

The Latest in Cyberlaw

5G HEALTH ISSUES

In the last column, we discussed 5G technology, the fifth generation of cellular network technology that will bring faster, more reliable, more responsive service. This month we look at health issues related to the new technology.

When I started researching this topic, little did I know that on Christmas Day 2020, a bomb would be detonated outside the AT&T building in Nashville. There is speculation that the attack might be linked to the bomber's alleged fears concerning 5G. Whether or not such concerns turn out to be a motive, it goes without saying that there is no place for violence in this debate.

Questions about the health impact of 5G have been raised by various groups in recent years. In September 2017, an appeal was submitted to the European Commission seeking a moratorium on 5G deployment until proper scientific evaluation of potential negative health consequences is conducted. The number of signatories has grown steadily and now includes more than 400 doctors and scientists from over 35 countries. The European Commissioner for Health and Food Safety has responded to the appeal with assurances that 5G technology does not pose health risks. The basic argument of the Commissioner is that the exposure to electromagnetic fields does not pose a health risk if the level remains below the limits set in Council Recommendation 1999/519/EC. The appeal signatories argue that 5G networks will substantially increase the exposure to radiofrequency electromagnetic fields (RF-EMF), and that RF-EMF has been proven to be harmful to humans and the environment.

Concerns related to the impact of 5G on health have also been raised in the US. For example, in March 2019, the Portland City Council unanimously approved Resolution 37418 requesting that the FCC update studies on the potential health risks of 5G. In

May 2019, the Louisiana House of Representatives unanimously approved HR 145 requesting that the La. Dept. of Environmental Quality and La. Dept. of Health study the effects of 5G on environment and health. Since then, bills have been introduced in several other states, including New York, calling for studies, task forces, or commissions to look into the health effects of 5G.

Some voices downplay the risks. The World Health Organization, which plans to release a 2022 assessment of the health risks of 5G technology, states that "Provided that the overall exposure remains below international guidelines, no consequences for public health are anticipated." Similarly, a December 2019 article in *Wired* opines that "concerns over the potential health impacts of 5G are overblown. If you weren't worried about prior generations of cellular service causing cancer, 5G doesn't produce much new to worry about. And you probably didn't need to be worried before."

But others strongly disagree, and litigation has been commenced in response to the FCC's December 2019 decision refusing to update the FCC's existing health guidelines for wireless technology. Back in 2013 the FCC issued a Notice of Inquiry posing the question whether to update the existing guidelines established in 1996. Specifically, the Inquiry was framed as a "science-based examination of the efficacy, currency, and adequacy of the" RF/EMF limits." Public comment was invited, and the FCC was deluged with submissions over the next six years. Proponents of tighter limits on RF/EMF submitted thousands of peer-reviewed studies and medical reviews indicating that the 1996 regulations were inadequate to protect the public. In December 2019, the FCC issued an Order refusing to update the



Anne F. Downey

Continued on Page 29

Construction Disputes

Arbitrator Mediator Expert Witness

brianpbrady.com

bpbradyarchitect@gmail.com

716.392.7271



Member of
AAA Panel
of Neutrals

Brian P. Brady, AIA, is an architect with 45 years experience. For over a decade, he has been a Member of the American Arbitration Association's Panel of Neutrals for Construction Disputes

The American
Institute of
Architects



OH MY 5G!

Continued from Page 20

existing guidelines, stating that “no scientific evidence establishes a causal link between wireless device use and cancer or other illnesses.”

In January 2020, the Environmental Health Trust and others filed a Petition in the Ninth Circuit Court of Appeals challenging the FCC’s decision refusing to revisit the guidelines. A similar Petition was filed in February 2020 in the District of Columbia Circuit Court of Appeals by the Children’s Health Defense (headed by Robert F. Kennedy, Jr.) and others. The cases were subsequently consolidated in the D.C. Circuit. *Environmental Health Trust, et al. v. FCC*, No. 20-1025 (D.C. Cir.); *Children’s Health Defense, et al v. FCC, et al*, No. 20-1138 (D.C. Cir.).

