IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BILL KASPERS, on behalf of himself and all other similarly-situated citizens, owners or co-owners of residences, and residents of the Derby Hills residential subdivision in Sandy Springs, Fulton County, Georgia,	)	CLASS ACTION
Plaintiffs,	)	CIVIL ACTION NO. 1:20-cv-02142-LMM
vs.	)	
VERIZON WIRELESS SERVICES, LLC,	)	
Defendant.	)	

PLAINTIFF'S SUR-REPLY TO DEFENDANT'S 8/21/2020 REPLY BRIEF

Comes now Plaintiff BILL KASPERS, on behalf of himself and the putative class which he seeks to represent, and files this Sur-Reply to the Reply Brief filed herein by Defendant Verizon Wireless Services, LLC (hereinafter "Verizon") on August 21, 2020 as doc. 24 (hereinafter "R.B."), addressing and correcting various inaccurate and misleading statements of law and fact made by Verizon in its R.B.:

Verizon misdescribes the scope, application and effect of the D.C. Circuit's decision in *United Keetoowah Bank of Cherokee Indians in Oklahoma v. FCC*, 933 F.3d 728 (C.A.D.C. 8/9/2019)(hereinafter "*United Keetoowah*").

Verizon claims that the D.C. Circuit Court's decision in *United Keetoowah,* did not address or overturn the FCC's radiofrequency (RF) emission regulations applicable to 5G as arbitrary and capricious. *See* R.B. at 1, 6 and 7. Verizon

states, on p. 7 of its R.B.: "The FCC's proposed deregulation [in the FCC's March 30, 2018 Order which was the subject of the D.C. Circuit Court's review[1]] applied only to facilities that '**do not result in human exposure to radiofrequency radiation in excess of applicable safety standards**'" [emphasis supplied], citing page 738 of the D.C. Circuit Court's decision in *United Keetoowah*. The above-emboldened quoted portion from page 738 of the decision in *United Keetoowah* actually reads:

> "The [FC]Commission defines the small cells that its Order deregulates as wireless facilities that…[*inter alia*] **do not result in human exposure to radiofrequency radiation in excess of applicable safety standards.**"

[emphasis supplied]. Verizon fails to inform this Court that the D.C. Circuit Court **rejected** the above-quoted definition which the FCC propounded to the Circuit Court, finding instead that paragraph 45 of the FCC's 3/30/2018 Order expressly addressed "**all facilities**" (*see id.* at 742, emphasis supplied)--including the 5G small cell facilities which the FCC attempted to deregulate via its 3/30/2018 Order.

The Circuit Court's reference in the above-indented quoted excerpt from p. 738 of its decision in *United Keetoowah* to "the small cells that [the FCC's 3/30/2018] Order **deregulates**" [emphasis supplied] also refutes Verizon's contention, on page 7 of its R.B., that the "FCC never proposed exempting 5G

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[1] The FCC's March 30, 2018 Order was entitled, "In re Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment," FCC 18-30, and can be found at 2018 WL 155856.

small cells from compliance with its RF emissions regulations." Verizon's additional contention, also on p. 7 of its R.B., that "the D.C. Circuit did not address the propriety of those [RF emissions] regulations [vis-à-vis 5G small cell transmission facilities] in *United Keetoowah"* is also refuted by the D.C. Circuit Court's express finding, on p. 742 of its decision in *United Keetoowah*, that the FCC's 3/30/2018 Order "failed to address concerns that it was speeding densification 'without completing its investigation of...health effects of low-intensity radiofrequency radiation,' which it [i.e., the FCC] is currently reassessing," citing *Comment of BioInitiative Working Grp.,* J.A. 235. The Circuit Court explained that the FCC "inadequately justified its portrayal of deregulation [of 5G small cells facilities]'s harms as negligible. The FCC partly based its public-interest conclusion on a picture of small cells that the record does not support." *See* 933 F.3d at 740. The Court found that "the FCC's conclusion that [5G] small cells are inherently unlikely to trigger concerns is arbitrary and capricious, and describing comments as 'generalized' does not excuse the agency of its obligation to consider those comments as part of reasoned decisionmaking" (*see id* at 745). The Court ultimately held "that the [FCC's] Order's deregulation of [5G] small cells is arbitrary and capricious because its public-interest analysis did not meet the standard of reasoned decisionmaking" required under the Administrative Procedure Act ("the APA"). *Id.*

