

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

In the Matter of	)	
	)	
Federal Preemption of	)	WT 02-100
Anne Arundel County Ordinance	)	DA 02-1044
Regulating Radio Frequency Interference	)	
	)	

**COMMENTS OF THE  
CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION  
IN SUPPORT OF THE CINGULAR WIRELESS PETITION FOR DECLARATORY  
RULING**

The Cellular Telecommunications & Internet Association ("CTIA")<sup>1</sup> hereby submits its Comments in the above captioned proceeding<sup>2</sup> in support of the Petition for Declaratory Ruling ("Petition") filed by Cingular Wireless, LLC ("Cingular").

In its Petition, Cingular requests that the Commission, in accordance with the Supremacy Clause of the U.S. Constitution and the Communications Act of 1934, as amended, preempt recent amendments to an Anne Arundel County, Maryland zoning ordinance that expressly attempts to regulate radio frequency interference ("RF interference") as it relates to the County's public safety communications system. Cingular provides substantial evidence demonstrating that these amendments attempt to regulate conduct in a field that Congress intended to be

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<sup>1</sup> CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including cellular, broadband PCS, ESMR, as well as providers and manufacturers of wireless data services and products.

<sup>2</sup> *See Public Notice*, Wireless Telecommunications Bureau Seeks Comment on Petition for Declaratory Ruling That Amendments to Anne Arundel County, Maryland Zoning Ordinance Are Preempted As Impermissible Regulation of Radio Frequency Interference Reserved Exclusively to the Federal Communications Commission, DA No. 02-1044 (May 7, 2002) ("Public Notice").

occupied exclusively by the Federal Communications Commission.<sup>3</sup> Moreover, Federal appellate courts have consistently upheld judicial and agency's decisions that attempt to infringe impermissibly upon the Commission's exclusive authority over RF interference issues. Both Congress and Federal courts have unequivocally stated that the FCC has exclusive jurisdiction over matters relating to RF interference. Thus, the Commission's consideration of Cingular's Petition and subsequent comments to the Public Notice must be reviewed in the context of congressional intent and Federal courts' definitive interpretation of that intent. CTIA concurs with Cingular's analysis of the specific Amendments. Rather than repeat the list of offending Amendments, CTIA's Comments shall focus on the legal authority and the Commission's previous decisions that support Federal preemption of local ordinances that attempt to regulate radio frequency interference. Based on the overwhelming legal authority supporting Federal preemption of local laws that attempt to regulate RF interference, the Commission should determine that the Amendments to the Anne Arundel County, Maryland zoning ordinance are preempted as impermissible regulation of RF interference, a field reserved exclusively to the Commission by Congress. Accordingly, the Commission must grant Cingular's Petition.

**I. CONGRESS HAS PREEMPTED LOCAL LAWS THAT ATTEMPT TO REGULATE RADIO FREQUENCY INTERFERENCE.**

The Supremacy Clause of Article VI of the United States Constitution provides Congress with the power to preempt state and local laws.<sup>4</sup> As Cingular correctly explained, Federal preemption of state and local RF interference laws or regulations occurs in three situations: 1) express preemption wherein Congress has explicitly stated by statute its intent to preempt state

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<sup>3</sup> See *Southwestern Bell Wireless Inc. v. Johnson County Bd. Of County Comm'rs*, 199 F.3d 1185, 1190 (10<sup>th</sup> Cir. 1999) (citing to *Mount Olivet Cemetery Ass'n v. Salt Lake City*, 164 F.3d 480, 487 (10<sup>th</sup> Cir. 1998) and *English v. General Elec. Co.*, 496 US 72, 79 (1990)).

<sup>4</sup> U.S. Const. art. VI, cl. 2.

and local regulation of RF interference issues; 2) field preemption; whereby the federal scheme of RF interference regulation is so pervasive that Congress must have intended to leave no room for a State or locality to supplement it; and 3) conflict preemption, wherein compliance with both the federal and state laws is a physical impossibility, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.<sup>5</sup>

Therefore, whether Anne Arundel County may regulate RF interference depends on the intent of Congress, as embodied in the statutory language of the Communications Act of 1934, as amended, (“the Act”) and its legislative history. Congress was clear in its pronouncement that the FCC shall exercise exclusive jurisdiction over interference and other technical aspects of radio communications, and that local or state law shall not regulate such matters.

