STATE OF MAINE
BUSINESS AND CONSUMER COURT

FRIENDS OF MERRYMEETING BAY,
KATHLEEN MCGEE, ED FRIEDMAN,
and COLLEEN MOORE,

Plaintiffs,

v.

CENTRAL MAINE POWER COMPANY,

Defendant.

Docket No. BCD-CV-20-36

Opposition to Motion to Dismiss

NOW COME Plaintiffs, through undersigned counsel, to oppose Defendant Central Maine Power Company's ("CMP") *Motion to Dismiss Plaintiffs' Complaint* for the reasons stated herein.

I. INTRODUCTION

This suit is about CMP's installation of a light and radar system on two towers at the Chops Passage of the Kennebec River. The towers' ten lights each flash sixty times a minute over an area of nearly four thousand square miles, are forbidden by local zoning law, and neither the lights nor the radar system were disclosed in an application to the Department of Environmental Protection. The light and radar system has decreased Plaintiffs' property values, harmed Plaintiffs' use of their property, and impacted wildlife values. Accordingly, Plaintiffs sued under Maine's law of nuisance.

CMP has moved to dismiss the case. In its brief, CMP makes no attempt to argue that the light and radar system is not a nuisance. Instead, CMP makes only a federal preemption argument, taking the position that this nuisance suit would "contradict the determinations" of the

Federal Aviation Administration ("FAA") regarding the lights and the Federal Communications Commission ("FCC") regarding the radar.

But CMP grossly overstates the application and weight of the agency guidelines as legal *requirements* instead of simply *recommendations*. As the Complaint notes – and CMP does not dispute – the FAA's Notices of No Hazard Determinations at issue are "recommendations," not "orders" and have 'no enforceable legal effect.'"[1]

Indeed, after a great deal of discussion of federal preemption, CMP eventually concedes in its motion that common law liability <u>does apply here</u>:

> Congress and/or the FAA could have chosen all manner of ways to give teeth to this regulatory regime - fines to be issued by FAA, private rights of action for individuals harmed by non-compliance, and so forth. What it chose to do was use "moral suasion" and **the preservation of common law liability** for failures to comply with its determinations.[2]

CMP is exactly correct. The FAA made a recommendation to CMP about its lighting system. CMP could have chosen to take those recommendations, not take them, or come up with an alternate system. But in any case, CMP would have to make that decision *within* the context of common law liability – which includes Maine's law of nuisance.

Similarly, CMP argues for FCC preemption under the federal Telecommunications Act of 1996. But that statute, by its own terms, only preempts state regulation of cell phone towers – it has no applicability to radar systems like the one at issue here.

Accordingly, CMP's motion should be denied.

II. STANDARD OF REVIEW

Dismissal under Rule 12(b)(6) is not appropriate unless "it appears beyond a doubt that the plaintiff is not entitled to relief under any set of facts that he might prove in support of his

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[1] Complaint at ¶ 72.
[2] Motion to Dismiss at pg. 18 (emphasis added).

claim."[3] Although "the court is not "obliged to accept conclusory allegations and legal conclusions that are bereft of any supporting factual allegations,"[4] factual allegations in a complaint must be evaluated "in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory."[5]

III. DISCUSSION

In any preemption case, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[6] Although the Supremacy Clause of the United States Constitution creates a clear rule that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any state to the Contrary notwithstanding,"[7] such power is limited by the central constitutional concept of federalism, which ensures that both federal and state governments can operate with sovereignty.[8] Sovereign governments will inevitably be in conflict, however, so courts have developed three circumstances where federal law will preempt state law: express preemption, field preemption, or conflict preemption.[9] However, the three categories "are not rigidly distinct."[10] Neither the Federal Aviation Act, nor any other federal law relevant to this lawsuit, includes a clause expressly preempting state law[11] so the Maine state laws at issue will only be preempted if such

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[3] *Bonney v. Stephens Mem'l Hosp*., 2011 ME 46, *16, 17 A.3d at 127 (quoting *Saunders v. Tisher*, 2006 ME 94, *8, 902 A.2d 830, 832).
[4] *Courtois v. Me. Pub. Emps. Ret. Sy*s., No. AP-11-26, 2012 WL 609567, at *l (Me. Super. Jan. 17, 2012)
[5] *In re Wage Payment Litig*., 2000 ME 162, ¶ 3, 759 A.2d 217, 220.
[6] *Wyeth v. Levine*, 555 U.S. 555, 565, 129 S.Ct. 1187, 173 L.Ed.2d 51 (2009) (internal quotation marks omitted).
[7] Art. VI, cl. 2.
[8] *See, e.g*., *Gregory v. Ashcroft*, 501 U.S. 452, 457, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991).
[9] *See, e.g., Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000).
[10] *Id.* at, 372, n. 6.
[11] Federal Aviation Act of 1958, 49 U.S.C. §§ 1301-1542.

preemption is "implicitly contained in the [Act's] structure and purpose."[12] As explained herein, no such implicit preemption exists.