The Circuit Court's holding that the FCC improperly attempted to deregulate 5G small cells facilities via the FCC's 3/30/2018 Order also directly refutes Verizon's contention, on p. 7 of its R.B., that the "FCC never proposed exempting 5G small cells from compliance with its RF emissions regulations." The D.C. Circuit Court's finding that the FCC's attempt to deregulate and thus exempt 5G small cell facilities from the FCC's RF emissions regulations was arbitrary and capricious because the FCC was still in the process of and "currently reassessing" the health effects of low-intensity radiofrequency radiation from 5G small cells facilities vis-à-vis the FCC's existing RF emissions standards and had yet to articulate a logical, rational and satisfactory explanation, as required under the APA, for disregarding the health effects of 5G small cells radiation and instead applying 20-year old emissions standards to 5G technology (citing *Motor Vehicle Mrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.,* 463 U.S. 29, 43 (1983)). *See* 933 F.3d 738.

Verizon's suggestion, in note 6 on page 7 of its R.B., that "the effect of a decision overturning the FCC's effort to deregulate [in the *United Keetowah* decision] is to return to a state of regulation" is illogical, based on the D.C. Circuit Court's above-described criticism of the FCC's disregard of the health effects of 5G radiation vis-à-vis the APA's requirement for a logical, rational and reasoned decisionmaking/rule making process.

While Verizon has finally acknowledged what it failed to even mention in its 7/6/2020 Brief in Support--that FCC's 12/4/2019 FCC Order was published in the Federal Register on April 1, 2020--Verizon mistakenly now claims, at pp. 8-9 of its R.B., that the FCC's 4/1/2020 publication of its 12/4/2019 Order in the Federal Register was "the end of the administrative process" for purposes of determining whether the FCC's 20-year old RF emission standards should be applied to 5G technology. In its *United Keetoowah* decision, the D.C. Circuit Court expressly informed and directed the FCC that it needed to continue to evaluate relevant data and comments submitted to the FCC and to complete its investigation and reassessment of the health effects of RF radiation emitted from 5G cell units (particularly small cells that require new construction, such as the 5G transmitters which Verizon wants to install throughout Plaintiff's residential neighborhood), and that it was obligated under the APA to articulate a satisfactory explanation and a logical rationale between the facts found from the data and comments submitted and the ultimate decision reached regarding whether 20-year old RF emissions standards should be applied to 5G technology. As noted by Verizon on page 6 of its 7/6/2020 Brief in Support (doc 16-1), in FCC's Dec. 4, 2019 Order which the FCC released less than 4 months after the D.C. Circuit Court's 8/9/2019 decision in *United Keetoowah* and subsequently published in the Federal Register on

4/1/2020, the FCC "decline[d] to initiate a rule making to reevaluate the existing RF exposure limits" vis-à-vis 5G technology.

Nor could the FCC lawfully conclude and bring an end to the administrative process via either the release of its 12/4/2019 Order or the publication of that Order in the Federal Register on 4/1/2020, as Verizon contends on pp. 4, 8 and 9 of its R.B.. The APA requires that the public be given an opportunity to participate in the rule-making process by submitting comments in response to any rule or order that is published in the Federal Register (*see* 5 U.S.C. §553(c)). The APA further specifies that the public must be given at least 30 days to provide such comments before a rule or order published in the Federal Register can become effective. *See* 5 U.S.C. § 553(d). In its 4/1/2020 publication of the 12/4/2019 Order in the Federal Register, the FCC stated that the 12/4/2019 Order would become effective 60 days hence—i.e, on June 1, 2020—thereby giving the public an opportunity to submit comments to the FCC for review, consideration and evaluation by the FCC before the 12/4/2019 Order became effective, while simultaneously providing organizations which had already expressed their opposition to the application of 24-year old emissions standards to 5G technology the opportunity to file substantive challenges to the FCC's 12/4/2019 in federal appellate court (pursuant to 5 U.S.C. § 553(e) of the APA).

By suggesting that the FCC's decisionmaking and rule making process ended with the publication of the 12/4/2019 Order in the Federal Register on 4/1/2019, Verizon assumes that the FCC will totally ignore the comments which the FCC has received since the release of the Order on 12/4/2019 and the subsequent publication of that Order in the Federal Register on 4/1/2019—both comments submitted directly to the FCC by interested members of the public, and comments received by the FCC in the litigation which has arisen challenging first the 12/4/2019 Order since its date of release, including but not limited to the Joint Brief and health reviews and studies referenced therein which was submitted to the D.C. Circuit Court in the consolidated actions which are currently pending and proceeding against the FCC in that Court regarding the lawfulness of the 12/4/2019 vis-à-vis the requirements of the APA, as articulated both in the *United Keetoowah* decision as well as in the recent decisions of the U.S. Supreme Court which are cited on pages 7 and 8 of Plaintiff's 8/10/2020 Brief in Opposition (doc 23) "before [the FCC's] regulation can 'have the force and effect of law.'" *See* 140 S.Ct. at 2384.

