CHD v FCC – OTARD: Transcript of CHD's Oral Arguments

Note: This is NOT an official transcript and only a part of the arguments are transcribed below.

My name is Scott McCollough. I am counsel for Petitioners Children's Health Defense and 4 individual petitioners: Dr. Elliot, Ginger Kesler, Angela Tsiang and Jonathan Mirin.

Petitioners Kesler and Tsiang and CHD member Baran each have two young children with debilitating RF-related conditions. CHD member Hoffman has a daughter similarly afflicted. These kids' homes are the only relatively safe space for them. They could die if a facility authorized by the rule amendment I'll get into in a minute suddenly appears nearby.

CHD appears in its organizational capacity representing almost 2,000 members who filed comments below. 823 of them also have RF-related disabilities.

The FCC contends (Br. p. 56) that these folks have no rights to be protected. They must helplessly witness their kids or spouse (like Mr. Mirin's wife) being tortured and then frankly exterminated. Those who suffer the same conditions, the adults, will suffer the same fate.

We respectfully disagree. To put it simply, the Communications Act does not grant the commission the power to issue a license to kill. This court must vacate and remand.

Now, to the rule. The rule at issue, and pardon me if I use an acronym, OTARD, that's the way it's always discussed at the Commission, that's "Over the Air Receiving Device." Iit's in 47 C.F.R. 1.4000). The Commission amended the rule, and we are challenging the amendment. Originally the rule– and to this day it still does preempt any state or local law which unreasonably restricts the placement or operation of these protected facilities.

Under the old rule, people who owned property or had a leasehold interest in property, could place consumer-end devices on their property in order to receive either satellite TV service or fixed internet service. It had to be for their primary use. It had to serve tenants on the premises.

Judge Millet: You just said it had to be primarily for serving tenants on the premises, so there could be some, I don't know what percentage, there could be some additional communication to another…

CHD: The FCC usual term for that is called "incidental use." The rule did allow incidental use. That was in 2004, and the commission allowed people who had these consumer-end devices to put in additional consumer-end devices that could provide connectivity to others nearby. You'd have point-to-point mesh-type service that could incidentally serve a couple of others. But it always had to be incidental, not primary.

Now, the main change to the rule isn't necessarily… the biggest part of the rule is the type of equipment that is now allowed. The commission wants to downplay this. But the actual equipment that it now allows through the amendment is far more powerful equipment. Whereas before it had to be consumer-end equipment, which could emit much lower emission levels allowed for consumer-end or CPE customer premise devices, now you can have a carrier come

in, a private carrier, put in a very, very powerful antenna, much like a cell phone antenna and a base station that can serve thousands of people with the antennas spreading in an omnidirectional manner out a mile or more. So what the commission did was it allowed far more powerful equipment, and it removed the primary use requirement. Indeed it flipped it. Now, the primary use can be to serve anybody nearby, up to a mile or two out however far the antennas go, so long as the use for on-premise customers is at least incidental. So they flipped that rule and they allowed more powerful equipment.

Judge Millet: What evidence is there that antennas will come up near them.

CHD: The commission itself touted the extent to which this rule is going to be used. As it explains, Starry alone, almost a million customers. Many other service providers will take advantage of this rule. There is clearly a substantial risk that one of these will show up without notice and thereby effect the taking of the restrictive covenant right.

Judge Randolph: Without notice?

CHD: Without notice.

Judge Randolph: Does the company that is erecting the tower have to get permission from the FCC before doing that?

CHD: There are no site-specific requirements, and a lot of it depends on which frequencies are being used, some of which are fully licensed. If that is the case, then they have to get the license or the radio station authorization for the emissions.

Judge Randolph: What about interference?

CHD: Essentially, it is all about the interference. The specific placement is not regulated by the FCC here unless the tower gets so tall that it must be registered to protect against…

Judge Randolph: That's another question I had. It's 12 feet about the roof line, right? How do you measure the roofline? You've got a community, some of which have 3-story houses, others of which have one-story ranchers (they call them in Texas, too), which is the roofline?

CHD: My understanding is it is the roofline of the specific house or building on which the structure will be built. And so if it is a 3-story building, the 12-foot exception for minimal local safety regulations could be 12 feet above the third story. On a single story then it would be 12 foot above the single story.

Judge Randolph: If it's 12 foot above, does that change the FCC's involvement in any way? If it's more than 12 feet, no matter how we measure, how does that change, if at all, the FCC's involvement?

CHD: The 12-foot exception, first, doesn't appear in the rule. The commission expressed this as a limited exception in one of its Orders before this rule was changed. But what it basically allows

is a very small amount of local safety regulation. They still cannot regulate placement. They still cannot require a permit. Indeed, before they can even enforce the safety regulations that the commission touts in its brief, they have to have previously promulgated an ordinance that specifically listed which safety regulation.