Field preemption applies only when "federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.'"[13] In other words, in order to preempt state law, the federal law must "provide a **full** set of standards" that not only impose their own obligations under federal law, "but also confer a federal right to be free from any other" obligations.[14]

Conflict preemption is when "(1) 'it is impossible for a private party to comply with both state and federal requirements,' or (2) 'where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[15] As CMP points out in its motion, the First Circuit uses a "functional approach" which considers "the effect which the challenged enactment will have on the federal plan."[16] However, Congressional intent, as determined by the "structure and purpose of the statute as a whole" is the "ultimate touchstone" for preemption.[17]

As explained herein, no form of preemption applies to either the FAA or FCC in this case and therefore it is appropriate to deny the *Motion to Dismiss*.

A. The motion should be denied. Plaintiffs' lawsuit is not preempted by the Federal Aviation Act because the towers do not intersect navigable airspace and because the FAA document at issue is a *recommendation*, not an *order* - and has "no enforceable legal effect."

[12] *Jones v. Rath Packing Co*., 430 U.S. 519, 525 (1977).
[13] *Cipollone v. Liggett Group, Inc*., 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992), quoting *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982).
[14] *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1481, 200 L.Ed.2d 854 (2018) (emphasis added).
[15] *Wigod v. Wells Fargo Bank, N.A*., 673 F.3d 547 (7th Cir. 2012) quoting *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995).
[16] *French v. Pan Am Exp., Inc*., 869 F.2d 1, 2 (1st Cir. 1989).
[17] *Medtronic, Inc., v. Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240, 134 L.Ed.2d 700 (1996).

Defendant argues that Maine state law is preempted by the Federal Aviation Act and the Federal Aviation Administration because the "United States Government has exclusive sovereignty of airspace of the United States."[18] While that is true statement of law, it is inapplicable here because the towers in question are not a "hazard to air navigation" such that they are governed by mandatory FAA regulations. The FAA guidelines at issue here are simply *recommendations*, not legal requirements.

1. The Chops Passage towers do not intersect with navigable airspace, and so application of state law is not preempted by the FAA.

The Federal Aviation Act allows the Secretary of Transportation to review "structures interfering with air commerce."[19] Structures that may interfere with navigable airspace, as enumerated in the act, require notice to be given to the FAA.[20] The FAA then conducts an aeronautical study "to determine whether the aeronautical effects of the specific proposal and, where appropriate, the cumulative impact resulting from the proposed construction or alteration when combined with the effects of other existing or proposed structures, would constitute a hazard to air navigation."[21] If the structure is determined to affect navigable airspace, the FAA may require certain measures to be taken. If not, the FAA may issue a "no hazard" determination at which point its involvement in the construction ceases, beyond a continuing notice requirement and potential conditional determinations.[22]

Certain structures, including the CMP towers[23], require notice to be given to the FAA, but such notice does not grant the Administration jurisdiction over construction or maintenance

[18] 49 U.S.C. § 40103.
[19] 49 U.S.C. § 44718.
[20] 14 CFR § 77.9.
[21] 14 C.F.R. § 77.25(b).
[22] 14 C.F.R. § 77.31 (d)(I).
[23] 14 CFR § 77.9(a) ("Any construction or alteration that is more than 200 ft. AGL at its site").

unless it interferes with air commerce.[24] In other words, if the FAA determines that the structure is not in navigable airspace, the Act would not apply beyond the notice requirement.

