

TABLE OF CONTENTS

SUMMARY ii

I. THE COMMISSION LACKS JURISDICTION OVER THIS PETITION. 2

II. THE COUNTY HAS ACTED REASONABLY TO PROTECT PUBLIC SAFETY COMMUNICATIONS. 4

III. THE COUNTY IS NOT SEEKING TO REGULATE CMRS “OPERATION.” 7

IV. THE LEGAL LIMITS ON LOCAL ZONING ARE SERVICE PROHIBITION AND UNREASONABLE DISCRIMINATION. 9

 A. Proof of prohibition is a high hurdle..... 9

 B. None of the conventional preemption analyses applies here. 11

 C. Neither the *Head* decision nor 1982 legislative history requires preemption..... 13

CONCLUSION..... 15

DECLARATION OF JEFFREY P. MARTIN 16

SUMMARY

Petitioner Cingular Wireless claims that Anne Arundel County exceeded its authority in adopting a zoning ordinance including safeguards against commercial interference to its public safety radio system. This does not change the nature of Cingular's grievance: that it has been adversely affected by a final zoning decision of the County. Under Section 332(c)(7)(B)(v), with one exception not pertinent here, such complaints may only be heard by courts. The FCC should dismiss the Petition for want of jurisdiction.

Commenter TIA, a Cingular supporter, cautions that the Commission's authority to regulate radio frequency interference ("RFI") must be coupled with responsibility to ensure that public safety communications are not compromised by harmful interference. Regrettably, the County's system has been sorely compromised and the FCC has been of little help. There are more than 60 "dead zones" where public safety communications are blocked or seriously degraded. Effectively thrown back on its own resources, the County is negotiating a frequency exchange with one carrier and has sought the cooperation of two others identified as sources of interference. Cooperation improved during and immediately after the adoption of the challenged ordinance, which remains under consideration for possible revision. There is no viable alternative, at this time, to continued local mitigation efforts.

To the best of our knowledge, there have been, as yet, no concrete applications of the new ordinance to specific carrier land use requests. Nothing in the local regulations seeks to supplant the FCC's authority over radio licensing or technical standards. By the letter of Section 332(c)(7)(B)(i), if the ordinance is applied so as to prohibit carriers from providing personal wireless services, a *prima facie* case for preemption will have been presented. Without a specific

application of the ordinance, there can be no such case. The FCC has discretion to decline or defer any ruling on the Petition.

Cingular has not met the legal test of prohibition of service. None of the conventional analyses of federal preemption works satisfactorily here. Courts have found no express preemption of RFI regulation. Nor can “field preemption” be inferred. To the contrary, Section 332(c)(7) explicitly and unqualifiedly reserves to local authorities the ability to mitigate RFI through consideration of placement, construction and modification of personal wireless facilities -- so long as the end result is not prohibition of service or unreasonable discrimination between or among carriers.

Absent field preemption, local regulation is not conflicting, per se. There is no showing of a carrier’s inability to meet both federal and local obligations. Neither the 1963 Supreme Court case of *Head v. New Mexico Board* -- which upheld state regulation of broadcast optometry advertising -- nor 1982 legislative history on interference to home appliances dictates the preemption of efforts to protect police, fire and emergency medical communications in the time-honored local interest of public safety.

The Petition should be denied if not dismissed.

I. THE COMMISSION LACKS JURISDICTION OVER THIS PETITION.

Apart from Cingular's Opposition to the County's Motion to Dismiss, only AT&T Wireless ("AWS") takes issue with our point that Section 332(c)(7)(B)(v) reserves to federal and state courts exclusive jurisdiction over final local zoning actions such as the ordinance, Bill No. 93-01, challenged here.² As we pointed out in our Comments (4, note 8), Cingular's effort (Opposition, 6) to distinguish a claim that the County "exceeded its traditional zoning authority" from an assertion that one or more of subparagraphs (B)(i)-(iv) was violated cannot be sustained. Courts have not hesitated to rule on *ultra vires* issues under the rubric of B(v).³