Specifically, Congress granted the FCC sole authority to regulate RF interference in 1934, as part of its grant of plenary authority to regulate radio communications.<sup>6</sup> Moreover, Congress legislated comprehensively, and intended for Federal law to occupy the entire field of regulation over technical matters associated with radio communications. Congress has left no room for local authorities to supplement Federal law governing RF interference. Since there is the potential for differing interpretations of what constitutes RF interference, as well as the choice of an appropriate remedy, compliance with both the local regulation and Federal law may be virtually impossible. Thus, the local law would stand as an obstacle to Congress' objectives.

**A. Congress Has Expressly Preempted State and Local Regulation of RF Interference.**

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<sup>5</sup> See *Southwestern Bell Wireless*, 199 F.3d at 1190.

<sup>6</sup> See 47 U.S.C. §§ 301, *et seq.* (2001).

In promulgating the Act, Congress endowed the FCC with "comprehensive powers to promote and realize the vast potentialities of radio."<sup>7</sup> The Act delegates to the FCC broad authority to regulate RF interference.<sup>8</sup> The plain meaning of the statutory language is clear. Section 302 of the Act grants to the FCC authority to make reasonable regulations governing devices that have the potential to interfere with radio reception.<sup>9</sup> Section 303 of the Act grants the FCC authority to "[m]ake such regulations not inconsistent with law as it may deem necessary to prevent interference between the stations . . ."<sup>10</sup> When adopting amendments to the Act in 1982, Congress clarified its intent that the FCC has exclusive jurisdiction over matters regarding RF interference, and that state and local authorities have no authority to enact RF interference regulations. In the Conference Report accompanying these amendments, Congress stated:

The Conference Substitute is further intended to clarify the reservation of exclusive jurisdiction to the Federal Communications Commission over matters involving RFI [radio frequency interference]. ***Such matters shall not be regulated by local or state law, nor shall radio transmitting apparatus be subject to local or state regulation as part of any effort to resolve an RFI complaint.*** [T]he Conferees intend that regulation of RFI phenomena shall be imposed only by the Commission.<sup>11</sup>

**B. Congress Intended the FCC To Occupy Solely the Field of RF Interference Regulation, and Courts Have Upheld the FCC's Exclusive Jurisdiction over RF Interference Issues.**

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<sup>7</sup> *National Broadcasting Co. v. United States*, 319 U.S. 190, 217; 63 S.Ct. 997, 1010 (1943).

<sup>8</sup> *See, e.g.*, 47 U.S.C. §§ 152(a), 301, 302(a), 303(f) (2001).

<sup>9</sup> 47 U.S.C. § 302(a).

<sup>10</sup> 47 U.S.C. § 303(f).

<sup>11</sup> H.R. REP. NO. 765, at 33 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2277 (emphasis added).

Since 1982, numerous state and Federal courts, and the FCC have issued rulings recognizing the FCC's exclusive jurisdiction over RF interference disputes and phenomena. In *Blackburn v. Doubleday Broadcasting Co.*, the Minnesota Supreme Court affirmed the dismissal of a private nuisance complaint brought against five Minneapolis radio stations, holding that the FCC has been delegated exclusive jurisdiction to regulate interference between radio stations.<sup>12</sup> Shortly thereafter, the FCC reiterated that its authority to regulate RF interference is exclusive, citing Sections 152(a), 301, and 303 of the Act, and preempted a municipal zoning authority in Klamath County, Oregon from imposing RF interference restrictions contained in a conditional use permit.<sup>13</sup> Relying upon the *960 Radio Order* and the legislative history of the 1982 amendments to the Act, the FCC's Common Carrier Bureau preempted local RF interference regulations that had been adopted by the town of Wilton, Connecticut, and declared an order issued by the local government based on an alleged violation of the local regulations to be null and void.<sup>14</sup>

Both the United States District Court for the District of Arizona and United States Court of Appeals for the Sixth Circuit also have issued decisions in which a common law nuisance action arising from an RF interference complaint was held to be preempted, even though Congress had not expressly addressed such common law actions.<sup>15</sup> In *Broyde v. Gotham Tower, Inc.*, the court rejected arguments that the plaintiffs were entitled to bring their nuisance action

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<sup>12</sup> *Blackburn v. Doubleday Broadcasting Co.*, 353 N.W. 2d 550, 552 (Minn. 1984).

