

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

In the Matter of)	
)	
Petition of Cingular Wireless Requesting)	
Federal Preemption of)	
Anne Arundel County Ordinance)	Docket No. 02-100
Regulating Radio Frequency)	
Interference)	

To: Wireless Telecommunications Bureau
Commercial Wireless Division

**COMMENTS
Of
UNITED STATES CELLULAR CORPORATION**

United States Cellular Corporation ("USCC") hereby files its comments in support of the above-captioned Petition filed by Cingular Wireless LLC ("Cingular") requesting a declaratory ruling that recent amendments to the zoning ordinance of Anne Arundel County, Maryland, are contrary to the Communications Act and must be pre-empted. USCC is a majority owned subsidiary of Telephone and Data Systems, Inc. ("TDS"), which now serves over 3.5 million cellular customers in 44 MSA and 101 RSA markets. USCC also has attributable interests in, owns, and or manages PCS systems in numerous markets nationwide. Accordingly, USCC has a considerable interest in any action the FCC might take which would facilitate the construction of wireless towers.

I. Cingular's Petition Should be Adopted
For the Reasons It Provides

In its petition, Cingular demonstrates that the recent amendments to its zoning ordinance adopted by Anne Arundel County, which give the county authority to regulate technical modifications to radio facilities, conflict with the exclusive authority to regulate radio frequency interference conferred on the FCC by the Communications Act. Specifically, the ordinance in question requires FCC licensees to obtain "zoning certificates" from the county before making "any change in [the] configuration, transmit frequency, or power level" of a "radio facility."

As is shown at pages 3-8 of Cingular's petition, those provisions of the ordinance contravene the U.S. Constitution's Supremacy Clause, and Section I of the Communications Act,¹ as well as Sections 301, 302, and 303 of the Act.² Also, Section 332(c)(7) of the Act preserves local control over zoning matters but does not affect the FCC's exclusive jurisdiction over RF interference issues. Finally, as is noted by Cingular (Petition, pp. 6-8), prior FCC and U.S. Court of Appeals' precedent supports FCC action to pre-empt the Anne Arundel County ordinance.

In the remainder of these comments, USCC will supply additional reasons why the FCC should take the requested pre-emptive action, drawn from prior FCC statements concerning wireless service and from the statute.

¹ 47 U.S.C. §151.

² 47 U.S.C. §§301, 302, 303.

II. The FCC Has, Since The Inception of The Cellular Service, Pre-Empted Control Over Cellular System Technical Standards

The FCC established what was then called the Domestic Public Cellular Radio Communications Service in 1981.³ In the relevant Report and Order, the FCC asserted:

"federal primacy over the areas of technical standards and competitive market structure for cellular service. Our licensing scheme requires assurance that the 40 MHz of radio spectrum allocated for cellular service is used effectively and efficiently. The technical standards set forth in this Report and Order are the minimum standards necessary to achieve the desired goals and any state requirements adding to or conflicting with them could frustrate federal policy."

86 FCC 2d, at 504-505

Among the "purposes" to be served by the "technical standards" which the FCC asserted control over was "the maintenance of signal quality and other quality aspects of signal performance." Id., at 505. The Commission adopted the following "cellular design concepts" to accomplish this and its other purposes:

(a) bonafide cellular configuration of base station transmitters and receivers to cover the proposed service area;

(b) base station transmitters radiating no more signal power than required to adequately cover each cell;

³ See In the Matter of An Inquiry Into The Use of The Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's rules Relative to Cellular Communications Systems, Report and Order, 86 FCC 2d 469 (1981).

(c) a radio system fully interconnected with the public landline telephone network and capable of providing a grade of service comparable to that of the landline system;

...

(g) compatibility with other cellular systems.

Id., at 506.

In 1982, in its Order on Reconsideration⁴ issued shortly before the FCC accepted the first applications to provide cellular service, the FCC reaffirmed its earlier action pre-empting state authority over the technical standards for cellular systems:

"We affirm our pre-emption over the technical standards for cellular systems. We continue to regard this as being essential to the assurance of compatible operation of equipment on both the local and national levels, Order at 505. We have carefully developed the technical requirements essential for efficient spectrum re-use, and nationwide compatibility, while providing sufficient flexibility to accommodate new technological innovations. It is imperative that no additional requirements be imposed by the states which could conflict with our standards and frustrate the federal scheme for the provision of nationwide cellular service."