Judge Randolph: The antennas that we're talking about are attached to houses or buildings– is that right?

CHD: Some of these can be attached to houses. Some of them can be free-standing towers and they are, much like the images that we gave you from Mr. Hoffman.

Judge Randolph: I want to pick up on one other assertion that you made that there doesn't need to be any notice. The rule we're talking about is on page 23 of the Joint Appendix. It doesn't say anything about preempting notice, does it?

CHD: It does not require notice. There is no specific requirement for notice.

Judge Randolph: If there's a notice requirement in a homeowner's association to build any kind of structure, or a zoning rule in a town or county, or even a state-wide requirement, where is it in the rule that it would preempt all those notice requirements?

CHD: The commission has declared, and I'm sorry I don't have a cite for you, but I could provide it post-argument, the commission has in fact already preempted some local ordinances that required notice for various things.

Judge Randolph: There's partial preemption. Maybe when the commission says 'We preempt it,' they're not erasing the statute or the ordinance. All they're doing is asserting the authority that they have through the regulation and statute. And if there's nothing in there that preempts a notice requirement, forget about citing a notice requirement, I don't know where you get the idea that notice is preempted. I must say that on page 38 of the commission's brief, they make the assertion too, and I don't find any support of that at all.

CHD: The rule is not expressed in this regard, but in the past decisions, where the commission has said, in the old rule when somebody had a satellite dish, for example, that localities could not require notice, the commission said that it was an unreasonable restriction because it impeded the ability and delayed the ability to install, therefore it was an unreasonable restriction.

Judge Millet: I thought they had only preseraved safety regulations– is that right? The only thing they preserved was safety regulations.

CHD: This rule, according to some of the commission precedent, allows a locality to impose a very limited amount of safety regulation.

Judge Millet: Only safety. Only safety.

CHD: Basically, the safety code, electrical code, building code. And only to the extent that….

Judge Millet: Is notice part of the safety code?

CHD: Sometimes it is, but my understanding and belief is that the commission would say that this notice requirement…

Judge Randolph: This is a facial attack on the regulation amendment on page JA23, and there's nothing on the face of the regulation–and you admit this candidly– that preempts anything other than siting.

CHD: It even preempts siting. All that it allows is a minimal amount of safety regulation in the form of electrical and fire code.

Judge Randolph: Got to page JA23 and tell me what language has that effect.

CHD: It does not appear in the rule, similar to the 12-foot exception, but the commission has in the past, under the old rule, preempted municipal regulations. It tried to…

Judge Randolph: If the old rule does that, and I don't know whether it does, then what's that got to do with the amendment that you're attacking?

CHD: Because of the new equipment that is allowed.

With this new very powerful equipment that goes very much further and impacts far more people, there is a whole new class of people who, pre-amendment, would have received notice under their local zoning code or would have been protected by a restrictive covenant. Now, with the change, all of that local protection goes away. The commission will contend...

Judge Millet: Because they're now commercial use.

CHD: Yes, including the commercial use and including the new wireless towers.

Judge Millet: I want to just clarify, and I'll give you some time for rebuttal, but another thing that you said in response to one of Judge Randolph's questions on what kind of notice to the FCC is required, you said if there's a certain level of frequency they may have to be licensed, but I had understood from your brief that, I don't know if it was some or many of these antennas, some portion of these antennas would not require notice to the FCC, or a license from the FCC at all.

CHD: That is correct. The so-called "unlicensed" frequencies.

Judge Millet: So there's no notice to the FCC that they're coming in.

CHD: That is correct.

Judge Millet: And the notice provisions if we take FCC at its word, that's its position, those are also preempted. So that's the source of your concern about lack of notice.

CHD: Absolutely. As a consequence, people will not know when one of these is about to show up so that they can deal with it however they otherwise would have.

Nor is there any ability to find where they are in order to ensure that their emissions, even under the new rule, are FCC-compliant. There is simply no way to find out where these things are or where they will be when they are coming.

For the petitioners here, the only way they will know is when their children begin to get sick **again** after they already fled to find somewhere else safe.

CHD's Response to FCC's Arguments

After the FCC's argument part was over, the court allowed CHD two minutes to respond. We didn't transcribe the back and forth with the judges, only CHD's last comments:

CHD: We are talking realy realy ugly powerful antennas now authorised by this rule. Instead of porch lights we are talking stadium lights that emit out to a mile. Instead of the TV speakers we are talking about a large rock band playing at a stadium for people who can hear it up to a mile. The old rule dealt with consumer-end equipment, not very powerful, with lower emissions. This rule directly allows for carrier base stations with up to 3 times the power level. Starry plans to put up to three base stations at each location serving 12,000 households within 1 mile 360-degree service radius. They could not do that under the old rule. That is a material change.