<sup>13</sup> *See In the Matter of 960 Radio, Inc.*, FCC Mimeo No. 85-578, 1985 FCC LEXIS 2342 (1985) ("960 Radio Order").

<sup>14</sup> *See In the Matter of Mobilecomm of New York, Inc.*, 2 FCC Rcd 5519 (1987).

<sup>15</sup> *See Still v. Michaels*, 791 F. Supp. 248 (D. Ariz. 1992); *Broyde v. Gotham Tower, Inc.*, 13 F.3d 994 (6th Cir. 1994).

to enforce state standards that exceeded the obligations imposed upon the defendants under the Act. The court reasoned that "radio signal interference . . . falls within the FCC's technical domain," and that the FCC's jurisdiction over such matters "is clearly exclusive."<sup>16</sup> Thus, Congress intended for the FCC's authority to "occupy the field" of RF interference regulation, and any state or local regulations in this area must fall.

The United States District Court in New York and the United States Court of Appeals for the Second Circuit also have examined local efforts to regulate RF interference through the zoning process and concluded that Federal law has preempted the authority of local or state governments to regulate RF interference. In *Great Lakes Wireless Talking Machine Company v. David Hoes*, a broadcaster filed an action to permanently enjoin a town zoning board from revoking a special use permit which allowed it to install and operate radio antennas on an existing tower.<sup>17</sup> The permit at issue contained conditions designed to mitigate the likelihood of RF interference to stereos, televisions and other electronic equipment of nearby homeowners, and indicated that the permit could be revoked if any of the conditions were violated. After receiving numerous complaints about interference from town residents and issuing an order to show cause why the broadcaster's special use permit should not be revoked, the zoning board unanimously passed a resolution requiring the broadcaster to cease operations within 24 hours and to remove its antennas within 10 days. The district court granted the broadcaster's request for a permanent injunction, concluding that "the Zoning Board is without authority to regulate

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<sup>16</sup> *Broyde v. Gotham Tower, Inc.*, 13 F.3d at 997, (citing *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 430 n.6, 10 L. Ed. 2d 983, 83 S. Ct. 1759 (1963)).

<sup>17</sup> *Great Lakes Wireless Talking Machine Company v. David Hoes*, No. CIV-91-6140T slip op. (W.D.N.Y. June 25, 1991).

radio interference, either by imposing restrictions or by revoking [the broadcaster's] special use permit.<sup>18</sup>

In *Freeman v. Burlington Broadcasters, Inc.*, the U.S. Court of Appeals for the Second Circuit concurred with the district court's ruling that the Act and the FCC's regulations governing RF interference "preempt a local zoning board's power to enforce a condition of a permit to construct and use a communications tower; the permit condition requires the permittees to remedy any RF interference from tower signals with appliances and devices in local homes."<sup>19</sup> While Section 332(c)(7) of the Act preserves local zoning authority over the placement, construction and modification of facilities, the court determined that a local zoning board does not have unfettered authority to use zoning laws as a means to regulate RF interference. The court concluded that "allowing local zoning authorities to condition construction and use permits on any requirement to eliminate or remedy RF interference 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress....'"<sup>20</sup>

In *Southwestern Bell Wireless v. Johnson County Bd. of County Comm'rs*, the U.S. Court of Appeals for the Tenth Circuit affirmed a district court's ruling that invalidated a county zoning regulation that attempted to regulate RF interference.<sup>21</sup> Specifically, the appellate court ruled that "Congress intended federal regulation of RF interference issues to be so pervasive as

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<sup>18</sup> *Id.* at 9.

<sup>19</sup> *Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311 (2<sup>nd</sup> Cir. 2000).

<sup>20</sup> *Id.* at 325 (citing *Fidelity Savings & Loan Ass'n*, 458 U.S. at 152 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941))).

<sup>21</sup> *Southwestern Bell Wireless v. Johnson County Bd. of County Comm'rs.*, 199 F.3d 1185 (1999).

to occupy the field. Thus, [the Johnson County RF interference regulations] are void as preempted,” and such preemption does not violate the Tenth Amendment.<sup>22</sup>

The aforementioned cases demonstrate that the Commission has ample legal authority to preempt the Amendments to the Anne Arundel County, Maryland ordinance. Any deference on the part of the Commission to allow local zoning boards to regulate RF interference, whether explicitly or implicitly, violates Federal law, including the Supremacy Clause of the United States Constitution.

