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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	FCC No. 97-303
	)	
Procedures for Reviewing Requests for Relief From State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934	)	WT Docket No. 97-192
	)	
Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation	)	ET Docket No. 93-62
	)	
Petition for Rulemaking of the Cellular Telecommunications Industry Association Concerning Amendment of the Commission's Rules to Preempt State and Local Regulation of Commercial Mobile Radio Service Transmitting Facilities	)	RM-8577

COMMENTS OF ORANGE COUNTY, FLORIDA

Below are the Comments of Orange County, Florida, in response to the above-referenced item. Specifically, reference will be made to the paragraph number contained in Section III of FCC Notice of Proposed Rulemaking No. 97-303. The issue as listed by the FCC will be paraphrased and the Orange County comment will follow.

1. *Para. 137 - Definition of "final action."*

Orange County, Florida, Comment:

Paragraph 137 as written in part states:

> In the *Conference Report*, however, "final action" is defined as final administrative action at the state or local government level so that a party can commence action under Section 332(c)(7)(B)(v) rather than waiting for the exhaustion of any independent remedy otherwise required. (Footnote omitted.) We understand this to mean that, for example, a wireless provider could seek relief from the Commission

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> from an adverse action of a local zoning board or commission while its independent appeal of that denial is pending before a local zoning board of appeals.

The applicable, full portion of the text of the Conference Report (H. Rep. No. 140-458, 44th Cong. 2nd Sess. [1996]) at page 209 reads:

> The term "final action" of that new subparagraph means final administrative action at the State or local government level so that a party can commence action under the subparagraph rather than waiting for the exhaustion of any independent State court remedy otherwise required.

As written by the FCC, the phrase "independent appeal of that denial is pending before a local zoning board of appeals" is ambiguous.

Clearly, the intent in the Congressional Report is that "final action" occurs when a local government action is ripe for appeal to the appropriate state court. The comment appears to be intended to not make an applicant wait until the state court judicial appeals are finalized.

The FCC wording in Paragraph 137 needs to be amended to delete the term "a local zoning board of appeals" and in its place insert the term "the appropriate appellate court."

In order to be a "final action" of the local government, the local government action must be ripe for appeal to court. Typically in a local zoning situation, the first level of special exception or variance approval is conducted at a public hearing before a zoning board that makes a recommendation to the governing board of the local government. Until the governing board, in our case the Board of County Commissioners, either endorses the zoning board recommendation or holds its own public hearing on the matter and renders a decision there is no "final action." During that time period between the zoning board recommendation and the Board of County Commissioners' public hearing when the application is still pending, there is no "final action" by

the County and the action is not ripe for appeal to court. Likewise, such action at that time would not be appropriate for consideration by the FCC because there is no "final action." The present language, "pending before a local zoning board of appeals," must be changed as outlined above.

2. *Para. 138. Definition of "failure to act" and typical timing for zoning process.*

Orange County Comment:

Caution must be taken in review of "failure to act" type of cases. If the applicant fails or refuses to provide the complete information as requested in the application form, as mandated by the implementing ordinance, then the local government cannot fully process the application and render a decision on the application. In such a case, the applicant's failure or refusal to comply with the locally adopted application processing requirements and the resulting inability to the local government to process the application must not be considered a "failure to act" by the local government. The applicant must not be permitted to benefit from his own failure or refusal to comply with the adopted procedures.

Similarly, the FCC should be cautious against mandating timelines for local government zoning actions which have historically been reserved to the province of local governments.

As to the average length of time to process applications for permits, please see the attached memorandum from Mitch Gordon, Chief of Operations, Orange County Zoning Department, dated 10-6-97.

3. *Para. 139. Review of local government decisions when the effect of RF emissions are raised as an issue during the proceeding.*

Orange County Comment:

The purpose of a public hearing is to allow the public to speak. The public has the

right to speak at public hearings and the public may choose to speak about things that are improper, inappropriate and totally offensive. Nevertheless, the public has a right to speak. Simply because a member of the public makes a remark during a public hearing that is somehow inappropriate, improper or offensive, does not and should not lead to the conclusion, that the public hearing is void or in violation of the Federal Telecommunications Act.

