

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF OREGON

3 PORTLAND DIVISION

4 AHM, by an through her Guardian ad)
5 litem and father DAVID MARK)
MORRISON, and DAVID MARK MORRISON,)
6 individually,)
Plaintiffs,) Case No.
7 v.) 3:11-CV-739-MO
8)
PORTLAND PUBLIC SCHOOLS,) July 20, 2012
9)
Defendant.) Portland, Oregon
10 _____)

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14 MOTION HEARING

15 TRANSCRIPT OF PROCEEDINGS

16 BEFORE THE HONORABLE MICHAEL W. MOSMAN

17 UNITED STATES DISTRICT COURT JUDGE
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APPEARANCES

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1 TRANSCRIPT OF PROCEEDINGS

2 DEPUTY COURTROOM CLERK: All rise. This court
3 is again in session. Please be seated. Your Honor, this
4 is the time and place set for oral argument in Case No.
5 3:11-CV-739-MO. AHM, et al. v. Portland Public Schools.

6 Counsel, can you introduce yourself for the record?

7 MR. CAMPBELL: Your Honor, Bruce Campbell on
8 behalf of the defendant, Portland Public Schools.

9 MR. ABRELL: Shawn Abrell on behalf of
10 plaintiffs, the Morrisons.

11 MR. MORRISON: David Morrison on behalf of my
12 daughter and the children of Portland.

13 MR. BAKKER: And Tyl Bakker also here for
14 plaintiff.

15 THE COURT: I sent out an email listing some
16 topics of concern for oral argument, and I have a
17 response from plaintiffs, what they styled their oral
18 argument memorandum.

19 Mr. Campbell, do I have anything from you?

20 MR. CAMPBELL: No, Your Honor. I was prepared
21 to address the Court's directive orally.

22 THE COURT: Why don't you go ahead, then.

23 MR. CAMPBELL: The Court has asked the parties
24 to address the effect of the *Dunifer* case on the -- on
25 the present case, and *Dunifer* is directly applicable,

1 because *Dunifer*, especially when coupled with *Bennett v.*
2 *T-Mobile* case that we've cited in our brief, shows that
3 this case is not properly before the district court.

4 The *Bennett v. T-Mobile* case holds that if you have
5 an attack against the FC -- a party who is complying with
6 FCC regulations, it's an attack against the regulations
7 themselves. *Dunifer* goes on to say that an action
8 challenging FCC regulations is equivalent to an action to
9 enjoin, annul, or set aside an order of the FCC.

10 Now, if that's the case, then the sole jurisdiction
11 lies initially with the FCC and then there's a direct
12 right of appeal to any court of appeal other than the
13 federal circuit under 47 U.S.C. § 402 and the Hobbs Act,
14 which is 28 U.S.C. § 2342.

15 So *Dunifer* makes clear, and coupled with *Bennett*,
16 that this case is not appropriately before this Court.

17 THE COURT: So your contention is that
18 plaintiffs need to go first to the FCC?

19 MR. CAMPBELL: Correct.

20 THE COURT: And what do they ask the FCC to do?

21 MR. CAMPBELL: Well, they file -- the courts at
22 47 -- or CFR § 1.1. It's an action -- it's a petition
23 for rule-making. They ask the FCC to revisit its radio
24 frequency exposure guidelines, specifically the limits
25 that are applicable here to this type of frequency, which

1 is one -- 1 milliwatt per square centimeter.

2 THE COURT: So the FCC agrees or doesn't to
3 take up that rule-making.

4 MR. CAMPBELL: They can go -- if they don't
5 like what the FCC does, they can take that directly to
6 the -- any circuit court.

7 THE COURT: Let's say the FCC agrees and
8 determines that, what exactly would they be asking to be
9 determined; that laptops can't emit more than a certain
10 level or -- my concern is that Portland Public Schools,
11 as an entity, are not directly subject to FCC
12 regulations. Or do you disagree with that?

