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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

CTIA – THE WIRELESS ASSOCIATION®,

Case No. C10-03224 WHA

Plaintiff,

VS.

THE CITY AND COUNTY OF SAN  
FRANCISCO, CALIFORNIA,

## Defendant.

**CITY AND COUNTY OF SAN FRANCISCO'S  
SUPPLEMENTAL FILING IN RESPONSE TO  
OCTOBER 17, 2011 ORDER**

Hearing Date: October 20, 2011

8:00 a.m.

Courtroom 9, 19th Floor

Date Action Filed: July 23, 2010

None set

## STANDING

The City believes CTIA has standing, and that *Carrico v. City and County of San Francisco*, No. 09-17151, 2011 WL 3890748 (9th Cir. Sept. 5, 2011) is not to the contrary. In contrast to *Carrico*, here the City has, by ordinance, imposed an affirmative requirement upon CTIA's members. Further, the City has made clear that this affirmative requirement will be enforced beginning October 25, 2011. This is reflected in paragraphs 13, 14, 19, 105, 106 and 107 of CTIA's Second Amended Complaint, which, taken together, properly allege standing.

## CELL PHONE SAFETY

As far as the City is aware, the FCC has not made a "finding" that cell phones are safe for human use. That is to say, the FCC has never declared that "the jury is back" on whether cell phone use poses health risks. To the contrary, when the FCC has made the statement that cell phones are "safe" in amicus briefs or elsewhere, it appears always to be careful to make clear that its exposure limits are the product of a balancing between the competing objectives of safety and efficiency, and that the balance may change as science progresses. A few examples follow.

1. Most recently, the United States, in a brief submitted by the Solicitor General and the FCC in opposition to the petition for a writ of certiorari in *Farina*, emphasized that the interests the FCC sought to balance when it set its RF energy emissions standards were "competing" ones:

The court of appeals correctly held that petitioner's suit is preempted because the state-law rule it seeks to impose would conflict with the FCC's RF regulations. Those regulations are intended to strike "a proper balance between the need to protect the public and workers from exposure to potentially harmful RF electromagnetic fields and the requirement that industry be allowed to provide telecommunications services to the public in the most efficient and practical manner possible." 1997 RF Order, 12 F.C.C.R. at 13,496 ¶ 2. This Court has recognized that when a regulatory agency seeks "to achieve a somewhat delicate balance" of competing "statutory objectives," such a balance "can be skewed by allowing . . . claims under state tort law" that could produce different outcomes. *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 348 (2001). The same concern justifies preemption in this case. [*Farina v. Nokia, Inc.*, 2011 WL 3799082 (U.S. Br.), 9-10 (ellipses in original).]

The Commission's RF guidelines thus were not simply procedural in nature, but reflected the agency's substantive determination that its standards for wireless phones would "provide a proper balance between the need to protect the public and workers from exposure to potentially harmful RF electromagnetic fields and the requirement that industry be allowed to provide telecommunications services to the public in the most efficient and practical manner possible." 1997 RF Order, 12 F.C.C.R. at 13,496 ¶ 2. This Court has repeatedly recognized that when a federal agency's rule reflects a balancing of competing considerations,

1 the federal regulation preempts any state laws that could disrupt the balance  
 2 struck by the agency. See, e.g., *Buckman*, 531 U.S. at 349-351; *Geier*, 529 U.S.  
 3 at 874-886. The fact that the FCC's RF rules were also adopted to satisfy NEPA  
 obligations does not alter this longstanding principle of conflict preemption. The  
 Third Circuit properly applied this principle when it concluded that the FCC's  
 RF rules preempted petitioner's lawsuit. [*Id.* at 20.]

4 2. In *RF Order II*, responding to arguments that its RF energy emissions standards were not  
 5 adequately protective, the FCC appeared to acknowledge that it is not equipped to make a definitive  
 6 finding about cell phone safety:

7 As for claims that our guidelines are not protective enough, we reiterate that  
 8 these guidelines are based on recommendations of expert organizations and  
 9 federal agencies with responsibilities for health and safety. It would be  
 10 impracticable for us to independently evaluate the significance of studies  
 11 purporting to show biological effects, determine if such effects constitute a  
 12 safety hazard, and then adopt stricter standards than those advocated by federal  
 13 health and safety agencies. This is especially true for such controversial issues  
 14 as non-thermal effects and whether certain individuals might be  
 15 "hypersensitive" or "electrosensitive." [In the Matter of Procedures for  
 16 Reviewing Requests for Relief from State & Local Regulations Pursuant to  
 17 Section 332(c)(7)(b)(v) of the Communications Act of 1934 in the Matter of  
 18 Guidelines for Evaluating the Env'tl. Effects of Radiofrequency Radiation, 12  
 19 F.C.C.R. 13494 (1997), ¶31 ("RF Order II").]

20 In summary, in considering the arguments raised with respect to the RF  
 21 exposure limits adopted in the *Report and Order*, we place special emphasis on  
 22 the recommendations and comments of federal health and safety agencies  
 23 because of their expertise and responsibilities with regard to health and safety  
 24 matters. In the *Report and Order*, we adopted RF exposure limits that addressed  
 25 specific safety concerns raised by these agencies about the limits we had  
 originally proposed to adopt. We do not believe that the petitioners and  
 commenters have provided reasonable alternatives that similarly would  
 adequately address these safety concerns. Accordingly, we conclude that the RF  
 exposure limits adopted in the *Report and Order* are appropriate because they  
 address those concerns and, at the same time, allow applicants and licensees to  
 meet the growing marketplace demand for communications services. [*Id.* at ¶  
 39.]