Furthermore, Orange County's Communication Tower Ordinance specifically defers to the federally established standards of RF emissions as being the standard of compliance within Orange County. Orange County Code, §38-1427(I). Hence, if the record does not support an allegation that the decision to deny an application for a special exception and/or variance was based upon the environmental effects of radio frequency emissions, then it should be presumed that those statements were discounted by the trier of fact. Without a specific showing in the record that the local government's decision was inappropriately based on the environmental effects of radio frequency emissions, the local government's zoning decision is entitled to a presumption of validity. *Anthony v. Franklin County*, 799 F.2d 681, 684 (11th Cir. 1986).

Any attempt to define the term "indirectly [based] on the environmental effects of RF emissions" as meaning the RF emissions were simply mentioned at the public hearing for a requested tower could lead to abuse of the system. Typically in Florida, land use decisions are appealable to State Circuit Court as a petition for writ of certiorari to review the record. Such proceedings are not de novo hearings. The FCC desire to review any case in which RF emissions are mentioned and then offer its expert opinions to the Courts on siting issues over which the FCC properly has no jurisdiction is inappropriate. New evidence or expert opinions may not be added to the record during those appellate proceedings.

4. *Para. 140. FCC tentative conclusion to grant relief when there is no formal justification that a decision to deny a permit is based on RF emissions but some evidence may indicate concern over RF emissions was contemplated in the decision making process.*

Orange County Comment:

This matter is potentially rip for abuse. The comments about public participation in our response to Para. 139 are equally applicable here. This is a slippery slop; how much evidence or discussion regarding RF emissions must be contained in the record to convey jurisdiction to the FCC? If taken to an extreme one lone citizen could mention RF emissions and taint the entire proceeding even if there is no indication in the record that the local government decision making board gave any weight to that evidence or testimony.

First and foremost, communication tower siting issues are zoning matters of which jurisdiction has been reserved to the local governments. *See* Section 332(c)(7)(A), Telecommunications Act of 1996.

5. *Para. 141. Whether non-governmental entities, such as homeowners' associations and private land covenants, should be subject to FCC review if those entities prevent wireless service facilities.*

Orange County Comment:

In the treatise *Rathkopf's The Law of Zoning and Planning*, the black letter law is clearly laid out:

> Zoning restrictions and restrictions imposed by private covenants are independent controls upon the use of land, the one imposed by the municipality for the public welfare, the other privately impose for

private benefit.

> Both types of land use restrictions are held by courts to legally operate independently of one another (citation omitted).

(*Ziegler, Rathkopf's Law of Zoning and Planning.* ¶ 57.02[1], 1990)

Typically, private actions and private covenants and restrictions over property are not subject to governmental review since there is no action by the "state or local government or any instrumentality thereof." Also, local governments do not enforce private covenants and restrictions. Private entities because of their private actions should not be subjected to review by the FCC under 47 USC 332(c)(7)(B)(V) since there is no state or local governmental action to be reviewed. Wireless service providers are not a suspect classification. Therefore, the holding in *Shelley v. Kraemer*, 334 US 1 (1948), which found that state court enforcement of a private restrictive covenant prohibiting the Negro race in a subdivision to be "state action" and an unenforceable covenant, may be distinguished. The *Shelley* case does not serve as a controlling precedent to allow the FCC to assume jurisdiction over the enforcement of private covenants as "state actions."

6. *Para. 143. The FCC recognizes that local governments could request any and all documents related to RF emissions submitted by an applicant to the FCC as part of the FCC licensing procedure.*

Orange County Comment:

Orange County concurs that a local government may properly request any and all documents regarding RF emissions that were submitted by an applicant to the FCC for their federal license. In Orange County, the Communication Tower Ordinance specifically defers to the federally established standards for RF emissions (Orange County Code § 38-1427[I]). The code provision

merely requires that a copy of the documented certification as submitted to the FCC, which establishes that the communications facility complies with all FCC regulations, also be forwarded to the County.

In regards to falsely certifying compliance with FCC RF emission guidelines, Orange County would defer to the FCC. Presumably such evidence would lead to the suspension or revocation of the applicant's license until the matter is rectified. If the communication tower sat ideally and was not utilized for communication purposes for a period of 180 days then the County could declare the tower to be abandoned. Upon such notification, the tower owner would have 180 days from the date of notice of abandonment to either reactivate the tower for properly licensed communication purposes or remove the tower. (Orange County Communication Tower Ordinance, Section 38-1427(f).)