Cingular's disclaimer that "the County violated any of the provisions enumerated in Section 332(c)(7)(B)" (Opposition, 6) cannot alter its earlier claim (Petition, 9, note 33) that the carrier "has been unable to modify certain cell sites within Anne Arundel County as a direct result of this Ordinance." Moreover, at least two of Cingular's allies, AWS and U.S. Cellular ("USCC"), evince little doubt that the County ordinance violates subparagraph (B) in various ways. AWS argues the local legislation is prohibitory and discriminatory (Comments, 3, 8-10) while USCC believes that (B)(iv) is infringed. (Comments, 5-6)⁴

² Our Comments explained the County staff's forecast of possible amendments to the ordinance (Exhibit C, 14,685) and the ensuing dialogue with affected carriers (Exhibit E and associated textual discussion). There is no dispute, however, that the ordinance took effect on March 8, 2002.

³ Carrier complaints that a local zoning authority's action was preempted -- and thus beyond its power -- under Section 332(c)(7)(B) are legion. Many are about the federal limit on radio frequency radiation ("RFR") in B(iv), e.g. *Bethia Brehmer v. Planning Board of Town of Wellfleet*, 238 F.3d 117 (1st Cir. 2001). In *Cellular Telephone Co. v. Town of Oyster Bay*, 166 F.3d 490 (2d Cir. 1999), the same issue was argued under the evidence standard at B(iii).

⁴ Cingular also attacks the County's RFR language at Section 10.125(K) of the ordinance, but mischaracterizes this as interference regulation. (See, County Comments, 12-13)

AWS's citation of judicial precedent on the jurisdictional point is inapposite. (Comments, 1-2, note 3) The *Kingston Township* case did not rule on whether enactment of a zoning ordinance could be treated as a final action for purposes of Section 332(c)(7)(B)(v). The Court simply held that a carrier could not challenge a zoning authority's failure to act because the carrier never filed an application requesting action.⁵ It is worth noting that the case included a facial challenge to an ordinance as well. The Court did not disclaim jurisdiction on grounds of unripeness but simply found the challenge moot because the ordinance had been changed to meet the carrier's objections. 286 F.3d at 693.

It is true, of course, that federal courts will scrutinize an appeal to make sure it represents a "case or controversy" under Article III, Section 2 of the U.S. Constitution. This does not mean, however, that a final zoning ordinance can never be heard on a facial challenge. One federal appellate circuit follows these steps: If the parties' interests are genuinely adverse, if a judgment can resolve their dispute conclusively, and if the rendering of a judgment has practical use, the court will find the case ripe for adjudication.⁶ In the Fourth Circuit,

Ripeness determinations depend on both "fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration."⁷

There is little doubt of adversity between Cingular and the County, nor of the efficacy and usefulness of a judicial disposition, were Cingular to take its complaint to the proper forum.

⁵ *Nextel Partners, Inc. v. Kingston Township*, 286 F.3d 687, 692 (3rd Cir. 2002) ("In the absence of a request to approve the construction of a facility, the failure to approve the facility is not a 'failure to act' within the meaning of this provision.")

⁶ *Bell Atlantic Mobile v. Zoning Board of Butler Township*, 138 F.Supp. 2d 668, 671 (W.D.PA 2001).

Since the judicial forum would be likely to apply the law of the Fourth Circuit, questions of fitness for decision and hardship to affected wireless carriers would come into play. Given the essentially legal nature of the Cingular challenge here, and the claim of current hardship (Petition, 9, note 33), we cannot accept AWS' assertion that a judicial complaint would necessarily be dismissed as unripe.⁸

For the reasons discussed above, and in the County's Motion to Dismiss and separate Comments, the Cingular Petition does not belong at the FCC and must be heard by a court.

II. THE COUNTY HAS ACTED REASONABLY TO PROTECT PUBLIC SAFETY COMMUNICATIONS.

Several commenters express support for the goal of reliable public safety communications and sympathy for the acknowledged, widespread and growing interference from commercial mobile radio service ("CMRS") providers. As TIA observes: "With the Commission's sole authority to regulate RFI [radio frequency interference] goes the responsibility to ensure that public safety communications are not compromised by harmful interference." (Comments, 6)⁹

Without accepting the FCC's "sole authority," the County respectfully submits that the FCC's responsibility has not been fulfilled. Effectively, we have been thrown back on our own

⁷ *Satellite Broadcasting and Communications Ass'n v. F.C.C.*, 275 F.3d 337, 369 (2001), citing *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983).

