30 October 2003 – All Party Mobile Telecommunications Committee – House of Commons

MAUK and BIRCHAM DYSON BELL PRESENTATION

1 I am Alan Meyer, Legal Director of Mast Action UK and a Consultant Lawyer at Bircham Dyson Bell at 50 Broadway, Westminster, London, SW1H 0BL.

2 MAUK, since it's founding in December 2000 at the House of Commons, has never been against Mast and Base stations as such, only against their insensitive siting and location.

MAUK now has over 400 groups as members who seek assistance in opposing local masts on sites chosen seemingly without regard for the concerns of the local community. MAUK provides advice as to how to present objections to the local planning authority, and on appeals to the Planning Inspectorate.

3 The position became more complicated after the issue on 11 May 2000 of the Stewart Report and its recommendations, when the Government accepted its main recommendations but then decided that the well being of people should not be taken into account.

The letters from the Planning Minister, Nick Raynsford, to local planning authorities on 29 June 2000 and 16 March 2001 muddied the water leading up to the issuing of the revised Planning Circular PPG8 on 23 August 2001 with its Annexe.

In Paragraph 30 and Annexe Paragraph 98 the Government stated that its view was that:-

> *"if a proposed mobile phone base station meets the ICNIRP guidelines for public exposure it should not be necessary for a local planning authority, in processing an application for planning permission or prior approval, to consider further the health aspects and concerns about them."*

N.B. Now see Paragraph 15 for the High Court decision quashing the Planning Inspector's Appeal Decision in the case of Yasmin Skelt v First Secretary of State and Three Bridges District Council and Orange PCS Limited – 26 September 2003, and also paragraph 16 on another High Court decision quashing a Planning Inspectors Appeal Decision in the case of Mrs Jodie Phillips.

4 Those letters and the revised Circular PPG8 have caused many of the problems facing local communities facing the escalation of network masts and base stations to accommodate:

a) The 2G Mobile Phone Network.

b) The TETRA Police Emergency Geographical coverage and

c) 3G coverage to sell data and IT products.

5 TETRA coverage is different from 2G and 3G mobile coverage in that TETRA requires geographical coverage and is not customer number demand for capacity led.

The real problem now is providing 3G coverage which means the existing 2G cells will not suffice because 3G cell size is significantly smaller and requires infilling alongside the existing 2G cells.

6 While it could properly be argued that the 2G networks were necessary to provide person to person coverage as opposed to the fixed landline coverage, it is believed to be <u>less</u> possible to argue that 3G coverage <u>everywhere</u> is necessary. The question is necessary for whom? Definitely for the network operators – YES. But for everyone – NO?

In conurbations probably the needs of industry and business may prevail over residents in flats and houses. On the contrary in rural communities may be other priorities should have priority over data processing in residential/country environments.

7 Planning Policy is governed by two relevant Planning Guidance Circulars:

PPG3 Housing and

PPG8 Telecommunications

The thrust of PPG3 Housing is, as has been made clear in a number of Planning Inspectorate Appeal Decisions, *"to provide an environment in which people would choose to live"*

PPG8 on the other hand, is designed to promote network rollout.

There is however no need for these twin objectives to be incompatible.

8 Planners need to understand that on 17 May 2002 the Court of Appeal stated in 2 Judgments v Brent Borough Council (2) and Oxfordshire County Council (1) that Guidance Circulars issued by a Secretary of State needed to be:-

> *"Kept in mind, but it was not direction and did not lay down rules to be strictly adhered to. The Guidance had to promote the Statutory Purposes and since October 2000 had to be Convention Compliant".*

9 On 25 November 2002 Mr Justice Sullivan in dismissing an appeal against a Planning Inspector's decision stated very clearly: -

> *"There can be no doubt that the Inspector recognised that the perceived adverse effects on health <u>could</u> justify refusing planning permission, and that he had not dismissed the public's fears as being irrelevant because they were not objectively justified." The Inspector had said that the perceived health risks <u>on the facts</u> (of the case) did not justify refusing planning permission.*

10 Previously in at least 2 Judicial Review leave applications in the Winchester and Stockport cases the Administrative Court in granting leave to appeal the local planning authority's decision made it abundantly clear <u>because</u> in both cases the local planning authority Councillors had been advised that they could not consider objections based upon "perceived health effects".

> *Both those Leave Decisions followed earlier Court of Appeal decisions in the "Newport" and "Tandridge" cases where the Court ruled "that genuine*

public fears and concerns are material considerations to be taken into account in considering objections to Planning Applications.