13 MR. CAMPBELL: I think if Portland Public
14 Schools were violating the FCC's exposure limits, then
15 they would have -- they could then bring an action
16 directly against the -- against the Portland Public
17 Schools. That would be appropriate. But here, according
18 to the plaintiffs' own expert, the maximum readings are
19 within -- are only one -- 1/500th of the FCC's exposure
20 limits for RF frequency.

21 THE COURT: So your contention is that if
22 the -- it's a chain of events. They have to go to the
23 FCC. Let's assume the FCC agrees to engage in
24 rule-making and believes their argument and determines
25 that in some way their current measurements are too high.

1 Now, in what way? Because this is typically product
2 specific, so they -- they're just -- you're expecting
3 that the FCC would agree to general, sort of,
4 environmental limits?

5 MR. CAMPBELL: Well, one of the arguments that
6 the plaintiffs' experts has made is that the FCC's
7 exposure guidelines are not sufficiently protective.
8 They don't account for what they call nonthermal effects.
9 And this was an argument that was previously made to the
10 FCC when it enacted its rules. And even afterwards -- I
11 think this is the *Cell Phone Task Force* case -- there's a
12 challenge to the FCC's regulations before the Second
13 Circuit. Similar challenge is made later before the D.C.
14 circuit.

15 THE COURT: So you're saying that at a minimum
16 they have in the past and could take up sort of a general
17 environmental limit that ought to be imposed? They
18 haven't yet? Isn't that the argument plaintiffs have to
19 make? Not that a particular laptop or cell phone tower,
20 or something else, emits too high of frequencies, but
21 that the environment at the school, in combination with
22 everything, is too high?

23 MR. CAMPBELL: That's right. And the exposure
24 limits take all that into account. There's a maximum
25 power density, which, in this case, is one -- 1 milliwatt

1 per square centimeter, and that's averaged over a
2 30-minute period.

3 THE COURT: So if they believe all those
4 arguments, which they've heard in the past in some
5 iteration, if FCC believes all those arguments plaintiff
6 is currently making, they could engage in rule-making and
7 enact a new rule that would, in effect, lower those
8 limits?

9 MR. CAMPBELL: That's absolutely correct. They
10 could lower it to a megawatt.

11 THE COURT: If they did that, you contend that
12 Portland Public Schools would either fall into line or --
13 if not, what?

14 MR. CAMPBELL: Well, I think that Portland
15 Public Schools would fall into line. We would not
16 violate the FCC's exposure guidelines.

17 THE COURT: Are you directly subject to FCC's
18 exposure guidelines? In other words, is Portland Public
19 Schools an entity that's covered by the FCC's exposure
20 guidelines? I guess, by virtue of being guidelines, you
21 are, or --

22 MR. CAMPBELL: Yeah. I think that covers all
23 wireless devices sold throughout the country.

24 THE COURT: Well, I guess that's the genesis of
25 my question, though. It covers wireless devices, but

1 does it tell schools that they do or don't have to do
2 something about the effect of those devices at a school,
3 or do you -- that's what I'm wondering if you agree or
4 disagree.

5 MR. CAMPBELL: I guess what my understanding
6 would be if -- if -- let's say the FCC dropped its
7 exposure guideline to 1 microwatt and Portland Public
8 Schools continued to have a Wi-Fi system in place that
9 exceeded that exposure limit, then they no longer have
10 the shield of being -- of compliance of the FCC's limits,
11 and they could be subject to liability if there's a
12 showing of harm and all the other factors would be
13 present for liability.

14 THE COURT: Since it had gone to the FCC for
15 rule-making, you wouldn't have the current summary
16 judgment argument you have now that the exclusive for
17 primary jurisdiction is with the FCC --

18 MR. CAMPBELL: Well, if the plaintiffs --

19 THE COURT: -- if all of that fell into place?

20 MR. CAMPBELL: If they had gone the correct
21 route, we wouldn't have this lawsuit, period. We would
22 be before the FCC.

23 THE COURT: So the answer to the second oral
24 argument question is that you believe that they have at
25 least a fair shot at rule-making by the FCC; that the

1 question presented here is a question that fairly could
2 be presented to the FCC?

