the Department of Commerce and the FCC’s own Senior Scientist, Robert Cleveland.

The Dismissal Letter also notes the FCC’s reliance in RFR matters on private standards-setting bodies such as IEEE and the National Council on Radiation Protection and Measurements (“NCRP”). The first of these, of course, is currently considering revision of its RFR standards of 1991. The second, while listing non-ionizing radiation among its program topics, does not

⁵ Petition, Exhibit A, 1.

appear to be active in revising the set of RFR safeguards (1986) on which the FCC last relied.⁶

The Dismissal Letter then offers this astonishing conclusion:

If efforts to revise or update our RF safety limits based on research in the field or on other factors are appropriate, that determination should be made by these or other federal agencies with primary expertise in and responsibility for ensuring health and safety, and should not be made in the first instance by the FCC. *Accordingly, any proceeding or inquiry should be initiated by and maintained under the auspices of such agency or agencies, and the determination of whether such an inquiry or proceeding is appropriate at this time should also be made by such agency or agencies.*

(Dismissal Letter, 2, emphasis added) Finally, “the dismissal of your petition should not be construed as a determination on the substantive merits of the matters it raises.” *Id.* For the reasons discussed below, the Dismissal Letter seeks to relieve the FCC of responsibilities it cannot lawfully avoid, and must be reviewed by the full Commission. On review, the Commission should open an inquiry as requested.

1. The EMR Network is entitled to know the reasons for the Commission’s action.

At a minimum, the right to petition for rulemaking entitles a petitioner to a response on the merits.⁷ As in *National Organization for the Reform of Marijuana Laws (NORML) v. Ingersoll*⁸, the FCC raises a kind of “impossibility” defense in dismissing a petition for rulemaking. NORML asked the Bureau of Narcotics and Dangerous Drugs of the Department of Justice either to remove marijuana from the list of controlled substances or to change the schedule under which it was regulated. The Bureau responded that it could not entertain the request without violating its treaty obligations and dismissed the petition. The remanding court

⁶ See the web site at www.ncrp.com, where the list of reports for 1999 to date likewise contains no documents matching the scope of the IEEE studies.

⁷ Richard J. Pierce, Jr., *I Administrative Law Treatise* (Aspen Law and Business, 4th ed.), 388.

refused to accept the dismissal without further explanation. Referring to the Bureau's conclusion as to treaty obligations, the court said:

[T]he point is not obvious or clear-cut, but requires a reflective consideration and analysis. That kind of determination should have been reflected in an action denying the petition on the merits . . . (citation omitted).

497 F.2d at 659. The Dismissal Letter is a kind of "impossibility" response, effectively stating that the FCC cannot manage its own rules and sending Petitioner EMR Network from pillar to post in an effort to find a competent forum. In so many words: "We can't help you here, go somewhere else."

By failing to discuss the IWG's 1999 recommendations to the IEEE, the FCC commits an even more grievous error than that of the Deputy Administrator of Veterinary Services in the U.S. Department of Agriculture. There, the official was presented with a study by Auburn University's Veterinary Medicine Department suggesting that, despite protective rules already in place, the practice of "soring" (deliberately injuring) show horses in order to make them perform in new or unusual or better ways was continuing. The Deputy Administrator dismissed a petition to strengthen the rules by saying simply that he had reviewed the study and other materials and concluded that the "most effective method of enforcing the Act is to continue the current regulations."⁹ The court remanded the dismissal to the Agriculture Department with these words:

In sum, we conclude that the Secretary has not presented a reasonable explanation of his failure to grant the rulemaking petition of the Association, particularly in light of the apparent message of the Auburn study.

⁸ 497 F.2d 654 (D.C. Circuit 1974).

⁹ *American Horse Protection Assn. v. Secretary of Agriculture*, 812 F.2d 1, 15 (D.C. Cir. 1987).

