

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

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

The Purpose of the Amendment

FCC: Petitioners in their briefing do not acknowledge the scope or history of the old rule, that it covered the relay antennas.

Judge Millet: What was primarily? They had to be primarily for customer use. The FCC made the considered decision that that restriction was a barrier to development of that type of communications ability. Significant barrier.

FCC: Correct, Your Honor.

Judge Millet: And that eliminating that would open up development and expansion of these capabilities in very important ways to allow better access to better serve... the exploding demand. I think you had numbers for that. So it seems to me that the FCC itself anticipated that this is going to produce substantial proliferation of these antennas. Am I incorrect in understanding that?

FCC: [ADMISSION]: No, I think you are correct.

Judge Millet: Ten-fold? 20-fold? How much more are you anticipating?

FCC: I don't have an estimate. I think the commission expected that...

Judge Millet: Lots?

FCC: Lots. That it would contribute...

Judge Millet: Lots and lots. It's 5G so we are going to have to do this, right? We've got to get these things out there.

FCC: Right, Your Honor, and I think the commission anticipates that by removing uncertainty about the scope of the old rule....

Judge Millet: There is no uncertainty. The "primarily" restriction. The "primarily customer use" restriction. It's getting rid of that.

FCC: Your Honor, I think that the use... the restriction before was that the antenna would not be primarily intended for use as a hub.

Judge Millet: But it will be primarily used for the customer service in that area.

FCC: Yes.

Judge Millet: That is a different formulation.

FCC: It is absolutely true that the commission removed the primary use restriction, and so antennas are no longer required to be primarily intended for customer use. There remains a restriction that each antenna that is on a premises used by the customer to receive a signal.

Judge Randolph: We are talking about antennas that are designed to receive. Are we also talking about an antenna that transmits signals? Or relays signals?

FCC: Yes, your honor. Part of the reason for the commission's decision is that these antennas, as wireless technology evolved, are multi-purpose. The same way that a personal computer can be used as a word processor and as a gaming device and to watch videos, these antennas increasingly have multiple functions. They can be used to receive and they can be used to transmit and they can be used to relay. A big reason the commission eliminated the restriction was because it concluded it was obsolete. It didn't make sense when you talk about multiple features.

Judge: The function is video and what else?

FCC: The rule change covers antennas that are used for broadband only. That is fixed wireless that is used for wireless internet. Not for voice, not for mobile. But specifically for broadband. And the commission explained that broadband-only antennas, that by covering those, it's serving the original purpose of section 207 in which Congress directed the commission to adopt this rule because customers increasingly stream video programs off the internet. The rule was originally enacted to increase consumers' access.

Judge Randolph: What do we know about the likely strength of these antennas? Your friend on the other side makes at least the plausible argument that when you move from an antenna that is primarily receiving for use on-site by the building owner, to antennas that are primarily transmitting... the new antennas would likely be much stronger.

FCC: I cannot speak as to what the power of the antennas will be. The rule change was to remove the primary use restriction, but the commission did not do any change regarding the power. The rules continue to require that the antennas be used by customers who receive service and continue the size restrictions on the antennas. My understanding of what the commission anticipated seeing is more rapid deployment of the antennas that would have been covered.

Judge Randolph: Is there any indication that there is some opportunity for local communities to have regulations, not for the purpose of regulating the frequency or the intensity of the signal, but because "They're ugly and we don't want them in our town for aesthetic reasons"?

FCC: The rule before the rule change and the rule after the rule change prohibits unreasonable restrictions on antenna deployment, on placement, and "unreasonable" means that completely

prevents the placement of an antenna, or delays it or increases its costs. There is commission case law, there are commission decisions that are interpreting that reasonableness standard, and that standard leaves room for communities to regulate with respect to aesthetics standard, with respect to the site of an antenna on a customer's property, with respect to radio frequency radiation safety as long as the restrictions are within the commission's limits. **The restriction is that they would not be "unreasonable."** For instance, the commission has said that a requirement that an antenna be painted so that they blend in with their surroundings can be reasonable as long as it doesn't increase the cost of the antenna to such an extent that it is not affordable or prevents its placement.