3 MR. CAMPBELL: And should be presented to the
4 FCC. The FCC is --

5 THE COURT: The reason I ask about could is it
6 would sort of undercut the primary jurisdiction argument
7 if I granted summary judgment on the issue, say, of
8 primary jurisdiction, the more -- well, on that issue.
9 And FCC turned around and said this isn't the sort of
10 thing -- this isn't the sort of issue on which we engage
11 in rule-making.

12 As best you can tell, your claim today is that it is
13 the sort of issue in which they engage in rule-making?

14 MR. CAMPBELL: That's correct.

15 THE COURT: Thank you.

16 Mr. Abrell, are you speaking to this issue?

17 MR. ABRELL: Yes, sir.

18 THE COURT: I've read your written submission.
19 Go ahead and respond to what you've heard as well as
20 supplement your written submission.

21 MR. ABRELL: Yes, Your Honor. First of all, we
22 would argue that a claim to the FCC would be futile in
23 that the FCC would -- has delayed similar types of claims
24 up to two to three years. And we cited in our briefs the
25 petition for rule-making by the environmental effects of

1 radio frequency radiation, petition for inquire to
2 consider amendment of rules in parts one and two,
3 petition for inquiry of EMR network.

4 That -- that claim was filed, I believe, several
5 years ago and is still pending.

6 THE COURT: That delay doesn't give me
7 jurisdiction. I mean, jurisdiction is an interesting
8 question, because it could mean that I can have all the
9 sympathy in the world and believe a case is urgent, but
10 I'm simply not authorized to hear it.

11 MR. ABRELL: Well, I believe that the primary
12 jurisdiction doctrine --

13 THE COURT: Let's not start with primary.
14 Let's start with exclusive jurisdiction.

15 MR. ABRELL: Exclusive. Well, if we're talking
16 about exclusive jurisdiction, Your Honor, we believe that
17 the Telecommunications Act gives the FCC specific
18 exclusive jurisdiction in essentially three areas. Those
19 three areas are licensing, the rollout of wireless
20 facilities, and pricing. Consumer pricing. That's
21 specifically set out in statute.

22 Now, 401(a) --

23 THE COURT: When you say you believe there are
24 those three areas, you know, I'm bound by the case law of
25 the Supreme Court and the Ninth Circuit, and those cases

1 talk about exclusive jurisdiction in areas beyond those
2 three that you've just mentioned.

3 MR. ABRELL: Well --

4 THE COURT: *Bennett*, for example, is --

5 MR. ABRELL: I would -- I would agree --

6 THE COURT: Let me finish my question.

7 So *Bennett* is about conflict preemption of state
8 laws. *Dunifer* we talked about. *United States v. Any &*
9 *All Radio Station Equipment*, that's the Eighth Circuit.
10 The Ninth Circuit, in *Moser*, looks at it, though, and --
11 you know, so we have a number of areas where either
12 conflict preemption or level of radiation have been taken
13 up and dealt with by courts of appeals or the Supreme
14 Court as questions of exclusive jurisdiction for the FCC.

15 MR. ABRELL: Well, I -- I would point to the
16 fact that those -- at least *Dunifer* and *Wilson*, those --
17 those -- first of all, they're appeals from agency
18 decisions. They're -- *Dunifer* is -- *Dunifer* is a case
19 relating to the FCC's jurisdiction under licensing and
20 enforcement. *Wilson* is dealing with overpricing. And
21 those are -- now, you -- you argue that the -- they give
22 additional jurisdiction. Under -- under 401(a), it gives
23 the FCC -- the district courts jurisdiction to enforce
24 provisions.

25 THE COURT: Well, the question of exclusive

1 jurisdiction is simply whether the question in front of
2 me is one that has been specifically tasked to the FCC.

3 MR. ABRELL: Well --

4 THE COURT: And your contention is that
5 determining safe levels of radiation is a question that
6 has not been specifically tasked to the FCC?

7 MR. ABRELL: Well, I would distinguish that our
8 claim is not a challenge to the guidelines. Our claim is
9 a challenge to the school's proprietary business
10 decision, which is not a regulation, which is not
11 preemptive.