812 F.2d at 21.

Similarly here, the Acting Bureau Chief has dismissed the EMR Network's Petition, which relies heavily on the recommendations of IWG experts, including a member of his own staff, without so much as a mention of the 1999 IWG letter. That the views of these experts were not presented as "official" does not excuse ignoring them, any more than the unofficial work of Auburn University excused the Secretary of Agriculture.

2. *The FCC must follow its own rules for dismissal of rulemaking petitions.*

Section 1.1401(e) of the Rules states that

[p]etitions which are moot, premature, repetitive, frivolous, or which plainly do not warrant consideration by the Commission may be denied or dismissed without prejudice to the petitioner.

EMR Network respectfully submits that it is unable to discern from the Dismissal Letter which of these categories, if any, the Commission has assigned to its Petition. There is utterly no hint in the decision of the Acting Bureau Chief that the Petition was considered moot, repetitive or frivolous. If the FCC believes the petition to be premature or otherwise unworthy of consideration, it should state why. If the dismissal is intended as a "denial," EMR Network is even more clearly entitled, under Section 1.1407, to "be notified of the Commission's action with the grounds therefor."¹⁰

The grounds for dismissal or denial are impossible for EMR Network to determine. The Dismissal Letter is a recitation of unconnected statements which cannot be followed to a logical conclusion. There is a fundamental failure to link the outcome to the facts found.¹¹ What is the

¹⁰ *American Lung Association v. EPA*, 134 F.3d 388, 393 (D.C. Cir. 1998) ("Given the gaps in the Final Decision's reasoning, we must remand this case to permit the Administrator to explain her conclusions more fully.")

¹¹ *Motor Vehicle Manufacturers Assn. v. State Farm Mutual Auto Insurance Co.*, 463 U.S. 29, 43 (1983).

point of mentioning the EPA and the FDA without at least acknowledging the 1999 RFR recommendations sent to the IEEE by experts from those agencies? What is the point of mentioning the IEEE without noting that, in fact, that standards body currently is engaged in studying the very subject matter of the Petition? What is the relationship between that private activity and the FCC's public demurrer? If the issues posed by the IWG experts to the IEEE are important enough for that forum, why are they not significant to the FCC? Under the APA and the Commission's Rules, EMR Network is entitled to have these questions answered.

3. *The FCC is responsible for its own rules, including decisions to amend or not.*

Section 1.401(a) of the Commission's Rules tracks the APA, 5 U.S.C. §553(e), by giving interested parties the right to petition for the issuance, amendment or repeal of a rule. Surely the right is to petition the agency that has issued the rule -- the FCC -- not the EPA, the FDA or any other federal health agency. EMR Network has no intention of pursuing the futile and improper course of asking another agency to inquire into the FCC's rules.¹²

The Acting Bureau Chief's assertion that

any proceeding or inquiry should be initiated by and maintained
under the auspices of such [other] agency or agencies

is an astonishing break with precedent so novel that, under Section 0.241 of the Rules, it should never have been issued under delegated authority.¹³ The Commission had no difficulty in

¹² While the EPA [Reorganization Plan No. 3, 1970, and 42 U.S.C. §2021(h)] and the FDA [Radiation Control for Health and Safety Act of 1968, 42 U.S.C. §§263b-n] are assigned consultative authority with respect to non-ionizing RFR, the limited missions of OSHA and NIOSH in relation to occupational safety and health cannot be considered any kind of substitute for the responsibility of the FCC under the Communications Act and the National Environmental Policy Act ("NEPA"). Even if the FCC were allowed to shunt the EMR Network Petition to another agency, there is no one else to do the FCC's job. (GAO 01-545, note 20, *infra*, 14-15, 19)

¹³ The error can be corrected, and should be reversed, in the full Commission's action on the Application for Review.