Here, the Chops Passage where CMP built the towers at issue is not a navigable airway and therefore the Act does not apply or preempt Maine state law. Under federal law, "[n]avigable airspace means airspace at and above minimum flight altitudes … including airspace needed for safe takeoff and landing."[25] As described in the Complaint, the FAA's determination falls in line with the definition of navigable airspace as the minimum safe altitude for aircraft over a city, town, or settlement is 1,000 feet above the highest obstacle within a horizontal radius of 2,000 and, over open water, no aircraft may be operated closer than 500 feet to any person, vessel, vehicle, or structure, prohibiting air travel in the Chops Passage which is only 790' wide.[26] The FAA determined as much in a May 18, 2016, Traffic Pattern Report which classified the area as "No Traverseway."[27]

Nor are the towers hazards an "obstruction to air navigation" due to their proximity to an airport. 14 CFR § 77.17 specifies that an object is "an obstruction to air navigation" if it meets certain criteria. Objects under 499 feet AGL (like the towers at issue here) are only presumptively obstructions if within a certain distance of airports, within certain obstacle clearance areas, or the "surface of a takeoff and landing area of an airport or any imaginary surface established under § 77.19, 77.21, or 77.23." The towers do not, however, fall within surface of a takeoff and landing area of an airport or any imaginary surface defined by the regulations. The FAA did issue CMP notices of no hazard determinations for the towers, but as

[24] 14 C.F.R. §77.1, et seq.
[25] 49 U.S. Code § 40102.
[26] 49 U.S. Code § 91.119.
[27] Complaint at Exhibit 8.

detailed in the next section, those determinations were merely recommendations, not orders, because the towers do not meet the obstruction criteria of 14 C.F.R. Part 77.

CMP agrees. As the Complaint alleges, on January 27, 2020, CMP's expert Clyde Pittman, Director of Engineering of Federal Airways & Airspace, Inc. wrote an opinion letter responding to an analysis and request by FOMB. Pittman agreed with FOMB that "the Chop Point towers do not meet the requirements of 14 CFR Part 77 to automatically require lighting/marking because the towers are not located within the mandated distance from an airport."[28]

Indeed, it does not appear that CMP even *argues* in its brief that the towers intersect with navigable airspace or constitute an obstruction to air navigation. And because the towers do not intersect navigable airspace, the cases Defendant relies on are not applicable. Defendant primarily cites to *City of Burbank v. Lockheed Air Terminal*,[29] arguing that it is "instructive" because the Court concluded that "the Administrator of the [FAA] has been given broad authority to regulate the use of the navigable airspace."[30] That assertion, in a vacuum, is not disputed, but as explained the Chops Passage *is not navigable airspace* so the Administrator's authority does not reach the CMP towers. The *City of Burbank* case presented a fact pattern of clear intrusion into FAA jurisdiction, as the preempted ordinance sought to regulate the hours which aircraft were allowed to take off and land at the airport. The court decided that the ordinance infringed on FAA jurisdiction because an airport curfew was a direct attack on its authority and that the justification for the ordinance – that the airplanes were a noise violation –

[28] Complaint at ¶ 51.
[29] 411 U.S. 624 (1973).
[30] *Id*. at 633.

directly implicated the Noise Control Act of 1972 as well as various Environmental Protection Agency regulations.[31]

Defendant's citation to *Big Stone Broadcasting, Inc., v. Lindbloom*[32] is similarly unpersuasive. *Big Stone* involved a tower that "penetrat[ed] into the protected highway flight space" in South Dakota. The FAA had issued a "no hazard" determination for the tower, but South Dakota overruled that determination because the structure violated a state statute which established different criteria for what was considered navigable airspace.[33] The state statute in question sought to *directly* circumvent the FAA regulation by creating its own criteria which, if allowed to stand, would make the FAA notice and aeronautical study requirements essentially obsolete, concluding that it was "confident that Congress did not intend to give the states veto power over FAA 'no hazard' determinations."[34] The South Dakota statute has no similarity to the Maine state law Defendant claims is preempted and therefore *Big Stone* is not determinative of the preemption question.

Defendants do not point to <u>any</u> case in which a court found federal preemption regarding structures that do not intersect navigable airspace. And because the CMP towers do not intersect the FAA's authority over navigable airspace and the Maine state law is not a directly subversion of FAA regulations, the cases cited by Defendant are not relevant to this particular preemption question.

2. <u>The FAA document at issue is a recommendation, not an order, and has "no enforceable legal effect." Therefore – according to CMP – common law principles of liability apply.</u>

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[31] *Id*. at 628-29.
[32] 161 F.Supp.2d 1009 (D. S.D. 2001).
[33] *Id*. at 1012.
[34] *Id*. at 1020.