12 THE COURT: Well, you have the argument that
13 this isn't a direct challenge and that's why we've talked
14 about cases that make a distinction, one we're thinking
15 about, between direct challenges; a lawsuit that says the
16 FCC regulations are wrong versus one that challenges the
17 consequences of those regulations, a lawsuit that says
18 all is well and good for the school to hide behind these
19 regulations, but that's -- the school is wrong.

20 But my question is earlier than that. My question
21 is just whether, first of all, before we get to the
22 indirect and direct question, you agree or disagree that
23 the FCC is charged with determining safe levels of
24 microwave radiation.

25 MR. ABRELL: I -- I agree that they set

1 guidelines. I would not say that those are set at safe
2 levels.

3 THE COURT: That is not my question. So please
4 listen and answer the question I'm asking.

5 MR. ABRELL: Okay.

6 THE COURT: Do you agree that Congress has
7 tasked the FCC with determining safe levels of radiation?

8 MR. ABRELL: Yes.

9 THE COURT: All right. So, normally, then, a
10 lawsuit that challenges an FCC's decision about safe
11 levels of radiation would have to go to the FCC first,
12 either by exclusive or primary jurisdiction. If I
13 understand your argument, it's simply that you're not
14 directly challenging those regulations.

15 MR. ABRELL: And we would argue that --

16 THE COURT: Is that right?

17 MR. ABRELL: That's correct.

18 THE COURT: All right.

19 MR. ABRELL: We further argue that we -- we are
20 bringing constitutional claims. I would further argue
21 that if we were to bring constitutional claims in the
22 FCC, they wouldn't even hear it. They would find that
23 they don't have jurisdiction.

24 THE COURT: Well, our whole question today, of
25 course, if there isn't a direct challenge, is whether the

1 challenge you are bringing, whether cloaked in
2 constitutional claims or other claims, is, in fact, a
3 challenge to the consequences of FCC rule-making. And
4 what I'm concerned about there is that the cases that
5 we've discussed, while not directly on point, do suggest
6 either in the Ninth Circuit or in the Supreme Court case
7 law that one doesn't get around the exclusive
8 jurisdiction of the FCC by challenging the consequences
9 of the decision as opposed to the regulation itself. So
10 what do you make of that?

11 MR. ABRELL: Could you restate that,
12 Your Honor?

13 THE COURT: I think it's clear, whether you
14 agree or not, that if a litigant challenges a rule
15 propounded by the FCC that that goes to the FCC first.

16 MR. ABRELL: I agree.

17 THE COURT: There is a body of cases that
18 concerns me that suggests that even if a litigant isn't
19 directly challenging the rule but challenging one of the
20 direct consequences of the rule -- so, here, for example,
21 it would be that the schools utilize or rely on the FCC's
22 rule-making about safe levels to decide what's safe at
23 school. You're challenging the school's decision, but
24 the school's decision is arguably a consequence of the
25 FCC's decision; that is, for me to determine or a jury to

1 determine, for example, that the school is providing an
2 environment that's unsafe, the fact-finder would have to
3 necessarily be deciding that the FCC's decision about
4 what's safe or not is wrong.

5 So let's start with that. Can you envision any jury
6 verdict in this case that wouldn't rest on the premise
7 that the FCC's decision about what is safe is wrong?

8 MR. ABRELL: I -- I would think that as it
9 dovetails, a jury's determination would find that Wi-Fi
10 or the powers emitted by Wi-Fi were harmful.

11 THE COURT: Well, that's the point of your
12 expert submissions; right?

13 MR. ABRELL: Correct.

14 THE COURT: Your experts are saying that to
15 date we've been insufficiently thoughtful about these
16 levels and that they're harmful.

17 MR. ABRELL: Correct.

18 THE COURT: And that the FCC's determination --
19 your experts say the FCC's determination is incorrect;
20 right? Don't they say that?

21 MR. ABRELL: I believe they do, in parts; but
22 that's -- yes, they do.

23 THE COURT: I'm not trying to trap you here. I
24 think it's all out on the table.

25 MR. ABRELL: I agree.

1 THE COURT: You believe the FCC is wrong. And
2 so the trial goes something like this: You don't start
3 your case by saying the FCC's ability here, they're
4 wrong. You start your case by saying Portland Police is
5 providing an environment that's harmful to children.
6 Here are our experts to prove that.