⁸ The County is not waiving here any defense of unripeness should Cingular or any other carrier challenge the current ordinance in a state or federal court. To the contrary, if the County and the carriers were still engaged in productive discussions about revising the ordinance (note 2, *supra*, and Comments, 4-7), we would reserve our right to argue that the matter remained unfit for judicial disposition. Similarly, we have contended here that if the Petition is not dismissed for want of agency jurisdiction, any FCC declaration should be deferred or denied until the informal County/carrier review process reaches consensus or an impasse.

resources,¹⁰ which we have attempted to use reasonably. We have hired an engineering consultant. Regrettably, we find that our earlier tally of 41 “dead spots” -- where public safety communications are severely compromised -- was under-counted by half. Upon further testing, the consultant has identified 61 such locations.¹¹ This is a serious and dangerous situation, not only in Anne Arundel County but also in many other locations reported by APCO’s “Project 39” and submitted on the record of several FCC proceedings.¹²

While we appreciate the existence of the FCC’s complaint process and its enforcement capabilities, these have not provided much help to the County in the more than three years since we first brought our problems to the federal agency. (Comments, Exhibit A and F, and associated text) Nor can we be optimistic that the 800 MHz rulemaking, Docket 02-55, will resolve our difficulties in the near term. (Comments, 10-11)

The County and similarly situated local governments need help now. We must agree with APCO’s warning, in Docket 02-55:

Correcting interference problems only after the fact is unacceptable for public safety radio systems. Any time there is interference to a public safety radio system, there is the danger that life-saving communications will be disrupted.¹³

⁹ See also, AWS, 10; Hutchins, 2d unnumbered page; McVey, 2-3.

¹⁰ Comments, 8.

¹¹ Declaration of Jeffrey P. Martin, attached hereto. The County is paying the consultant out of its own pocket, the gratuitous speculations of Sprint (Comments, 8, 11) and Verizon (Comments, 5) notwithstanding.

¹² See, http://www.apcointl.org/frequency/project_39, and Notice of Proposed Rulemaking (“Notice”), WT Docket 02-55, FCC 02-81, released March 15, 2002, ¶14.

¹³ Comments of the Association of Public-Safety Communications Officials-International, Inc., May 6, 2002, 10.

This is why the County is attempting to negotiate with Nextel -- the prime source of interference -- a mitigating exchange of frequencies at 800 MHz. This is why the County and other local governments (Sprint Comments, 4-7; Verizon Comments, 5-6) are attempting to head off interference to the extent possible and lawful, rather than simply seeking to remedy the problem after it appears.¹⁴ At the same time, the County has demonstrated (Comments, 4-7) its openness to revising the challenged ordinance pursuant to productive discussions with affected wireless carriers.

The FCC's complaint processes and enforcement mechanisms are designed to work effectively when a licensee is violating the Commission's rules. But the problems of interference at 800 MHz are typically not of this kind. Instead, the public safety licensees and the CMRS providers both are acting within the scope of their federal authorizations.¹⁵ Thus, the Best Practices Guide jointly produced by public safety and CMRS industry interests (note 15, *supra*) recommends the following when, as in the County, new or expanded public safety systems are contemplated:

By assessing intermodulation potential, base station locations and design parameters, adjacent frequency deployments and the relative signal strengths of each system at representative locations, the parties can identify where the probability of interference is greatest and plan around it.¹⁶

Even prior to these actions:

CMRS carriers introducing service, expanding coverage or making other major modifications should contact the local public safety

¹⁴ The County, of course, cannot speak for the actions or ordinances of governments other than its own. For reasons set forth *infra*, and in our earlier Comments, we believe our actions have been reasonable and lawful under extreme circumstances.