Even if the FAA is considered to have regulatory authority over the CMP towers, generally, the FAA has stated that lighting and marking standards are recommendations, not requirements. For instance, in the August 17, 2018, FAA Obstruction, Marking and Lighting Advisory Circular, the Administration plainly states that "lighting and marking requirements are recommendations, not requirements." Similarly, notice of no hazard determinations are "of an advisory nature," and so do not trigger National Environmental Policy Act (NEPA) review.[35]

The FAA reiterated this in an April 15, 2020, letter regarding the Chop Point Towers which stated that a discretionary review was not necessary because the determination involved a "marking and lighting *recommendation*."[36] Federal courts have reiterated this, finding that these determinations "have 'no enforceable legal effect.'"[37]

CMP concedes this, and responds that:

> Congress and/or the FAA could have chosen all manner of ways to give teeth to this regulatory regime - fines to be issued by FAA, private rights of action for individuals harmed by non-compliance, and so forth. What it chose to do was use **"moral suasion" and the preservation of common law liability** for failures to comply with its determinations.[38]

But in so arguing, CMP gives away the whole game. They are precisely correct: the FAA's document here is a recommendation, not a requirement. It must be applied against the backdrop of typical, state-law common law principles – such as Maine's law of nuisance. Preemption of all state common law regulation is explicitly *not* the course chosen by Congress, according to Defendants.

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[35] Federal Aviation Administration Order No. 1050.1, *Environmental Impacts: Policies and Procedures* (July 16, 2015) at § 2-1.2 (available online at https://govtribe.com/file/government-file/28777-attachment-2-faa-order-1050-1f-dot-pdf-7).
[36] Ex. B (emphasis added).
[37] *Town of Barnstable, Mass. v. FAA*, 659 F. 3d 28, 31 (D.C. Cir. 2011), citing *BFI Waste Sys. v. FAA*, 293 F.3d 527, 530 (D.C. Cir. 2002)
[38] Motion to Dismiss at pg. 18 (emphasis added).

Their citation to *Geier v. Am. Honda Motor Co., Inc.* is inapposite for the same reason. They cite that case for the premise that there should be a "policy of preemption" when state law "premise[s] liability upon the presence of the very [lighting system] that federal law requires.[39] But the parties are on the same page that federal law does not "require" the lighting system – it is, at most, a recommendation backed by "moral suasion."

Finally, Defendant's own actions contradicts their conclusion that the FAA recommendations are legally binding, as they failed to adhere to the lighting guidelines issued by the FAA. When CMP replaced the old Chops Point Towers in 2018, the individual lights in the new system flash at a rate of 60 times per minute. This is *double* the FAA recommendation, which states that "optimal flash rate for the brighter lights to flash simultaneously was determined to be between 27 and 33 flashes per minute (fpm). Flashing at slower speeds (under 27 fpm) did not provide the necessary conspicuity for pilots to clearly discern the obstruction at night in vicinity of steady-burning lights, and flashing at faster speeds (over 33 fpm), the lights were not off long enough to reduce attractiveness to migratory birds."[40] If Defendant was actually bound to follow FAA recommendations to the letter, CMP would fall short of their own standard.

Furthermore, CMP cannot have it both ways, relying on the advisory nature of the no hazard determinations to exempt them from environmental review, but then claiming the determinations are binding for the purpose of preemption.

And finally, CMP misrepresents Plaintiffs' requested relief. In its Motion to Dismiss, CMP suggests that Plaintiff seek injunctive relief to result in "leaving the towers unmarked."[41]

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[39] Motion to Dismiss at pg. 19, *citing Geier v. Am. Honda Motor Co., Inc,* 529 U.S. 861, 875 (2000).
[40] Complaint at ¶ 43, *citing* James W. Patterson, Jr., Evaluation of New Obstruction Lighting Techniques to Reduce Avian Fatalities, DOT/FAA/TC-TN12/9. U.S. Department of Transportation, Federal Aviation Administration Technical Note. (May 2012).
[41] Motion to Dismiss at pg. 4.

This is absolutely false. As the Complaint explains in detail, FOMB proposes a package of marking and notification elements that would be less intrusive, but still address air-safety concerns. FOMB proposed marking the towers with paint, adding additional marking balls to the wires, issuing a Notice to Airmen, and implementing a lighting system triggered by a passive-detection or pilot-controlled system.[42]

The motion to dismiss should be denied.