7 MR. ABRELL: Correct.

8 THE COURT: And the first thing out of
9 Portland -- I said "Portland Police." I'm sorry. First
10 thing out of Portland Public School's mouth is, "We're
11 relying on the FCC's guidelines to determine what's safe,
12 so it's safe because the FCC says so." And your rebuttal
13 case is that the FCC is wrong.

14 That's the trial, isn't it?

15 MR. ABRELL: Yeah, I would say that's a
16 possible affirmative defense, but I don't think that
17 makes their case.

18 THE COURT: Right. Because you're going to
19 knock it down and say the FCC is wrong.

20 MR. ABRELL: Correct.

21 THE COURT: All right. So I don't see how
22 anything about the way this case is presented to a
23 fact-finder avoids a decision that the FCC is wrong.

24 Now, I agree that this case does not directly
25 challenge the FCC's rules, so the whole question in front

1 of me and the reason why we're having oral argument is am
2 I bound by the cases that we've been talking about to
3 find that if the trial is going to end up being a -- at
4 least in major part about whether the FCC is right or
5 wrong, I'm obligated to first send the issue to the FCC.

6 MR. ABRELL: Well, I think that the doctrine of
7 primary jurisdiction is an equitable doctrine where the
8 courts have to balance the comity between the states and
9 the agencies. Now, there's factors that go into that.

10 Now, if we have acute harm here, harm to children in
11 school and the court knows it's going to take two to
12 three years, if ever, to get a ruling from the FCC, it
13 must strike the balance between the state's high duty
14 when it steps in the state of a father to care for their
15 children in a reasonable way.

16 Now, they -- they put no thought at all into the
17 health and safety aspects. It was the -- the decision
18 was a proprietary business decision made by --

19 THE COURT: "They," meaning Portland Public
20 Schools?

21 MR. ABRELL: Correct. Made by the -- the
22 business -- business people. So we would argue that in
23 that instance when -- when the State has to look after
24 the children, that it would -- it would be -- they have
25 to balance the -- the interests of the State versus

1 sending this off so the FCC can preserve their
2 jurisdiction. And, by the way, we have a -- an agency
3 that's -- that's so tied up with the telecommunications
4 companies that it's almost ineffective.

5 THE COURT: Well, if I -- if I kept cases that
6 I normally wouldn't have jurisdiction over only when the
7 agency that has jurisdiction is closely tied to the
8 industry it regulates, then I'd keep a lot of cases,
9 because the FCC is not the only one where that's the
10 problem.

11 But, yet, that fact, if I accept it as true, doesn't
12 confer jurisdiction on me.

13 MR. ABRELL: I would -- I -- I -- going back to
14 jurisdiction, we believe that the Court has jurisdiction
15 to hear a constitutional claim; that if we even took --
16 what we would argue in front of the FCC is that your
17 guidelines are unconstitutional because they're not
18 protective of children and for quite a few other reasons,
19 but we argued that the guidelines don't even apply based
20 on the history of the guidelines and how they set them.

21 THE COURT: Don't apply to Portland Public
22 Schools?

23 MR. ABRELL: Don't apply to children.

24 THE COURT: I see.

25 MR. ABRELL: But, back again, the FCC has

1 specific jurisdiction to hear a certain type of claims.
2 It doesn't have just a broad-sweeping jurisdictional
3 authority to hear anything related to anything. In fact,
4 I have a recent case here.

5 THE COURT: Well, I mean, I agree with that
6 position, but I asked you a moment ago if you thought the
7 FCC had jurisdiction, by Congress, to determine safe
8 levels of radiation, and you said yes.

9 MR. ABRELL: Yes. But our claim -- I think
10 it's the type of claims that are made that's important.
11 Our claims would be a constitutional violation, and I
12 don't think the Court of Appeals -- the FCC would even
13 have jurisdiction to hear that.

14 THE COURT: Well, your claim to the FCC would
15 be that your currently erroneous determination of safe
16 levels of radiation unconstitutionally harms children;
17 right? I mean, that's your constitutional claim?