"Since October 2000 Guidance Circulars and existing Acts of Parliament and new Acts have to be Convention Compliant. That is the law, and it applies both to prior approval applications, and full planning permission applications, equally.

The Human Rights Act applies to "Public Authorities". Section 6(1) makes it clear that:

"It is unlawful for a Public Authority to act in a way which is incompatible with a Convention Right".

Article 6 of the Convention requires:

"a fair and impartial hearing in public".

To have a fair hearing "perceived health concerns" have to be listened to and considered by the Decision Maker (usually the local planning authority).

Article 8(1) of the Convention requires:

"Respect for private and family life home and possessions"

That qualified Right can only be contravened if it is "necessary".

12. What is necessary in giving consideration to the combined effect of Circulars PPG3 and PPG8 , when read and followed in the light of the LAW. The LAW, not planners obeying in 2003 Planning Guidance as if Holy Writ, as it may have been before 2 October 2000, is what is now the requirement.

This means for both TETRA and 3G applications considering what is "NECESSARY" to enable the Public Authority to come within the exemptions in Article 8(2).

CONCLUSION

13 Since 17 July 2003 Section 118 of the new Communications Act includes for the first time CPO powers for "Electronic communications Network Providers" as set out in the Act's Schedule 4.

This should mean that no longer can network providers plead that the sites they wanted were "not available", so the selected residential site or sites had to be chosen. In addition, for 3G in residential communities in the light of both now the Freiburger Appeal, concerning actual health effects signed by more than 2,000 German GPs and since Tuesday 30 September the announced findings of the Dutch Government's sponsored research into 3G networks, which found that people are affected by 3G mast emissions, as opposed to those from 2G masts. Again it is essential to prove "necessary" and "necessity".

14 The Dutch Study carried out by TNO Physics and Electronics Laboratory in The Hague was carried out on the instructions of the Dutch Ministries of Economic Affairs, Planning, Housing and the Environment, and Health, Welfare and Sport into the effects of Global Communications system radio-frequency fields on Well Being and cognitive functions of human subjects with and without subjective complaints.

In the report's conclusions, it was stated, *"From our research it is concluded that our hypotheses to find no causal relation between the presence of RF fields and the measured parameters is rejected".*

The TNO press release stated as follows:-

> *"We looked into systems using GSM and UMTS/G3 Protocols. GSM is already in use, UMTS is new. From our research it appears that people have unpleasant sensations when they are exposed to fields generated by UMTS/G3 base stations. The symptoms displayed vary from nausea, tingling sensations to dizziness. These effects have not been detected for GSM base stations".*

15 Planners, to comply with the law, need now to consider seriously whether ICNIRP and NRPB thermal heating only guidelines have any present relevance, since you can only be thermally adversely affected by a mast within 3 to 5 feet of the antennae.

In the High Court on 26 September 2003 Mr Justice Moses approved a Consent Order quashing a successful Orange Planning Inspectorate Appeal decision. In that decision the Planning Inspector stated *"because the mast conformed to the ICNIRP guidelines, there was no need to consider health concerns"*. The Legal Judgment is that *"the Inspector failed to consider adequately the weight to be given to health concerns."*

> **The legal point was conceded by HM Government through the First Secretary of State and the claimant was awarded costs. Paragraph 30 and Annexe Paragraph 98 of Circular PPG8 now have only limited guidance weight, since the ICNIRP Guidelines only relate to thermal heating, and the Guidelines do not relate to other possible RF Radiation effects on health which have to be considered.**

These actual findings show that the European Union's "Precautiona ry Approach" needs to be followed much more closely now and for the future.

16 On 22 October 2003 Mr Justice Richards in his High Court Judgment in the case of Mrs Jodie Phillips and Hutchinson 3G ruled that not only peoples health fears have to be taken into account but also in addition concerning the location for the Mast and Base Station selected by the Network Operator that the Question is not just *"Is this an acceptable location but is this the best location?"* The Judge then stated *"and for the purpose of answering that question, one can and should look at whatever alternative possibilities there may be."*

In practice this should mean that the *"Necessity Test"* to enable a Network Operator to come within the European Convention Article 8(2) Exemption has to be a complete two part test. Firstly relating to proving a genuine *"Network Need"*, and then more particularly secondly that the particular site or location selected by the Network Operator also satisfies the Article 8(2) *"Necessity Test"* as clarified further now in the High Court by Mr Justice Richards.

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