7. *Para. 144. Whether the FCC should establish uniform guidelines for RF emissions demonstration of compliance.*

Orange County Comment:

Orange County concurs with the FCC proposed course of action as outlined in Paragraph 144. Regarding criteria for demonstration of compliance Orange County defers to the expertise of the FCC and her sister agencies. As to which party should pay for the demonstration of compliance, since the proposed rule would not permit local governments to request information beyond that required by the FCC to demonstrate compliance, the applicant should bear the cost of demonstrating compliance. No additional work will be done for local governments by the applicant other than providing copies of documents.

8. *Para. 145 through 148. Establishment of a uniform RF emissions compliance*

Orange County Comment:

Orange County defers to the expertise of the FCC and concurs with the proposed procedures.

9. *Para. 149. Establishment of procedures under 47 USC 332(c)(7)(B)(V).*

Orange County Comment:

Orange County concurs with the proposed procedures.

10. *Para. 150. Definition of "adversely affected party".*

No comment by Orange County, Florida.

11. *Para. 151 and 152. Presumption of compliance with RF emission guidelines unless evidence to the contrary presented.*

Orange County Comment:

Orange County concurs with the approach taken by the FCC.

12. *Para. 153. Operation of Presumption.*

Orange County Comment:

Orange County concurs with the operation of presumption as suggested by FCC.

13. *Para. 154. Rebuttable Presumption.*

Orange County Comment:

Orange County concurs with the proposal to allow interested parties to rebut the presumption of compliance. The County has no suggestions as to other methods of demonstration of noncompliance.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and nine (9) true and correct copies of the foregoing has been furnished by Federal Express this 8th day of October, 1997, to the Secretary, Federal Communications Commission, Washington, D.C. 20554 in accordance with Para. 158 of FCC No. 97-303.

Paul H. Chipok
Assistant County Attorney
Florida Bar No. 494054

cc: Thomas J. Wilkes, Orange County Attorney
Robert Spivey, Assistant to the County Administrator, Orange County Administrator's Office
Shaun Maher, Esquire, Policies and Rules Branch, Commercial Wireless Division, Wireless Telecommunications Bureau, 7th Floor, Room 93, 2100 M Street, N.W., Washington, D.C. 20554 (Including a diskette in accordance with Para. 159 of FCC 97-303)
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Tammy Torres, Florida Association of Counties, Post Office Box 549, Tallahassee, Florida 32302
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(10/07/97)

October 6, 1997

TO: Paul Chipok, Assistant County Attorney

FR: Mitch Gordon, Chief of Operations, Zoning Department

RE: Communication Towers Scheduling for Public Hearings and Permits

Below is a schedule and timing for communication towers requiring public hearing and building permit approvals and those that simply require building permit approvals:

I. <u>Towers Requiring Public Hearing for Special Exception and/or Variance and Building Permit Approvals</u>

1. A completed application for a variance and/or special exception in accordance with the submission requirements of the communications tower ordinance must be submitted at least 6 weeks prior to Board of Zoning Adjustment (BZA) public hearing date. County staff meets with the applicant approximately 2 weeks prior to the BZA public hearing date to discuss the application. The BZA public hearing dates are the 1st Thursday of each month;

2. BZA conducts a public hearing on tower application on first Thursday of month;

3. Assuming the BZA recommends approval of the application, the request becomes final if no one appeals within 15 calendar days from the BZA recommendation. In addition, on the first or second Tuesday after the BZA recommendation, the Board of County Commissioners (BCC) must confirm the BZA's recommendation;

4. If the BZA recommendation is appealed to the BCC, a public hearing before the BCC must take place within 45 days of the BZA's recommendation;

5. If the BCC approves the tower application, it becomes final after 10 calendar days. After 10 calendar days, the applicant may submit construction plans to Orange County staff;

6. The construction plans are reviewed by County staff and permits are typically issued within 6 weeks from submission date of plans.

The total amount of time the above steps take is 18 weeks.

ZONING DEPARTMENT
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Towers Requiring Building Permit Approvals Only (Consistent with Zoning Regulations, no public hearing required)

SEE STEP #6 ABOVE. TOTAL TIME IS 6 WEEKS.