3. <u>If this case is not preempted by the FAA, this Court need not reach the FCC issues, because the towers are a nuisance with or without the radar system.</u>

Should this Court conclude that the suit is not preempted by the FAA, it need go no further. The Complaint is clear that the towers' lighting system constitutes a nuisance with the lights alone, whether or not they are paired with a radar system.[43] That is true even now that the radar system is operational. According to CMP, even with the radar system, the lights will be flashing 20 to 30% of each day.[44] At sixty flashes per minute for ten bulbs, that works out to 172,800 to 259,200 flashes per day, even *with* the mitigating effect of the radar system.

Accordingly, whether or not the FCC preempts a state court nuisance analysis will not change whether or not the towers' lighting system is a nuisance, and this Court can end its assessment here and deny the motion. If, however, the Court does wish to address CMP's FCC arguments, it should also deny the motion regarding that issue, as described in the following sections.

[42] Complaint at ¶¶ 52-60.

[43] *E.g*, Complaint at ¶ 166 ("Here, CMP has, through its unnecessary lighting system, created an annoyance injurious and dangerous to the health, comfort and property of individuals and the public."); ¶ 169 ("Here, the towers' lighting system separately and or inclusive of the in-process AADLS meets all three tests for a public nuisance.")

[44] Ex. A (Oct. 6, 2020 Corr. from CMP Spokesperson Jenna Muzzy).

B. The motion should be denied because the tower's radar system is not a cell phone tower, and therefore does not fall within the preemption clause of the Telecommunications Act of 1996.

CMP also argues that the application of state nuisance law to the towers' radar system is preempted by federal law. But that argument hinges on application of the Telecommunications Act of 1996 – a law that covers cell phone towers, but does not apply to regular radar transmitters at all.

CMP does not make that clear. CMP first discusses the Federal Communications Act, a broad 1934 statute that provides a grant of authority to the FCC "over all the channels of radio transmission" via a licensing scheme.[45] The Federal Communications Act does indeed address radar systems, through its Part 90 regulations.[46] The Federal Communications Act does not contain a preemption clause.

CMP then notes in a footnote that there is a separate statute, the Telecommunications Act of 1996, that amended the Federal Communications Act in part. [47] As CMP notes, the Telecommunications Act contains a preemption clause that prevents states from regulating certain facilities "to the extent that such facilities comply with the [FCC's] regulations concerning such emissions."[48]

But what CMP does *not* mention is that the Telecommunications Act preemption clause does not apply to radar facilities like the one at issue here. The Telecommunication Act's preemption clause falls within a section entitled "Mobile services," and preemption is limited to "the placement, construction, and modification of personal wireless service facilities."[49] The

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[45] 47 U.S.C. § 301.
[46] 11 FCC Rcd 17268 (30) (Dec. 9, 1996) ("Radar units are transceivers, i.e. they both transmit and receive a signal, and operate under rules for the Radiolocation Service contained in Part 90 of the FCC's Rules. As such, they are type-accepted and authorized by the FCC under Parts 2 and 90 of the FCC's Rules.")
[47] Motion to Dismiss at Fn. 3.
[48] 47 U.S.C. § 332(c)(7)(B)(iv)
[49] 47 U.S.C. § 332(c)(7)(B)(iv)

statute defines "personal wireless services" to mean "commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services"[50] – *i.e.*, cell phones and similar devices. As summarized in *Stanley v. Amalithone Realty, Inc.,* 94 A.D.3d 140, 143 (N.Y. App. 2012) (a case cited by CMP), the "TCA, which is part of the Federal Communications Act of 1934 (FCA) and is administered by the FCC, restricts the ability of states to regulate cellular towers through state statutes and state common law."

All of the cases Defendant cites are cell phone cases governed by the Telecommunication Act. The first case which Defendant claims is "representative" is *Farina v. Nokia, Inc,* which found that state law regulating personal cell phones was preempted.[51] The *Farina* court rejected both express and field preemption, explicitly stating "that neither Congress nor the FCC has evinced an intent to occupy the entire field."[52] The court did conclude that there was a conflict preemption with the TCA, but only because of the potential effects on the national scheme of cell phone towers, which necessarily must act uniformly to function.[53] No national uniformity is necessary for the towers at issue, so comparisons between the two situations fall short.