18 MR. ABRELL: That would be a constitutional
19 claim. The other would be to -- for -- a request for
20 rule-making as to whether or not they apply to children,
21 but we know that that would be a futile attempt and would
22 last years to do.

23 THE COURT: Thank you.

24 I think I'm probably in the top group of judges in
25 America when it comes to frustration with the

1 effectiveness and efficiency and pace of rule-making on
2 important questions, but I accept, for purposes here
3 today, that the claims before me, while not directly
4 challenging FCC action, do indirectly challenge in a very
5 serious way -- I think the parties acknowledge -- that
6 the kind of trial I described is one in which whether the
7 FCC is right about the decision it's made regarding safe
8 levels is at the very core of that trial. And so it's
9 with no pleasure that I determine that that question
10 raised by this case, in this trial, is one allocated
11 first to the FCC and then exclusively, after that, to the
12 Court of Appeals.

13 Even if I were wrong about that, the doctrine of
14 primary jurisdiction would rear its head, and that
15 similarly counsels that I exercise my discretion to send
16 it first to the FCC, and I would -- and I do so, if
17 that's the decision before me.

18 I'm aware that under primary jurisdiction there are
19 countervailing factors such as the pace of
20 decision-making and the history of prior decision-making
21 on this -- on similar issues, but the core purpose of FCC
22 rule-making is to give the chance to pass on the validity
23 of its own decisions to ensure review by the agency
24 charged with it and an agency that has certainly far more
25 expertise than this Court does on this question.

1 So under either exclusive or primary jurisdiction, I
2 would send this case to the FCC. I think it's exclusive
3 jurisdiction, and I grant summary judgment to that
4 effect. But I also grant the second theory of summary
5 judgment, which is primary jurisdiction.

6 I'm unaware what the Court of Appeals does with
7 delays in the agency, but I'm hopeful that if this is
8 unduly delayed that the litigants are not without remedy
9 to get even the delay looked at.

10 But I think the scheme is pretty clear here. In my
11 own view of the cases that I have cited to you and that
12 you have cited to me are that it's not only when the
13 agency's regulations are being directly challenged, but
14 that something less than a direct challenge can still
15 result in exclusive jurisdiction; that you can't evade
16 these provisions by bringing actions where the outcome of
17 the agency's order is the issue or one of the major
18 issues in the case, and that's our case.

19 Portland Public Schools is also moot on the merits
20 for summary judgment. And, of course, since I don't have
21 jurisdiction, as I've determined it, I make no decision
22 about the merits of the case and should not do so.

23 That will be something we take up if it turns out
24 I'm wrong about exclusive jurisdiction.

25 So I grant PPS's motion for summary judgment on

1 exclusive and primary jurisdiction. I deny plaintiffs'
2 motion for summary judgment. And there have been motions
3 to strike, and the like, which I deny as moot by my
4 decision here today.

5 Thank you all. We'll be in recess.

6 MR. ABRELL: Your Honor, one last point.

7 THE COURT: Yes.

8 MR. ABRELL: Well, we would ask that being that
9 you found in favor of -- found without jurisdiction, we
10 would ask that this case be abated and we would ask for a
11 preliminary injunction pending the outcome of the FCC
12 ruling, giving the acute harm to children that's going to
13 be ongoing.

14 THE COURT: It's a first year law school rule
15 that if you don't have jurisdiction over a case you can't
16 issue rules, so as sympathetic as I might be to the
17 question of harm, if I don't have jurisdiction, I can't
18 enjoin. I can't abate. The case is not properly in this
19 court, so I can't accommodate that request.

20 Thank you. We'll be in recess.

21 DEPUTY COURTROOM CLERK: This court is
22 adjourned.

23 (Hearing concluded at 3:30 p.m.)
24
25

C E R T I F I C A T E

I certify, by signing below, that the foregoing is a true and correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature, conformed signature, or digitally signed signature is not certified.

/s/Jill L. Erwin

Jill L. Erwin, RMR, CRR
Official Court Reporter

Date: August 17, 2012