

**In the
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

EMR NETWORK,)	
)	
Petitioner,)	
)	No. 03-1336
v.)	
)	
FEDERAL COMMUNICATIONS COMMISSION)	
and THE UNITED STATES OF AMERICA,)	
)	
Respondents.)	

RESPONSE TO FCC MOTION TO STRIKE PORTION OF EMR’S REPLY BRIEF

EMR Network opposes the FCC’s motion to strike “Point II” of EMR’s Reply Brief purportedly on the ground that it refers to matters not mentioned in EMR’s opening brief.

The Function of an appellant’s Reply Brief is to **reply** to factual statements and arguments advanced in the appellee’s brief.

FRAP Rule 28(e) explicitly states:

(e) Reply Brief. The appellant may file a brief in reply to the appellee’s brief.

(Emphasis added.)

EMR’s Reply Brief does exactly that—it replies to a false and misleading factual assertion made in the FCC’s brief.

I. FCC’s False and Improper Factual Statement in its Brief Required a Reply from EMR

Appellee’s brief contains a highly improper factual statement, entirely outside the record, entirely unsupported, and demonstrably false, which mandated a reply from the appellant.

The false assertion is that “Nothing has changed” since 1997 to provide a basis for the FCC to review its existing radiation standards. That statement appears on page 30 of the FCC brief and is the very heart of the FCC’s case.

Here is the FCC incorrect and misleading statement in context (FCC Br. 29-31):

In 1997, the Commission rejected arguments that the RF regulations take non-thermal effects into account, explaining that its regulations were “based on recommendations of expert organizations and federal agencies with responsibilities for health and safety,””*RF Reconsideration Order*, 12 FCC Red at 13505 ¶ 31. The Commission concluded then that it would be “impracticable” to ignore the advice of those bodies, especially for “controversial issues,” such as non-thermal effects. *Id.* In upholding the Commission’s judgment, the Second Circuit found that the ANSI/IEEE and the NCRP had considered and rejected non-thermal effects in developing their recommended guidelines, that “[a]ll of the expert agencies” were aware of the Commission’s approach and found it satisfactory, and that certain “new evidence” that purported to undercut the RF guidelines merely showed that non-thermal effects remained “controversial.” *Cellular Phone Taskforce*, 205 F.3d at 90.

Nothing has changed. No federal health and safety agency has changed its position on non-thermal effects. *See, supra*, pp. 12-13. “[N]ot one of the agencies represented” in the IWG “has elected to initiate any action” in response to the IWG Letter Order ¶ 7 (J.A. 114), *see Marsh*, 490 U.S. at 384 (“The concerns disclosed *** apparently were not sufficiently serious to persuade [the state agency] to abandon its neutral position”). No expert federal agency has demonstrated a “show of concern or even interest” despite its having the “same (or greater) knowledge of research in this field – and its implications” – as the Commission Order ¶ 11 (J.A. 116). Nor has the IEEE – which is currently reviewing its RF guidelines – “yet to determine what, if any, responsive action is appropriate.” Order ¶ 7 (J.A. 114). In short, the absence of any “expression of concern” by these expert bodies – even after EMR Network specifically informed many of them of its position for inquiry (fn omitted)– indicates that there is not (as there was not in 1997) any basis for compelling the Commission to act. *See Marsh*, 490 U.S. at 380.

(Emphasis added.)

The FCC’s factual claim that “Nothing has changed” since the Commission refused to take non-thermal effects into account in 1997 is plain misstatement of fact. The most

notable change since 1997 has been the Commission’s own push for rapid proliferation of Broadband digital high speed wireless services, a subject raised and discussed at the outset of Point III of EMR’s opening brief (at pp. 46-5). EMR’s Reply Brief directly addresses this rapid Broadband expansion (all occurring since 1997) and particularly the FCC’s stress on bringing Broadband services into schools, citing the FCC’s own 1999 report, which placed special emphasis on expediting the deployment of Broadband service to schools. (See Reply Brief at pp. 2-5).

The development and proliferation of Broadband digital wireless transmissions has dramatically changed wireless technology and radiation– and the Commission itself has been directly responsible for carrying out that change. Responding to the FCC’s false contrary statement in its brief was the principal purpose of EMR’s Reply Brief, as clearly stated at the very outset of that brief on page (iii):

REPLY BRIEF FOR PETITIONER

Summary of Argument

Respondent’s principal factual assertion is that “nothing has changed” since the Second Circuit upheld the FCC’s 1997 rejection of “controversial” evidence of the non-thermal effects of RF radiation on human health (FCC Br. p. 30).

This Reply Brief is intended to show that what **has** changed is the FCC’s current headlong rush to expand “broadband” high-speed digital electronics communications, particularly to elementary and secondary schools, while failing and refusing to inquire into and consider all factors relevant to the public interest.

II. References to the British Government School Policy and to NYC’s Harlem Schools are Examples of “Legislative Facts” Which This Court Can and Should Judicially Notice

EMR pointed out in its main brief that the Advisory Committee notes following Rule 201 of the Federal Rules of Evidence encourage Federal Judges to consult any and all

relevant sources for persuasive data in arriving at decisions on domestic law. The Advisory Committee quoted Harvard Law Professor Edmund M. Morgan on this practice:

“In determining the content or applicability of a rule of domestic law, the judge is unrestricted in his investigation and conclusion. He may reject the propositions of either party or of both parties. He may consult the sources of pertinent data to which they refer, or he may refuse to do so. He may make an independent search for persuasive data or rest content with what he has or what the parties present. *** [T]he parties do no more than to assist; they control no part of the process.” Morgan, *Judicial Notice*, 57 Harv.L.Rev. 269-270-271 (1944).

(EMR Brief, pp. 43-45, n.2) (Emphasis added.)

The “legislative facts” concerning the British Government’s school policy and the location of base stations near Harlem schools exactly meet the Advisory Committee’s objective. They provide “persuasive data” which the Court may wish to consider. With the help of the internet-savvy law clerks, we have no doubt that the Judges may find even more pertinent information on non-thermal radiation effects from Broadband transmissions by the time this appeal is argued and decided.

There is absolutely nothing wrong in a party calling such facts to the Court’s attention. It would be derelict not to do so. The Commission may choose to put on blinders to what is happening in the real world, but it cannot put blinders on the Judges of this Court.

The FCC’s motion is inappropriate and unwarranted in the circumstances of this case, and should be denied in all respects.

Respectfully submitted,

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April 28, 2004

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EMR NETWORK, Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION & USA, Respondents

Certificate of Service

I, Whitney North Seymour, Jr., hereby certify that the foregoing “Response to FCC Motion to Strike Portion of EMR’s Reply Brief” was served this 28th day of April, 2004, by mailing true copies thereof, postage prepaid, to the following persons at the addresses listed below:

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