assuming its responsibilities under NEPA when, in 1974, it first adopted RFR safeguards.¹⁴ Nor did it hesitate, in 1979, 1982 and 1985, to take the initiative – from Notice of Inquiry through Report and Order – in amending the RFR regulations. Three years prior to the 1982 IEEE revision of RF protection guidelines, the FCC issued a Notice of Inquiry

to gather information and views that will assist it in . . . fulfilling its regulatory responsibility to promote communication by radio in light of increased concern about the biological effects of radio frequency radiation.¹⁵

The scientific, social and political environment in 1979 was not unlike today's. The Commission said it was opening the inquiry

in light of the increased concern about the biological effects of radio frequency radiation. Publicity over the irradiation of the U.S. Embassy in Moscow, Senate Hearings on Radiation, Health and Safety, the recent Canadian proposal to lower the limits of exposure of the general population to non-ionizing radiation . . . have all combined to increase public awareness and interest in radio frequency radiation. *Id.*, 482-83.

Even more to the point, the two decades and more since that earlier NOI have witnessed the explosion of cellular and PCS communications. The least a new NOI could do would be to determine whether the increased amounts of ambient electromagnetic energy from transmitters and receivers represent any increased risk to public health.¹⁶

¹⁴ *National Environmental Policy Act*, 49 FCC 2d 1313 (1974).

¹⁵ *Standards-Radio Frequency Radiation*, 72 FCC 2d 482 (1979). What the FCC did in the NOI is precisely what the EMR Network Petition seeks. The NOI was followed by an NPRM in 1982, 89 FCC 2d 214, and amended rules in 1985, 100 FCC 2d 543.

¹⁶ Although the current rules were adopted in 1996, in the midst of the wireless explosion, they were based on standards of 1986 and 1991 and on scientific studies dating from the late 1970s and early 1980s, when cellular telephony was only a gleam in AT&T's eye.

Finally, in the period 1993-97, the Commission was confident in its issuance of a notice for further amendment, and in its defense of the adopted rules against claims that the FCC had not solicited sufficient help from its more knowledgeable sister agencies.¹⁷

With this history and precedent in mind, EMR Network is simply baffled by the Dismissal Letter's conclusion that the kind of inquiry it seeks can only be initiated and maintained by some agency other than the FCC. Similarly astounding is the statement that

the determination of whether such an inquiry or proceeding is appropriate at this time should also be made by such agency or agencies.

In 1997, defending on reconsideration its 1996 order most recently amending the RFR safeguards, the Commission explained why and how it dared to choose between two sets of recommended standards and between and among the conflicting views of other federal agencies themselves. 12 FCC Rcd at 13505-508.

The Dismissal Letter refers to the appellate court decision upholding those regulations, but omits to mention that the judges accepted, after lengthy oral argument on the point, that the FCC was entitled to deny petitions for reconsideration without specially seeking out or consulting its sister agencies.¹⁸ Now that the shoe is on the other foot, the Commission cannot and should not be heard to say that it is unable to evaluate the EMR Network's Petition.

¹⁷ Notice of Proposed Rulemaking, ET Docket 93-62, 8 FCC Rcd 2849 (1993); Report and Order, 11 FCC Rcd 15123 (1996); Order on Reconsideration, 12 FCC Rcd 13494 (1997).

¹⁸ *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 91 (2d Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001).

4. *The FCC should consider seriously when and how to provide a public counterpoint to the private RFR activities of the IEEE.*

With the NCRP no longer directly active in the field of RFR standards, the FCC should think more carefully about whether the effect of refusing to open an inquiry on the subject would leave the matter entirely in the hands of the IEEE and whether that would be a good thing. In the 1993-96 amendment period, the tensions produced by honest agency differences over the NCRP versus the IEEE recommendations resulted – so far as the FCC and most of its sister agencies were concerned – in a better set of regulations.