¹⁵ Nextel "White Paper," 17 (<http://wireless.fcc.gov/publicsafety/>); Best Practices Guide, 6 (http://www.apcointl.org/frequency/project_39)

¹⁶ Best Practices Guide, 14.

agency to examine whether their plans potentially represent an interference risk. (Best Practices Guide, 13)

As described in the County's Comments (4-7) and in the attached Declaration of Jeff Martin, it was not until mid-2001, when the County began to consider amending its wireless zoning ordinance, and only grudgingly on the part of Cingular even then, that the carriers began to share with local public safety authorities the sort of information recommended for advance planning by the Best Practices Guide. Now that the process has begun, however fitfully, we do not want to see it interrupted.

Pending the kind of universal remedies under consideration in Docket 02-55, the present circumstances call for cooperation to prevent or mitigate interference rather than complaints aimed at vindicating either side. Now is not the time to put a federal damper on reasonable local self-help by governments and carriers.

III. THE COUNTY IS NOT SEEKING TO REGULATE CMRS "OPERATION."

USCC (Comments, 3-5) and Verizon (Comments, 3-4) defend, and the County does not challenge, the FCC's authority and obligation to set technical standards of operation for CMRS carriers.¹⁷ By its references to antenna configuration, power and frequency, the County ordinance is not attempting to substitute its own technical standards. Instead, the County requires this information in working toward a goal common to itself, the FCC and the wireless carriers: prevention or mitigation of commercial interference to public safety radio systems. (Comments, 12)

¹⁷ Verizon cites Sections 22.917 (cellular) and 24.238 (PCS) of the FCC's regulations as "intended to prevent harmful interference to other radio services." The intent and the reality are far apart. The rules are failing to prevent interference to public safety radio systems of the County and other local governments, as the FCC has acknowledged. (Notice, ¶14)

AWS (Comments, 9), Pinnacle (3, and Millard Declaration) and Hutchins (1st unnumbered page) state that the ordinance's absolute insistence on new certificates of use for "any" change in these parameters is impractical if not impossible to fulfill, and in any event quite costly. Pinnacle speaks of "dynamic" changes from moment to moment, AWS of day to day shifts in power and frequency. Hutchins doubts that any absolute assurance against interference can be certified.

These comments illustrate why it would be best for the FCC to allow the County's discussions with affected carriers to move forward without federal intervention; or, absent mutually satisfactory revisions to the ordinance, to await some concrete County application of a challenged provision. Almost any legislation is vulnerable to attack based on extreme or impractical interpretations. As indicated by the appended Declaration of Jeff Martin, the County never intended to impose on itself, much less the carriers, the burden of re-certifying uses on a daily or hourly basis. But keeping up with major changes makes sense. Hutchins suggests, for example, that:

Nonetheless, intermodulation studies are valuable tools, and a conditional prediction can always be made. Furthermore, RFI from personal wireless facilities is rarely unable to be eliminated or effectively reduced. (Comments, 2d page)

Perhaps the County and its affected wireless carriers should be striving for more modest results along these lines.

There is, in any event, a statutory limit to how much the ordinance can accomplish. If the County were to interpret or apply the legislation in a manner that would make compliance impossible, we would risk "prohibiting" CMRS or discriminating among competitors, both of which are enjoined by Section 332(c)(7)(B)(i). With constituents having access to six CMRS

providers, and being itself a subscriber to CMRS, there is every reason for the County to avoid the extreme and unintended result of prohibiting service.

IV. THE LEGAL LIMITS ON LOCAL ZONING ARE SERVICE PROHIBITION AND UNREASONABLE DISCRIMINATION.

Although Cingular seeks to differentiate its Petition as a challenge to an interference regulation, the complaint fundamentally attacks provisions in the County ordinance concerning placement, construction and modification of personal wireless service facilities. Under the Communications Act, Section 332(c)(7), for our purposes here, such decisions are limited only by the requirements that they not “prohibit or have the effect of prohibiting” service nor “unreasonably discriminate among providers of functionally equivalent services.”¹⁸ While the second of these requirements has been the subject of discussion between County and those PCS carriers operating elsewhere than 800 MHz, we do not read the Petition to be claiming unreasonable discrimination. Thus, we are called to focus solely on the federal injunction against prohibition of personal wireless service.