Notice to Homeowners' Associations

Judge: Is it true that an antenna under this regulation can be erected without any notice to the homeowners' association?

FCC: With respect to notice, the commission has held that under the rule itself, I am leaving aside the safety exception, but with respect to the rule itself, the commission has held that the prior approval requirements cause unreasonable delays. But a notice requirement may be ..

Judge: There is a phenomenon that I think I am aware of that what often happens is that the homeowners association gets wind of a tower going up even though that association has no authority to approve or disapprove the tower, they can take action by mobilizing people and petition whoever has the authority under the First Amendment right to stop the project. So regardless of whether they have the authority to stop it, what I am asking is, how are they going to know that there is a tower that is going up?

FCC [Note - FCC's ADMISSION!]: Under the rule, there is a rule for aesthetics standards. The commission in its case law so far has ruled that prior approval requirement, notice to the community prior to the erection of the antenna or tower cause unreasonable delays.

Judge Millet: So your example here says "**prior notice is prohibited.**"

FCC: Except for the safety exceptions. If I want the tower or a mast on my property or an antenna covered by the rule and it is more than 12 feet from the roof line, then the safety exemption is **as long as the tower is within 12 feet - no prior notice is allowed. But notice after the fact is acceptable.**

Judge: Is that a result of the amended rule?

FCC: No, Your Honor, it is not. The commission has been very clear that it had not changed any aspect of the rule except for the "primary use restriction."

Judge Millet: Yes, but the volume of these things that will be put up and the power that they are using are going to expand enormously. What they said is that under the old rule the requirement is going to be used primarily for customer usage. With their homeowners restrictions they have been able to control and prevent them from being put in. Now that is because they (HOA) have

restrictions on commercial uses and now that it is gone, it is preempted, they can come in without any notice.

FCC: First of all, Your Honor, two things: I think that there is nothing in the record and there is nothing in the commission order to indicate that a significant increase in power of the devices will be a result of the rule change.

Judge Millet: The mere number of them surrounding them. They don't need more power. Just the number surrounding them next door. Now they cannot even have a notice that it affects them. So put aside the frequency. I am assuming here that the power is at the level...

FCC: Your Honor, I don't think that before they could contest, even under the private restrictions, that they could contest the placement of an antenna based on exposure to radiofrequency from the antenna.

Judge Millet: They could contest it based on commercial usage. Commercial use is not for the use of the homeowner. They could contest it on that ground. They could, right? At least from the record and the affidavits.

FCC: No, Your Honor, I think that even if an antenna prior to the rule change was intended primarily for commercial use it wouldn't be covered by the rule if a homeowners association wanted to prevent the erection of an antenna on the basis of radio-frequency energy from that antenna.

Judge Millet: [raising her voice] No, they don't. I am going to say this again. Their homeowners' restrictions prevented it because they didn't want commercial usage of these devices on their property. Antennas that are erected on their property for commercial purposes. That is what is preempted now. I am not talking about radio frequency. I am talking about commercial usage.

FCC: I don't believe that the private restrictions that are in the record speak specifically to commercial usage.

Judge Millet: Take it as a hypothetical. That would be preempted.

FCC [ADMISSION] Yes, absolutely.

Judge Millet: And no notice at all.

FCC: Yes, that is correct.

Increased RF Radiation Exposure

Judge Millet: I just have a practical question. Take your radio frequency exposure limits. As more of these antennas are out there, let's say they are multiplied by five as a result of the rule, then what someone is exposed to would increase, would they not? If I am exposed to one antenna

there is a certain amount. This is highly hypothetical - but if I have antennas on all four sides of me, what I am exposed to is going to increase. It may not exceed your limit, but it is going to increase the amount of exposure.

FCC - That is not necessarily true. The amount of exposure varies according to the power, to the frequency, to the proximity, to the equipment.