Today, there is no effective push-back to the IEEE, which is a private, commercial body dominated by private, commercial interests.¹⁹ The EPA is without funding or staff to engage seriously in the work,²⁰ and the FDA's responsibility for RF emissions from equipment such as microwave ovens or (with the FCC) cellular phones is simply too narrow to cover all dimensions of the task.²¹ As can be seen from recent coverage in the trade press, even academic research is plagued with conflicting claims of which corporate donors are really controlling the outcome of experiments on the biological effects of RFR.²²

¹⁹ Attachment 1 hereto is the attendance list from the SC4 (SCC 28) meeting in June 2001, where some two-thirds of the attendees are listed as having private commercial affiliations, counting military and university representatives on the public side. If the proportion were taken for voting members, the private commercial percentage likely would rise.

²⁰ Petition, Exhibit C, and discussion of GAO Report (GAO-01-545, May 2001) at 9, 14-15.

²¹ Several members of Congress were concerned enough about a privately-funded study of cellular phone emissions that they lobbied strenuously for improved FDA oversight. The study is discussed at pages 17-18 of the GAO Report (note 19, *supra*). The statement of Rep. Edward J. Markey (D-MA) on that report, issued May 22, 1001, can be found at http://www.house.gov/markey/iss_telecomm_st010522.htm

²² Jeff Silva, "RCR Lawsuits May Start to Lose Steam," *RCR Wireless News*, December 17, 2001, reports on charges traded between scientists as to whose research is more beholden to industry sponsors. See also, the December 10th issue of *RCR Wireless News*.

Which leaves the IEEE. The record of the 1993-96 amendment process is replete with claims that industry-sponsored research on RFR is rigged to the desires of its private funders and that the IEEE corporate members who work or consult for radio service providers and equipment makers, despite good intentions, cannot objectively evaluate RFR studies whose outcomes suggest greater harm from non-ionizing radiation than previously assumed. The charges and counter-charges continue.²³

Against this private orchestration of RFR research and standards, we submit, the FCC's role should be to provide some public counterpoint. The IEEE's deliberations, whatever their merits or good intentions, are not conducted in the full light of day. Membership on major committees is not open, and the early work of crucial subcommittees is embargoed.²⁴ On information and belief, the EPA does not send observers to the IEEE meetings on RFR standards – although the FCC and other agencies sometimes do – for fear that EPA might be charged with bias or predisposition if it were ever called upon to adopt RFR recommendations of its own. By contrast, FCC proceedings of a rulemaking character – inquiries, PRMs, NPRMs – are conducted openly under judicially-inspired requirements to disclose ex parte contacts.

EMR Network respectfully submits that the time is now for public counterpoint to the restricted IEEE proceedings, to be conducted by the FCC. The FCC need not misrepresent its technical competence by ultimately “determining” new RFR safety standards. On the other hand, despite the demurrer in the Dismissal Letter, the Commission is not compelled to leave to other agencies “the determination of whether such an inquiry or proceeding is appropriate at this

²³ Jeff Silva, “Relaxed RF Guidelines Drafted,: *RCR Wireless News*, November 26, 2001, reports that unnamed government scientists are “alarmed” by early draft IEEE proposals for relaxing exposure limits in the current 1991 standards.

²⁴ See the exchange of correspondence between EMR Network and IEEE representatives at <http://www.EMRNetwork.org/news/news.htm>.

time.” In 1979, the Commission opened an inquiry that ran in parallel with IEEE work on the 1982 standards. There is ample cause to do the same in 2002.

The May 2001 GAO Report (note 20, *supra*) discussed in the Petition is another reason for seriously considering the opening of an inquiry at this time. In its “Recommendations for Executive Action,” the Report suggested that the FCC Chairman

- Direct [OET] to issue revised guidance on SAR [specific absorption rate] testing procedures to reduce variations in test results caused by a lack of standardized procedures.
- Direct [OET] to consult with FDA on the advisability of adopting FDA’s method of incorporating measurement uncertainty in determining compliance with [RF] safety limits.
- Direct the Office of Managing Director to develop a strategy for meeting the need for additional expertise in [RF] exposure and testing issues.²⁵

The first two of these recommendations coincide with recommendations in the 1999 IWG letter and could be advanced by information gathered in an inquiry.²⁶

Conclusion. For the foregoing reasons the Commission should overrule the Dismissal Letter of the Acting Bureau Chief and open the inquiry sought by EMR Network.