In July 2020, Petitioners submitted a joint brief in the proceeding. The brief argued, among other things, that the FCC violated the Administrative Procedure Act (APA) when it failed to consider any evidence demonstrating that the 1996 regulations do not protect against health and environmental risks or at least explain why such evidence did not warrant amending the exposure regulations and cellphone testing procedures. Petitioners also argued that the FCC violated the National Environmental Policy Act (NEPA) by failing to explain why NEPA does not apply to the FCC’s reassessment of the exposure regulations and cellphone testing protocols, or conduct an environmental analysis regarding the decision not to amend the exposure limits or testing procedures.

In September 2020, the FCC filed its response brief. The FCC noted that the 1996 guidelines were previously upheld in cases before the Second Circuit and D.C. Circuit. *Cellular Phone Taskforce v. FCC*, 205 F.3d 82 (2d Cir. 2000), cert. denied, 531 U.S. 1070 (2001)(upholding the FCC’s decision not to tighten RF radiation guidelines, said decision resting on the scientific uncertainty about such effects and the costs of imposing restrictions without a clearer showing of effects); *EMR Network v. FCC*, 391 F.3d 269 (D.C. Cir. 2004), cert. denied, 545 U.S. 1116 (2005) (finding that the Commission’s decision not to initiate an inquiry into health effects neither violated NEPA nor was otherwise an abuse of discretion). The FCC asserted that, having reviewed the public comments related to its 2013 Inquiry, there was no persuasive evidence of “non-thermal effects” of the radiofrequency radiation on public health. In addition, no commentator proposed amended guidelines supported or justified by scientifically rigorous data or analysis. Accordingly, the FCC determined that no revision should be made to the 1996 guidelines.

Oral argument was heard on January 25, 2021 by a D.C. Circuit panel comprised of Judges Karen Henderson, Patricia Millett and Robert Wilkins. Tough questions were posed to both sides. The attorney for Petitioners, W. Scott McCullough, was pressed by the judges on the issue of court deference to a federal agency’s decision, as well as whether the FCC’s sparse statements about its reasons for upholding the guidelines were sufficient under the law, and why shouldn’t the FCC guidelines be upheld when

Petitioners had failed to propose any specific new guidelines.

Then FCC Deputy General Counsel Ashley Boizelle was in the hot seat. One question was how it could be deemed reasonable for the FCC to rely upon the FDA in reaching its decision upholding the 1996 guidelines, when in fact the FDA had addressed only radiation from cell phones (not the multiple sources of radiation that were the subject of the FCC Inquiry) and addressed only cancer (not the many health issues at issue in the Inquiry). Moreover, Judge Wilkins was very direct in asking why he shouldn’t rule against the FCC when Congress mandated in 21 USC 360ii and 21 USC 360kk that the FDA establish a Technical Electronic Product Radiation Safety Standards Committee to be consulted before the FDA prescribed standards, and there was no evidence that the Committee even exists much less had been consulted on the issues. Indeed, Ms. Boizell admitted that she did not know if the Committee exists. The panel gave her 24 hours to submit written information to the court about the existence of said Committee.

It will be interesting to see how the D.C. Circuit rules. Meanwhile, in the US, the deployment of 5G technology is moving forward speedily. Indeed, more than 25 states have enacted laws that streamline regulations to facilitate the deployment of 5G small cells.

No doubt the controversies concerning the health impact of 5G will continue for years to come. 🏠

Are your personal injury or commercial disputes dragging on and on and costing you time and money?

Consider the alternative...

ALTERNATIVE DISPUTE RESOLUTION
Consider Lynn D. Gates



Experienced Arbitrator/Mediator

Awarded Who’s Who in Law for Arbitration/Mediation (Buffalo Law Journal and Business First); Business First’s 2013 Legal Elite of Western New York; rated AV Preeminent by Martindale-Hubbell; rated as Super Lawyer for Alternative Dispute Resolution Upstate Division 2011; Member of the National Academy of Distinguished Neutrals; Member of Western District of New York Federal panel of mediators

716-852-1544 ext. 314 Reasonable Rates

Smith, Murphy & Schoepperle, LLP
Ellicott Square Building • 295 Main Street, Suite 786 • Buffalo, NY 14203