Repeating the same action/inaction but expecting a different result is a classic definition of insanity. It is irrational to believe that the FCC's restatement of its decision to apply 20-year RF emission standards to 5G technology in its 12/4/2019 Order without explanation or articulation of why the comments which

the FCC has received regarding the health effects of 5G would produce a different result today than the "arbitrary, capricious,…otherwise not in accordance with the law" decisionmaking/rule making conclusion reached by the D.C. Circuit in the *United Keetoowah* case.

How does all of this fit into the factual chronology of the instant case? As alleged in paragraph 7 on page 9 of his 5/19/2020 Complaint, Verizon's 5G installation crew showed up in Plaintiff's neighborhood and was about to install a pole and 5G small cell transmitter in Plaintiff's front yard and throughout the rest of Plaintiff's residential neighborhood on March 30, 2020—several days before the FCC's 4/1/2020 publication in the Federal Register of the 12/4/2019 Order upon which Verizon has since based its federal preemption argument. While Verizon's installation crew was turned away by the City of Sandy Springs on that date, as they were leaving on March 30, Verizon's crew threatened to be back—leaving Plaintiff and his neighbors with no choice but to seek at least temporary injunctive relief from this Court before the 12/4/2019 Order became effective on June 1, 2020, and, perhaps more importantly, before the FCC had an opportunity to evaluate the comments it has received both directly and through several ongoing pieces of litigation challenging the lawfulness of the 12/4/2019 Order and the FCC's decision to apply 24-year old RF emission standards to 5G technology without any articulation or explanation of the reason(s) why it has ignored all of

the comments the FCC has received regarding the adverse health effects of 5G technology. From the time that this lawsuit was filed and continuing to the present, the FCC's regulatory authority over 5G technology remains subject to continuing FCC review as well as several on-going federal appellate court challenges. In other words, the legality of Verizon's asserted FCC preemption argument remains highly questionable and likely to be found "unlawful" in light of the *United Keetoowah* decision and the FCC's failure to articulate rational, reasoned and balanced decisionmaking/rule making since.

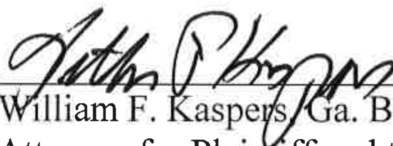
On page 9 of its R.B., Verizon alleges that Plaintiff has failed to allege that Verizon was a "state actor." Of course, on the previous page 8 of its R.B., Verizon asked this Court to imply that it had authorization to install 5G technology in Plaintiff's front yard and throughout the rest of Plaintiff's neighborhood via permits to conduct such activity on public rights of way on Plaintiff's and Plaintiff's neighbors' private property. Verizon implies it received its authorization as a "state actor" via permits issued by the City of Sandy Springs. Plaintiff intends to show, at the appropriate time in the litigation, that the City of Sandy Springs was told by Verizon and led to believe that it really didn't have a say in the matter because of the same preemption argument that Verizon has raised in its motion to dismiss Plaintiff's Complaint.

Verizon's contention, on page 9 of its R.B., that Plaintiff has failed to allege any specific federal or state right ignores Plaintiff's and his neighbors' constitutional right to the peaceful enjoyment of their property without unlawful invasion or interference.

Verizon's challenge to Plaintiff's fraud by omission claim ignores the fact alleged on p. 6 of Plaintiff's Complaint--that when Verizon first appeared at Plaintiff's front door on 3/27/2020, Verizon's agent handed Plaintiff a card with Verizon's email address on it. In other words, Verizon induced Plaintiff to go online to Verizon's fraudulent omission of the health risks associated with 5G. Verizon's contention, on p. 12 of its R.B., that Plaintiff did not sufficiently allege what Verizon stood to gain by failing to disclose information regarding the health risks of 5G which the FCC itself has refused to acknowledge or take seriously is ludicrous on its face.

Finally, Verizon's continuing attempt to describe this case as nothing more than a complaint about "the routine installation of a utility pole" (R.B. at 10) and "a routine utility pole installation" (R.B. at 12) simply indicates that Verizon, like the FCC, still doesn't get it. This case is about so much more. "A complaint should not be dismissed for failure to state a claim unless it appears **beyond doubt** that the plaintiff can prove no set of facts in support of his claim which would entitle him relief." *Conley v. Gibson,* 355 U.S. 41, 45-47 (1957).

Respectfully submitted, this 28th day of August, 2020.



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