The second case Defendant relies on is *Robbins v. New Cingular Wireless PCS, LLC*, another cell phone tower case.[54] The *Robbins* court decided that the suit was preempted because it hindered the goals *of the TCA*, specifically.[55] Those goals, as stated by the *Robbins* court, are "to foster industry competition in local markets, encourage the development of telecommunications technology, and provide consumers with affordable access to

[50] 47 U.S.C. § 332(c)(7)(C)(i)
[51] 625 F.3d 97 (3rd Cir. 2010).
[52] 625 F.3d 97 (3rd Cir. 2010)
[53] *Farina v. Nokia Inc*., 625 F.3d 97, 126 (3rd Cir. 2010) ("Moreover, the resulting state-law standards could vary from state to state, eradicating the uniformity necessary to regulating the wireless network. The wireless network is an inherently national system. In order to ensure the network functions nationwide and to preserve the balance between the FCC's competing regulatory objectives, both Congress and the FCC recognized uniformity as an essential element of an efficient wireless network.").
[54] 854 F.3d 315 (6th Cir. 2017).
[55] *Id*. at 320.

telecommunications services" and to balance public health with "promoting a robust telecommunications infrastructure."[56] Again, the TCA preemption cases are simply too dissimilar from the CMP towers to warrant preemption. The CMP towers have nothing to do with a nationwide "robust telecommunications infrastructure" and finding that *every* tower emitting RF radiation across the United States falls under FCC jurisdiction – whether or not it is related to the TCA – would expand FCC powers over states well beyond the intentions of Congress.

By contrast, cases that address state regulation of non-cell-phone services like radar detectors, safety disclosure requirements, and radio advertising find no preemption.[57] Plaintiffs cannot find, and Defendant has not cited, a single case in which a court found the Federal Communications Act to preempt the application of state nuisance law to a radar transmitter. That is not surprising, because the FCC regulations do not cover all aspects of radar facility operation. They do not "address how radar units are to be operated as devices to measure an object's speed" and "do not contain provisions concerning the calibration of radar units, the reliability of the readings, or operator capability requirements."[58]

Thus, Congress chose to preempt state regulation of cell phone facilities, but not radar facilities. And for good reason - as the court noted in *Farina, supra*, 625 F.3d at 126 the, "wireless network is an inherently national system. In order to ensure the network functions nationwide and to preserve the balance between the FCC's competing regulatory objectives, both

[56] *Id*. at 319-20.
[57] *Head v. New Mexico Board of Examiners In Optometry*, 374 U.S. 424, 83 S.Ct. 1759, 10 L.Ed.2d 983 (1963) (rejecting argument of FCC preemption of radio advertising); *The Wireless Ass'n v. City & Cnty. of San Francisco,* 827 F.Supp.2d 1054 (N.D. Cal. 2011) ("Nothing in the federal statutes or FCC regulations bars local disclosure requirements like those now required in San Francisco."); *State v. Anonymous*, 421 A.2d 867, 36 Conn.Supp. 551 (Conn. Super. 1977) (in case involving radar detectors, court concludes "we reject the claim of federal preemption raised by the defendant."); *People v. Gilbert*, 88 Mich.App. 764, 773, 279 N.W.2d 546 (1979) (same holding); *Crenshaw v. Commonwealth*, 219 Va. 38, 245 S.E.2d 243, 246 (1978) (same holding).
[58] 11 FCC Rcd 17268 (30) (Dec. 9, 1996)

Congress and the FCC recognized uniformity as an essential element of an efficient wireless network." By contrast, radar systems like the one at issue here are not part of a national network.[59]

Defendant's final attempt to argue FCC preemption is to claim, without evidence or explanation, that finding against preemption would cause a total shutdown or radio stations, cell phone towers, and other technologies. Defendant suggests that ruling against preemption would cause a "disruption of a comprehensive federal regulatory regime" but does not explain how that would occur. Plaintiffs' complaint is simply that CMP's radar system is not necessary and is causing harm to Plaintiffs, specifically. Just as the TCA and other laws do not apply to the CMP towers as they are radar systems, not cell phone towers, the reverse is not true, either. Finding that Maine state law is not preempted with respect to radar would not cause the downfall of an unrelated regulatory scheme over cell phone towers.

IV. CONCLUSION

For the reasons described above, Plaintiffs respectfully request that this Court deny Defendant's Motion to dismiss.

Respectfully submitted,

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[59] Indeed, the TCA by its own terms does not apply to solely intra-state systems like the towers here. …" 47 U.S.C. § 152(b) (1) ("…nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with **intrastate** communication service by wire or radio of any carrier.")