Since 1982, CMRS services have frequently been controversial. However, no one has ever successfully questioned the FCC's exclusive control over wireless technical standards, including system design, or the FCC's right to license each cell in a cellular system or to grant PCS area licenses in accordance with federal signal strength and coverage requirements.

⁴ Order on Reconsideration, 89 FCC 2d 58 (1982).

Any action by a state or locality to deny a permit to a wireless carrier on the grounds that the state or locality believed that the wireless carrier would cause "interference" to the locality's licensed radio facilities would flatly contravene the FCC's pre-emptive exercise of jurisdiction over technical standards and system licensing.

III. The Communications Act Provides Additional Support For Pre-emption of Such a Local Requirement

Section 253(a)⁵ of the Communications Act provides that:

"(a) In General . – No state or local statute or regulation, or other state or local requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

And Section 253(d)⁶ of the Act provides, in pertinent part, that if the FCC:

"determines that a state or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection(a) . . ., the Commission shall pre-empt the enforcement of such statute, regulation, or legal requirement. . . ."

In considering possible preemption of such a local zoning ordinance, the FCC or a court would have to take account of Section 332(c)(7) of the Communications Act, enacted in 1996, which, as noted above, preserves local control over zoning. However Section 332 also provides support for pre-emption in those circumstances.

Section 332(c)(7)(B)(ii) states as follows:

"No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning each emissions."

⁵ 47 U.S.C. §253(a)

⁶ 47 U.S.C. §253(d)

In Section 332(c)(7)(B)(iv), Congress, in essence, forbade states and local governments from having their own radio frequency radiation standards, preempting such standards in favor of the FCC's standards. And, whether a state or locality labeled its regulation an "interference" as opposed to an "environmental" regulation should not matter for the purposes of pre-emption analysis. The states simply cannot make those types of judgments, or else our national wireless network could potentially be subject to hundreds of contradictory local technical regulations. Such a result would violate both the U.S. Constitution's Supremacy Clause and the Communications Act.

IV. The FCC Should Act Quickly on This Petition

In recent years, securing the necessary government consents to the construction of wireless facilities has become markedly more difficult. If they continue, such difficulties will greatly hamper the development of national voice and data wireless networks.

One important reason for the difficulties and delays referred to above is that the environmental "checklist" set forth in Section 1.1307(b) of the FCC's Rules has turned into an obstacle course for carriers. Frequently, tower construction is delayed, for example, by lengthy and inconclusive reviews of tower proposals by state historic preservation officers or by federal Fish and Wildlife officials.

The local zoning process has also become adversarial in many states, with tower approvals being delayed or refused for no reason related to legitimate zoning concerns.

Under such circumstances, carriers often have little or no recourse which is both effective and (equally important) timely. The inevitable end result is fewer towers constructed, more expense incurred by carriers, and more areas with inferior wireless service.

If the FCC fails to act affirmatively and with reasonable speed on the Cingular petition the forces of delay and obstruction will be greatly strengthened. Other communities will suddenly discover that they too have "interference" concerns and carriers, in addition to the other obstacles to tower siting they now face, will have to deal with hundreds of local interference standards.

Such a result would be inequitable, unfair to wireless carriers and contrary to law. It would also constitute profoundly mistaken public policy for all the reasons referred to above.

Conclusion

For the foregoing reasons and those provided by Cingular, we ask that the FCC speedily grant its petition for declaratory ruling and pre-empt the relevant portions of the Anne Arundel County zoning ordinance.

Respectfully submitted,

UNITED STATES CELLULAR
CORPORATION

By /s/ Peter M. Connolly
Peter M. Connolly

Holland & Knight LLP
2099 Pennsylvania Avenue, N.W. #100
Washington, DC 20006
(202) 862-5989

Its Attorney

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