A. Proof of prohibition is a high hurdle.

Numerous federal courts have addressed the point. Plainly, denial of an application for a particular site is not, by itself, a prohibition.¹⁹ In some federal circuits, prohibition speaks to the

¹⁸ Subparagraph 7(B)(i). Other procedural limitations found at (B)(ii) and (iii) are not challenged in the Petition. Although Cingular purports (Petition 3, 7, 8) to find fault with the ordinance’s radio frequency radiation (“RFR”) safeguards at Section 10-125(K), it mischaracterizes the provision as regulation of radio frequency interference (“RFI”).

¹⁹ *AT&T Wireless v. City Council of Virginia Beach*, 155 F.3d 423, 428 (4th Cir. 1998); *Town of Amherst v. Omnipoint Communications Enterprises*, 173 F.3d 9, 14 (1st Cir. 1999).

totality of service by all carriers, not the offerings of a single provider.²⁰ Local zoning authorities have been upheld in denying a multi-tower placement because a carrier refused to consider a single tower.²¹ At least one decision based partly on RFR concerns has been affirmed because it did not amount to service prohibition.²²

Thus, Cingular faces the high hurdle of demonstrating that the County's application of its Section 332(c)(7)(A) authority to prevent or reduce commercial interference constitutes commercial service prohibition under (7)(B)(i). The *Clarkstown* case is particularly instructive. Although RFR regulation is forbidden to local governments if a wireless carrier meets federal standards, the court found

nothing in the statute that prohibits a municipality from seeking to minimize perceived health effects when deciding among competing applicants.

* * *

As long as no one who met the FCC's emissions standards was denied consideration, it seems to this Court that the municipality ought to be able to address the concerns of its citizens, and limit political fallout, by deciding to maximize the distance between the monopole and other municipal uses.²³

Similarly here, the County seeks, by advance planning through its amended ordinance, to avoid or minimize the serious and dangerous risks of interference to public safety communications. To be sure, the ordinance cannot be applied in such a way as to prohibit

²⁰ *Omnipoint Communications Enterprises v. Newtown Township*, 219 F.3d 240, 244 (3d Cir. 2000), cert. den. 531 U.S.985; *Airtouch Cellular v. City of El Cajon*, 83 F.Supp.2d 1158, 1167 (SDCA 2000)

²¹ *Sprint Spectrum v. Willoth*, 176 F.3d 630 (2d Cir. 1999)

²² *New York SMSA Limited Partnership and Crown Atlantic v. Town of Clarkstown*, 99 F.Supp.2d 381, 392 (SDNY, 2000)

²³ *Id.* The other municipal uses included homes and schools, toward which the Town was persuaded to adopt a principle of "prudent avoidance" of RFR.

personal wireless service. If carriers prove unable to submit the certifications called for in Sections 1-128 and 10-125(J)(1), or find their use permits revoked without opportunity for cure, such that they are prohibited from providing or continuing wireless service, they will have made out a *prima facie* case against the County. But that case is not yet made.

B. None of the conventional preemption analyses applies here.

The discussion above amplifies the view we expressed in our Comments (13-16), that Congress has not occupied the field of RFI entirely, but has left open a relatively narrow path for local governments to tread when facing serious risks to public safety such as the County confronts here. As noted earlier, the shared authority encompassed by “placement, construction and modification” in Section 332(c)(7)(A) does not extend, for example, to such technical standards as separation between transmitters. The carriers who apply to the County for certificates of use will have met any such federal requirements, or will have been granted FCC waivers, independently of the County’s review. The County’s interest in configuration, frequency and power of wireless transmitters (Comments, 12) is not intended to, and does not, encroach on FCC technical and operating parameters such as frequency tolerances, emission masks, effective radiated power limits, modulation requirements, etc.²⁴

Although neither the *Burlington Broadcasters* nor *Johnson County* cases found any express preemption by Congress,²⁵ CTIA resorts to highly general discussions of FCC authority

²⁴ See, e.g., Chapter 47, Part 22, Code of Federal Regulations, Subparts C and H.

²⁵ In *Burlington Broadcasters*, “complete preemption” was inferred, 204 F.3d at 321, while according to *Johnson County*, “federal communications legislation lacks any statement expressly preempting local regulation of RFI.” 199 F.3d at 1190.

and to 20-year-old legislative history for such an expression.²⁶ We agree with the Second and Tenth Circuits that Congress has not spoken explicitly to the point.