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FW: Chops Point Transmission Towers Update - Oct 8th Meeting Details

William Most <williammost@gmail.com> Fri, Oct 23, 2020 at 6:35 PM
To: William Most <williammost@gmail.com>

From: Muzzy, Jenna [mailto:[redacted]]
Sent: Tuesday, October 06, 2020 7:07 PM
To: [redacted]
Subject: Chops Point Transmission Towers Update - Oct 8th Meeting Details

Dear Chops Point Community Members-

As part of our commitment to keep you informed about our work, we'd like to share that Central Maine Power Company (CMP) will be "going live" with the tower lights radar system sometime in the next several days.

Our "go live" preparation plan is almost finished. Last week's storm grounded our previously scheduled test flights but in recent days we were able to do numerous fly-bys with a small aircraft. Based on these flights, we are making the final adjustments to the radar system and then will "go live".

Since the initial days of testing we've collected data on how often the radar system will activate the lights. We found:

- In a 24-hour period, the lights will be off approximately 70-80% of the time
- During the day, the lights will be off approximately 60% of the time
- At night, the lights will be off approximately 95% of the time

CMP will hold a virtual informational meeting about the operation of the radar on Thursday, October 8 at 6 p.m. The Zoom meeting information is below. Please send in questions beforehand to outreach@cmpco.com. Also, please let us know whether you will be attending so that we can plan access for the appropriate number of attendees.

Please remember: If you notice that the system may not be operating properly, please call 1.800.696.1000 to report any problems. Our Customer Service Representatives are trained to take your calls and direct the issue to the appropriate department.

Thank you again for your understanding as we work towards the completion of this project.

Zoom meeting information from online, your mobile, or telephone:

Join Zoom Meeting online:

https://zoom.us/j/98161728666?pwd=SVVjbFpNZUlzVmtCWDh6VGdSK29adz09

Meeting ID: 981 6172 8666

Passcode: 731961

One tap mobile:

+13126266799,,98161728666#,,,,,,0#,,731961# US (Chicago)

Telephone dial by your location (the local number for Maine):

+1 646 558 8656 US (New York)

Meeting ID: 981 6172 8666

Passcode: 731961

Find your local number: https://zoom.us/u/aoOvTPSaF

Sincerely,

Jenna

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800 Independence Ave, SW
Washington, DC 20591

Obstruction Evaluation Case No.
2020-AWA-5-OE

Issued Date:04/15/2020

William Most
201 St. Charles Ave.
Ste. 114, #101
New Orleans, LA 70170

****NOTICE OF INVALID PETITION RECEIVED****

The Federal Aviation Administration has examined your petition under the provisions of Title 14 of the Code of Federal Regulations, part 77, concerning:

Structure Type:	Lighting Study
Determination :	NO HAZARD
Aeronautical Study Number:	2018-ANE-1642-OE
	2020-ANE-1540-OE

Specifically, part 77.37(a), allows the sponsor of any proposed construction or alteration, or any person who stated a substantial aeronautical objection to it in an aeronautical study, or any person who has a substantial aeronautical objection to it but was not given the opportunity to state it, may petition the Administrator within 30 days after the issuance of the determination.

We have completed our examination of your petition and find that it does not meet the criteria in part 77.

Your petition is considered invalid because:

According to 14 CFR, part 77.37(b), you may not file a petition for discretionary review for a Determination of No Hazard that is issued for a marking and lighting recommendation. Advisory Circular (AC) 70/7460-1L, Obstruction Marking and Lighting, contains FAA standards, procedures, and types of equipment specified for making and lighting structures. Chapter 1, paragraph 5, Modifications and Deviations, states in part that “requests for modification of deviation from the standards outlined in this AC must be submitted to the FAA Obstruction Evaluation Group (OEG).” If submitted, an appropriate aeronautical study will be initiated to determine whether the deviation/modification is acceptable. Therefore, your petition for discretionary review is considered invalid. Please contact Jay Garver, at (202) 267-0105, or J.Garver@faa.gov, to submit a request for modification or deviation from the recommended marking and lighting for this structure.

If we can be of further assistance, please contact our office at (202) 267-8783.
On any future correspondence concerning this matter, please refer to Obstruction Evaluation Case Number 2020-AWA-5-OE

Mark E Gauch

Mark Gauch (INVALID)
Manager, Airspace Rules and Regulations