FREE STATE FSF FOUNDATION

Perspectives from FSF Scholars
November 3, 2026
Vol. 21, No. 45

The FCC's RF Exposure Rules Should Be Dictated by Data, Not the Number of Filings

by

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On September 17, in response to a judicial remand, the FCC's Office of Engineering and Technology released a Public Notice that bent over backwards to solicit tailored, scientifically rigorous input from subject-matter experts on a discrete set of questions regarding the Commission's decision in December 2019 to leave its RF exposure rules unchanged. However, RF exposure without question is a topic that elicits strong emotions from members of the general public, and therefore it perhaps is not surprising that advocates have attempted to win the day by overwhelming the FCC's electronic filing system with personal submissions disguised as hard data.

In *Environmental Health Trust v. FCC*, the United States Court of Appeals for the District of Columbia Circuit – without taking a "position in the scientific debate regarding the health and environmental effects of RF radiation" – directed the Commission to address directly a handful of submissions in the record that its order did not explicitly discuss.

Significantly, the court did not vacate the FCC's decision to maintain its rules – which, as the Public Notice emphasizes, "remain effective today and have allowed Americans to benefit from

world-leading networks." Rather, the court merely directed the agency "to provide a reasoned explanation for its determination that its guidelines adequately protect against harmful effects of exposure to radiofrequency radiation unrelated to cancer."

Specifically, the court identified three issues regarding which, as the Public Notice puts it, the Commission must "provide further explanation to justify its findings." They involve (1) testing procedures; (2) "the impacts of RF radiation on children, the health implications of long-term exposure to RF radiation, the ubiquity of wireless devices, and other technological developments that have occurred since the Commission last updated its guidelines"; and (3) environmental impacts. The scope of inquiry is limited to the roughly six years of record evidence before the agency at the time of its 2019 decision.

Comments were due on October 22. As I write this, the number of filings exceeds 2,400. Many of those submissions undeniably disregard the Commission's instructions that "[c]ommenters who choose to address the body of scientific studies regarding the issues on remand … should clearly describe their specialized experience and subject-matter expertise that makes them well qualified to address such matters." That is because, according to "HHS and FCC wireless radiation dockets draw 1,519 submissions – and little science the FCC says it will weigh," an article published on *WirelessEstimator.com*, 298 of the 364 comments filed as of the end of September were "largely personal accounts."

Indeed, an effort organized by Children's Health Defense (CHD) mischaracterized this proceeding as "a critically important opportunity *for all Americans* experiencing negative health effects from RF radiation exposure to submit comments to the FCC and make your voices heard!" (emphasis added). And, in an apparent attempt to shoehorn these personal anecdotes within the data-driven guardrails set forth by the Public Notice, CHD not only provided sample text for submissions, but also explicitly instructed individuals to:

> **Strengthen your comment by including one of the scientific studies listed below.** Choose a study that most closely aligns with your concerns or personal experience, include its title and link, and briefly explain why the FCC should consider its findings. **You only need to reference one study, so select the one most relevant to the issue you want the FCC to address**. (Emphasis in original.)

Repeating a citation, however, is not replicating a finding – and the Public Notice specifically asked, among other things, whether studies have been replicated and whether they rely on self-reported data. A personal account of symptoms inevitably fails each of those tests, regardless of which study it references.

To be clear, I am not a subject-matter expert on matters relating to RF exposure. Nor are my fellow Free State Foundation scholars. That explains why we have not participated directly in this docket by opining on the impacts of RF exposure on health. We are, however, well versed in the FCC's rulemaking process, and thus able to speak with authority on what has been referred to as "the John Oliver effect" – that is, the inclination, in high-profile proceedings, to focus on the digital mountain, rather than the data-driven merit, of submissions.

In that regard, I can say with confidence that we have seen this movie before.

In 2014, after John Oliver, the host of "Last Week Tonight," urged his viewers to flood the FCC with "net neutrality" comments, the *Protecting and Promoting the Open Internet* proceeding drew a then-record 3.7 million comments. When Mr. Oliver reprised the call during the 2017 *Restoring Internet Freedom* proceeding, the docket closed with nearly 22 million comments.

Free State Foundation President Randolph May has addressed this phenomenon squarely. In a 2021 separate statement to the Administrative Conference of the United States, he observed that mass comment campaigns in the net neutrality proceedings presupposed that the outcome would be determined by "counting comments" rather than by the quality of the data, evidence, and arguments submitted. In "Preventing Mass Comment Wars," an opinion piece published that same year by *The Regulatory Review*, he explained that rulemakings generally should not be decided through "mere plebiscites," and he urged agencies anticipating comment floods to remind the public up front that the comment process is not a vote. And in "Let Us Not Raise a Ruckus Over Net Neutrality," another op-ed published by *The Regulatory Review* in 2023, he warned that if mass comments are understood to drive outcomes, "then what the Commission needs more than expertise is a good electronic filing system for counting votes."

To its credit, the FCC's Office of Engineering and Technology did go to great lengths to acknowledge and account for such concerns. The Public Notice emphasized that the agency is "prioritizing the quality of submissions over their quantity," citing the *Restoring Internet Freedom* Order. It also made plain that it does not "anticipate affording such [scientific] weight to unverifiable or repetitive testimonial submissions that purport to assert the existence or absence of adverse health effects." Moreover, and as noted above, it directed commenters to "clearly describe their specialized experience and subject-matter expertise."

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The D.C. Circuit instructed the FCC to provide "a reasoned explanation," based on a limited record, for its decision to maintain its RF exposure rules – not open a new referendum on wireless technology broadly. In addition, it is important to keep in mind that the consequences of this remand have significant implications well beyond this particular proceeding. As the Public Notice pointed out, America's global leadership in 5G and 6G mobile broadband – which is so important to furthering overall consumer welfare and the nation's economy and national security – hinges on the Commission's ability to make large amounts of spectrum available, and that effort will be undercut if RF policy is set, not on the basis of hard science, but rather on the basis of whichever side mobilizes more cookie-cutter responses. The outcome of this proceeding therefore should be based firmly on expert evidence – that is, as Mr. May long has urged, on the merit of the submissions, not their mass.

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