If the field of RFI regulation is shared -- as we maintain -- rather than fully occupied by federal authority,²⁷ the only conventional analytical tool remaining is so-called “conflict” preemption. This may arise from a state or local attempt to regulate in a fully occupied field,²⁸ or from the impossibility of simultaneously complying with federal and local law.²⁹ Since the County respectfully disagrees that Congress has occupied the field -- insofar as placement, construction and modification of facilities lies within the field -- and since we have been shown no impossibility of dual compliance, we conclude that conflict preemption is no bar to the County ordinance. To the contrary, as we have stated, the County, the carriers and the FCC seek the common goal of preventing or mitigating commercial interference to public safety radio systems.

Johnson County dismisses an argument that absolute preemption of local efforts to protect public safety communications would violate the Tenth Amendment to the Constitution, declaring that “RFI regulation is not a traditional local interest but a national interest preempted

²⁶ See Section IV.C., *infra*.

²⁷ Besides local zoning authorities’ unqualified power to rule on placement, construction and modification of personal wireless facilities, we note in passing that Congress added Section 302(f) to the Communications Act, 47 U.S.C. §302a(f), four years after the enactment of Section 332(c)(7). P.L.106-521. Section 302(f) permits state and local governments to enforce federal citizens band (“CB”) regulations.

²⁸ 204 F.3d at 320, citing *English v. General Electric*, 496 U.S. 72, 79, n.5 (1990).

²⁹ 199 F.3d at 1190, citing indirectly *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 31 (1996).

by federal legislation.”³⁰ Leaving aside the circularity of this declaration, we respectfully suggest that legitimate local concerns change with changing times.

When, as here, there is no federal help for the County, at least in the near term, and when the FCC effectively has remanded to local resolution the problem of interference between two fully complying licensees -- public safety and CMRS -- times definitely have changed and different answers may be needed than are found in regulatory and judicial precedent.

C. Neither the *Head* decision nor 1982 legislative history requires preemption.

Five commenters cite *Head v. New Mexico Board*, 374 U.S. 424 (1963) as if it summarily disposes of any state or local attempt to regulate RFI.³¹ Their citation is to an afterthought in a footnote which constitutes *dictum* in the first place:

It is to be noted that this case in no way involves the Commission’s jurisdiction over technical matters such as a frequency allocation, over which federal control is clearly exclusive. 47 U.S.C. 301.³²

The purpose of the footnote, in a decision upholding state regulation of radio advertising of optometry services, was to amplify the following caveat:

In dealing with the contention that New Mexico’s jurisdiction to regulate radio advertising has been preempted by the Federal Communications Act, we may begin by noting that the validity of this claim cannot be judged by reference to broad statements about the “comprehensive” nature of federal regulation under the Federal Communications Act. *Id.*

The Supreme Court went on to say:

³⁰ 199 F.3d at 1194. The Tenth Amendment reserves to the states, or to the people, powers not granted by the Constitution to the federal government.

³¹ Sprint, 4, n.8; CTIA, 6, n.16; Cingular Opposition to Motion to Dismiss, 3, n.6; WebLink, 3, n.8; ARRL, 3.

³² 374 U.S. at 430, n.6.

[T]he question whether Congress and its commissions acting under it have so far exercised the exclusive jurisdiction that belongs to it as to exclude the State, must be answered by a judgment upon the particular case. Statements concerning the “exclusive jurisdiction” of Congress beg the only controversial question: whether Congress intended to make its jurisdiction exclusive.³³

The teaching of *Head*, then, is to look at the particulars rather than at general statements such as found in Sections 1, 2, and 301-303 of the Communications Act, and broadly relied on by Cingular and its allies here. Proper attention to this teaching means that the Court’s own afterthought about “technical matters such as a frequency allocation” must be placed in a factual context and not used as an incantation to preempt local health and safety regulations.