**C. Existence or Enforcement of Local RF Interference Laws Would Stand as an Obstacle to Accomplishing the Full Purposes and Objectives of Congress.**

Given the explicit pronouncements of Congress in adopting its 1982 amendments, allowing operators of radio transmitters to remain subject to potential liability from local regulations would frustrate the objectives of Congress embodied in the Act. In discussing the breadth of the FCC's authority under Title III, the United States Supreme Court observed that "[t]he Communications Act...expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission."<sup>23</sup> Such control allows the FCC to "secure the maximum benefits of radio to all the people of the United States."<sup>24</sup> Allowing Anne Arundel County, Maryland or any locality to adopt its own RF interference regulations would negate the comprehensive powers of the FCC and the agency's administrative expertise on the dynamic aspects of radio transmission. Moreover, it would place licensees in the position of having to comply with a multitude of potentially conflicting rules .

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<sup>22</sup> *Southwestern Bell Wireless*, 199 F.3d at 1193.

<sup>23</sup> *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940).

<sup>24</sup> *National Broadcasting Co. v. United States*, 319 U.S. 190, 217 (1943).

## II. THE FCC ENFORCES ITS OWN COMPREHENSIVE RF INTERFERENCE REGULATIONS.

The Commission has delegated authority to the Enforcement Bureau and the Wireless Bureau to eliminate interference to authorized communications, to ensure interference-free operation of wireless telecommunications equipment and networks, and to assist the Commission in its RF compliance and enforcement activities.<sup>25</sup> In this regard, the Commission has developed rules and implemented procedures to resolve RF interference disputes involving cellular and other wireless licensees.<sup>26</sup> In all cases, the FCC is empowered to shut down offending operations.

The FCC has always taken seriously its duty to protect safety-related communications, and takes swift action where the integrity of radio communications are threatened.<sup>27</sup> Moreover, the FCC has field offices located throughout the United States, which are available to enforce the FCC rules, respond to interference complaints and provide technical advice to licensees.<sup>28</sup> The

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<sup>25</sup> See, e.g., 47 C.F.R. §§ 0.111(a)(4), 47 C.F.R. §§ 0.131(h) (2001).

<sup>26</sup> See, e.g., 47 C.F.R. § 22.353 (governing interference from cellular, paging, and other Public Mobile Service providers); 47 C.F.R. § 24.237 (governing interference from Personal Communications Service ("PCS ") operations); 47 C.F.R. §§ 90.173(b), 90.403 (governing interference from private radio operations).

<sup>27</sup> See, e.g., *In the Matter of Revision of Part 15 of the Commission's Rules Regarding Ultra-Wideband Transmission Systems*, First Report and Order, ET Docket No. 98-153, FCC 02-48, (rel. Apr. 22, 2002)(The Order includes standards designed to ensure that existing and planned radio services, particularly safety services, are adequately protected with respect to RF interference. FCC states it will act vigorously to enforce the rules and act quickly on any reports of interference.); *News Release*, (Feb. 9, 2001)(Wireless Telecommunications Bureau announces best practices guide for avoiding interference between public safety and commercial wireless 800 MHz communications systems); *News Release*, (Jan. 7, 2000)(FCC investigation leads to arrest of suspect interfering with police radio communications in the Los Angeles area.); *Rocky Mountain Radar, Memorandum Opinion and Order*, Mimeo No. FCC 97-404, 1997 FCC LEXIS 6914 (rel. Dec. 10, 1997) (FCC declares radar jamming devices illegal because they interfere with police radar signals.); *News Release*, Report No. CI 97-12, October 24, 1997 (FCC locates and shuts down unlicensed radio broadcasting operations that threaten safety-related communications at two Florida airports.).

<sup>28</sup> See FCC Enforcement Bureau Regional Field Offices (visited June 10, 2002) <http://www.fcc.gov/eb/rfo/>.

FCC already has a comprehensive RF interference enforcement scheme in place, and is available to respond quickly to any interference complaints. Accordingly, the Amendments to the Anne Arundel County, Maryland ordinance are not only impermissible but also unnecessary in protecting public safety communications from RF interference.

**CONCLUSION**

Based on the foregoing, CTIA strongly urges the Commission to grant Cingular's Petition and declare that the Amendments to the Anne Arundel County, Maryland Ordinance are preempted by the Communications Act of 1934, as amended.

Respectfully submitted,

/s/ \_\_\_\_\_

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