Respectfully submitted,

EMR NETWORK

By _____

James R. Hobson

Miller & Van Eaton, P.L.L.C.

1155 Connecticut Avenue, N.W., #1000

Washington, D.C. 20036 (202) 785-0600

ITS COUNSEL

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²⁵ GAO 01-545 at 31-32.

²⁶ In its formal response to the GAO Report, the FCC said that it had consulted with FDA and found that the margin of safety for measurement uncertainty which the latter agency incorporated into its microwave oven standards was not, in fact, insisted upon by FDA in its “post-production” testing of these units. It promised to act unilaterally on SAR measurement uniformity if its consultations with IEEE did not produce prompt consensus. (GAO 01-545, at 34-36) Neither activity, it would appear, has been brought to closure.

Attachment 1 - Footnote 19, p. 9**Radisson Riverfront Hotel
St. Paul, Minnesota**

June 8, 2001

1:00 PM – 5:00PM*and***June 9, 2001****8:00 AM – Noon**

	Name	Affiliation	Status	Country	E-Mail Address
1.	Adair, E. R.	USAF	M	US	eleanor.adair@hebro
2.	Anderson, V.	Private Consultant	M	AU	vtas@iee.org
3.	Aslan, E.	NARDA Microwave	M	US	edward.aslan@nardan 3COM.com
4.	Baron, D.	Holiday Industries	O	US	baron006@tc.umn.edu
5.	Bellier, P.	Health Canada	O	CA	pascale_bellier@hc-sc
6.	Black, D.	Enviromedix IT Me	M	NZ	drblack@itmedical.co
7.	Blick, D.	USAF	M	US	dennis.blick@brooks.
8.	Bodemann, R.	Siemens AG	O	DE	ralf.bodemann@mchp
9.	Brecher, A.	DOT/RSPA Volpe Center	M	US	brecher@vople.dot.g
10.	Bushberg, J. T.	Univ of CA – Davis	M	US	jtbushberg@ucdavis.c
11.	Chou, C. K.	Motorola	M	US	ECC017@email.mot.
12.	Cleveland, R. F.	FCC	M	US	rclvla@fcc.gov
13.	Cohen, J.	Consultant	M	US	jcohen@denny.com
14.	D'Andrea, J. A.	Naval Health Research Det	M	US	john.dandrea@navy.b
15.	DeFrank, J.	US Army – CHPPM	M	US	john.defrank@amedd.
16.	Dowdle, J.	3M	O	US	dmdowdle@mmm.co
17.	Elder, J.	Motorola	O	US	
18.	Gettman, K.	NEMA	O	US	ken_gettman@nema.c
19.	Gibney, K. B.	Independent	O	CA	kgibne6276@home.c
20.	Gorsuch, G. M.	Dept of Navy – Bur of Medicine	M	US	gmgorsuch@us.med.n
21.	Haes, D. L.	MIT	M	US	haes@mit.edu
22.	Hammer, W. C.	Navy – SPAWAR Systems	M	US	hammerw@spawar.na
	Name	Affiliation	Status	Country	E-Mail Address
23.	Hatfield, J. B.	Hatfield & Dawson	M	US	hatfield@hatdaw.com
24.	Heynick, L. N.	Independent Consultant	M	US	louhey@mindspring.c
25.	Hubbard, R.	Technology Services	O	ZA	roy.hubbard@eskom.
26.	Hurt, W. D.	USAF	M	US	william.hurt@brooks.
27.	Ivans, V.	Medtronic, Inc	M	US	veronica.ivans@medt