Nor should the legislative history of 1982 amendments to Section 302 of the Communications Act be interpreted as preemptive with respect to interference to public safety communications.³⁴ In the first place, the original enactment of Section 302 in 1968 was not addressed to the licensee-caused disruptions of essential services that the County must confront and resolve. Instead, Congress was chiefly concerned with the interference potential of equipment and devices, not intended for communications or for use in communications services, such as garage door openers, home security systems, public address systems, etc.³⁵ As explained in the legislative history:

Under the present statute, the Federal Communications Commission has no specific rulemaking authority to require that before equipment or apparatus having an interference potential is put on the market, it meets the Commission’s required technical standards which are

³³ *Id.*, quoting from *California v. Zook*, 336 U.S. 725, 731, and *Kelly v. Washington*, 302 U.S. 1, 10-13.

³⁴ Cingular and most of its supporters rely on this statutory gloss.

³⁵ *See*, generally, Kurt A. Wimmer and Cara E. Maggioni, “Congress and the Expansion of Communications Technology,” in *The Communications Act: A Legislative History of the Major Amendments, 1934-1996* (Pike & Fischer, 1999), 207-212.

designed to assure that the electromagnetic energy emitted by these devices does not cause harmful interference to radio reception.³⁶

Similarly, the 1982 amendments were aimed chiefly at RFI to “home electronic equipment and systems,” which is not at issue here. The *Burlington Broadcasters* court could take guidance from the 1982 amendments because that case was about broadcast and other wireless service interference to home appliances and business-premises devices. But the decision cannot be precedent for disposing of our much graver problem: the persistent and increasing (but federally sanctioned) interference from commercial licensees to critical public safety communications in the County.

CONCLUSION

For the reasons discussed above and in our earlier Comments and Motion to Dismiss, the Cingular Petition should be dismissed or denied. The courts hold exclusive jurisdiction over complaints about local zoning ordinances. Even if the Commission takes the case, it enjoys lawful discretion to decline or defer any ruling. In the apparent absence of radio license violations by any party, the process of complaint and enforcement is not helpful. Until County-carrier discussions reach consensus or an impasse, they should be encouraged. The law does not compel preemption or a declaration of exclusive Commission jurisdiction.

Respectfully submitted,

ANNE ARUNDEL COUNTY

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June 25, 2002

³⁶ Senate Report No. 1276, reprinted in 1968 U.S. Code Congressional and Administrative News, Volume 2, 2486, 2487.

DECLARATION

Pursuant to Section 1.16 of the Rules of the Federal Communications Commission, I declare under penalty of perjury that the following is true and correct:

1. I am a Senior RF Engineering Consultant with RCC, an engineering consulting firm assisting Anne Arundel County in identifying sources of interference to its present 800 MHz public safety radio system. In December 2001, as testified by County Police Chief Thomas Shanahan and recapitulated in the County's Comments of June 10, 2002 in this proceeding (page 2 and Exhibit B), RCC's testing had identified 41 "dead zones" or "dead spots" in the County where public safety communications were either blocked or seriously degraded. Since then, an additional 20 such areas have been found, for a total of 61.

2. In seeking to identify or narrow possible CMRS sources of interference that might explain the dead zones, the County in June of 2001 asked several wireless service providers for the following information:

- Location of Cellular Sites to test interference in close proximity
- Frequencies assigned for use in inter-modulation studies
- RF System configurations to identify high-intensity signals

By July of 2001, the information had been received from Nextel and Verizon. Cingular initially objected to providing the data, but eventually did so in November of 2001 after the completion of the initial county-wide testing.

3. The County's telecommunications staff and RCC are, of course, aware that CMRS transmitters undergo minor changes in frequency, power level and orientation in the ordinary course of cellular system operation. As a matter of fact, many carriers are migrating to

dynamic channel allocation algorithms to improve their channel efficiency. The intent of the ordinance was not to re-certify these essentially automatic adjustments of daily operation but to capture those deliberate decisions by a wireless carrier to change power, frequency and antenna orientation so as to modify significantly the operation of its system in the County.

*

Jeffrey P. Martin

June 25, 2002

* The paper filing of the Reply Comments contains Mr. Martin's signature

Certificate of Service

I certify that copies of the foregoing “Reply Comments of Anne Arundel County” have been served by regular mail upon:

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June 25, 2002