26 3. It is important to note that quotation of one full paragraph does not always place this issue in  
 27 the proper context. For example, CTIA repeatedly quotes the passage from the FCC's amicus brief in  
 28 *Murray*, which states: "The FCC has determined that wireless phones that do comply with its RF  
 standards are safe for use by the general public and may be sold in the United States." FCC Murray  
 Br. at 15-15. But that same brief also states as follows:

29 The FCC's RF exposure standards "represent the best scientific thought." RF  
 30 Order ¶ 168, 11 FCC Rcd at 15184. The FCC has concluded that its standards  
 31 "will protect workers and the general public from potentially harmful RF  
 32 emissions due to FCC-regulated transmitters," *Id.* ¶ 28, 11 FCC Rcd at 15135,  
 33 while "provid[ing] a proper balance between the need to protect the public and

1 workers from exposure to excessive RF electromagnetic fields and the need to  
 2 allow communications services to readily address growing marketplace  
 3 demands." Second RF Order ¶ 29, 12 FCC Rcd at 13505. [Murray Br. at 6-7.]  
 4

5 The Commission has acknowledged that "research and analysis relating to RF  
 6 safety and health is ongoing, and we expect changes in recommended exposure  
 7 limits will occur in the future as knowledge increases in this field." RF Order ¶  
 8 4, 11 FCC Rcd at 15124. The Commission therefore has continued to cooperate  
 9 "with industry and with the various agencies and organizations with  
 10 responsibilities in this area in order to ensure that our guidelines continue to be  
 11 appropriate and scientifically valid." *Ibid.* [Murray Br. at 7-8.]

12       4. The City has already submitted two prior versions of the FCC's factsheet entitled "Wireless  
 13 Devices and Health Concerns." The first version existed prior to CTIA's lawsuit, and the second  
 14 version existed shortly after CTIA filed its lawsuit. *See* Sanders Dec., Ex. G-H. This factsheet has  
 15 changed again, in a way that further reflects that the FCC does not purport to have the definitive  
 16 answer. Specifically, the FCC's factsheet (at least as of today) includes a link to the WHO's factsheet  
 17 which explains that the WHO has classified RF energy from cell phones as a possible carcinogen:  
 18

19             Several US government agencies and international organizations work  
 20 cooperatively to monitor research on the health effects of RF exposure.  
 21 According to the FDA and the World Health Organization (WHO), among other  
 22 organizations, to date, the weight of scientific evidence has not effectively  
 23 linked exposure to radio frequency energy from mobile devices with any known  
 24 health problems.

25             The FDA maintains a **website on RF issues**. The World Health Organization  
 26 (WHO), which has established an International Electromagnetic Fields Project  
 27 (IEFP) to provide information on health risks, establish research needs and  
 28 support efforts to harmonize RF exposure standards, **provides additional  
 information on RF exposure and mobile phone use**. For more information on  
 the IEFP, go to [www.who.int/peh-emf/en](http://www.who.int/peh-emf/en).

29       *See* <http://www.fcc.gov/guides/wireless-devices-and-health-concerns>. By clicking the link on the  
 30 bolded words "provides additional information on RF exposure and mobile phone use," the reader is  
 31 taken to the WHO's factsheet, which the City submitted as Exhibit A to its Request for Judicial Notice.

32       5. This same FCC factsheet acknowledges that studies are ongoing, and that studies "should  
 33 explore" whether there is a "better basis" for RF safety standards:

34             Recently, some health and safety interest groups have interpreted certain reports  
 35 to suggest that wireless device use may be linked to cancer and other illnesses,  
 36 posing potentially greater risks for children than adults. While these assertions  
 37 have gained increased public attention, currently no scientific evidence  
 38 establishes a causal link between wireless device use and cancer or other  
 39 illnesses. Those evaluating the potential risks of using wireless devices agree  
 40 that more and longer-term studies should explore whether there is a better basis  
 41 for RF safety standards than is currently used. The FCC closely monitors all of

1 these study results. However, at this time, there is no basis on which to establish  
2 a different safety threshold than our current requirements.

2 See <http://www.fcc.gov/guides/wireless-devices-and-health-concerns>.

3 6. The FCC has even placed quotation marks around the word "safe." At another page on its  
4 website, the FCC states as follows:

5 Working closely with federal health and safety agencies, such as the Food and  
6 Drug Administration (FDA), the FCC has adopted limits for safe exposure to  
7 radiofrequency (RF) energy. These limits are given in terms of a unit referred to  
8 as the Specific Absorption Rate (SAR), which is a measure of the amount of  
9 radio frequency energy absorbed by the body when using a mobile phone. The  
FCC requires cell phone manufacturers to ensure that their phones comply with  
these objective limits for safe exposure. Any cell phone at or below these SAR  
levels (that is, any phone legally sold in the U.S.) is a "safe" phone, as measured  
by these standards. The FCC limit for public exposure from cellular telephones  
is an SAR level of 1.6 watts per kilogram (1.6 W/kg).

10 See <http://www.fcc.gov/encyclopedia/specific-absorption-rate-sar-cellular-telephones>. This page also  
11 contains a link to the FCC's "Wireless Devices and Health Concerns" factsheet discussed in the  
12 preceding paragraph.

13  
14 Dated: October 19, 2011

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17 WAYNE SNODGRASS  
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