Judge Millet: Four times exposure is not more than a single exposure. That is what you are telling me? If I have a circle of these antennas surrounding me all operating simultaneously at unlicensed levels [she meant frequency] I am not exposed to any more radio frequency than if there was just one? Is that your answer?

FCC: I don't speak to that. I don't want to answer that. The answer under the commission radio-frequency exposure limits is that the limits....

Judge Millet: I am not questioning your limits here. If I am surrounded by more, is there more?

FCC: Possibly but it will have to be within the limits.

Judge Millet: I am not questioning your limits here. I am asking just a fact question - is there more? [radiation]

FCC: [ADMISSION] - I would assume so, Your Honor, I am not an expert.

Judge: If I have 15 objects that are transmitting waves at a certain decibel it doesn't mean that it is 15 times louder than it would be if there would be only one of them transmitting. So I am not sure that that's....

FCC: And I don't know either, Your Honor and I just want to make the point that the commission's radio frequency exposure limits govern radiation from multiple sources.

Since There is no Notice - Who is Ensuring Compliance with FCC's RF Exposure Limits?

Judge Millet: But that is not what I am asking. What I am trying to figure out is if there is no notice to the FCC of where these things are, how does someone figure out if the exposure has gone up or not? What someone is exposed to has increased, even if it is still within your ranges here.

FCC: The service providers are responsible for compliance with the commission radio-frequency exposure limits.

Judge Millet: How do they comply if they don't know who else is putting an antenna out?

FCC - The service providers and carriers have responsibility under the commission radio-frequency exposure limits to maintain levels that are within the commission's limits, even for multiple source devices. So if you are standing at a spot and there are 10 different sources of

radiation then all of the carriers and service providers that are contributing to that are responsible to ensure that...

Judge Millet: How do they do that if there is no notice anywhere as to where the other antennas are? There could be in someone's backyard behind a tree.

FCC: The provider would have to ensure that the installation was consistent with the radio-frequency exposure limits in order to be able to install it in the first place.

Judge Millet: An individual one would not exceed the limit. But if the collective impacted..

FCC: I believe, Your Honor, that a service provider would be responsible before installing the antenna to ensure compliance with the radio frequency exposure limits.

Judge Millet: How would they do that if there is no notice of the other ones?

FCC: The service provider has to work with the customer. The customer has an exclusive control of the property and so it knows where it puts the antenna and would have to ensure that by putting the antenna there he was not creating exposure risks beyond the commission's limits.

"Ugly" Antennas Are Not a Reasonable Restriction

Judge: If a tower goes up and I am the next door neighbor and I think it's ugly, what is my recourse? I take a look at the zoning restrictions and they say no towers shall go up without approval of the zoning approval commission. So what's my recourse as a neighbor? I don't want to have to stare looking out of my window at an ugly tower.

FCC: Well, Your Honor, again, the commission didn't change the rule except for primary usage restriction and **the rule allows for reasonable restrictions.**

Judge: So who do I go to? Do I go to the FCC to complain?

FCC: Yes. If you believe that there is an issue about coverage - whether the rule covers a particular device there is a declaratory relief process with the commission to determine whether something is covered by the rule. You could go to your local zoning authority and you could say someone put up a mast with a supporting antenna and its ugly and I want it removed. It will be up to the local authority to decide whether that was something that needs to be removed or whether it was something that is subject to reasonable restrictions and someone could go to the FCC to obtain a decision about

Judge Millet: You are not here saying that a local zoning board could order these antennas removed considering their aesthetics, are you?

Judge Millet: [raising her voice] **Are you saying that local zoning commissions retain the authority to order these antennas removed because they are ugly?**

FCC: If it is reasonable.

Judge Millet: [with raised voice] Is this reasonable? You told me that unreasonable things are things that increase cost or prevent it from happening. But now you are suggesting to Judge Randolph that maybe he could order them removed. Because that is a very important concession if that is what you are saying. Could it be removed by an order of a local board without any preemption because of aesthetics, not safety?

FCC: [ADMISSION] No, I think not, Your Honor.

Judge Millet: So that is not your answer then.

FCC: I think I am out of time, Your Honors.