

ORIGINAL

Before the
Federal Communications Commission
Washington, DC 20554

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In the Matter of)
)
Federal Preemption of Anne Arundel County)
Ordinance Regulating Radio Frequency)
Interference)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

WT Docket No. 02-100

DA 02-1044

To: Wireless Telecommunications Bureau, Commercial Wireless Division, Policy and Rules Branch

REPLY COMMENTS

Cingular Wireless LLC ("Cingular") hereby replies to the comments submitted in response to its Petition for Declaratory Ruling ("Petition") in the above-captioned proceeding.¹ With the exception of Anne Arundel County ("County"),² whose Ordinance the Petition sought to preempt, all commenters supported Cingular's request.³

The County asks the Commission to dismiss, deny, or simply not rule on the Petition.⁴ Aside from the fact that many of the arguments were made in the County's motion to dismiss,⁵

¹ See "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," *Public Notice*, DA 02-1044 (May 7, 2002); Petition for Declaratory Ruling of Cingular Wireless LLC, WT 02-100 (filed Apr. 23, 2002).

² Anne Arundel County Comments, WT 02-100 (filed June 10, 2002) ("County Comments").

³ See comments filed in this docket by ALLTEL Communications, Inc.; ARRL; AT&T Wireless Services, Inc.; Cellular Telecommunications & Internet Association; Mark F. Hutchins; Pinnacle Towers Inc.; Sprint Corporation; Telecommunications Industry Association; United States Cellular Corporation; Verizon Wireless; W. Lee McVey; and Weblink Wireless, Inc.

⁴ County Comments at 9, 11.

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the positions taken do not support intrusion into the FCC's exclusive jurisdiction over RFI.

Furthermore, they are contradictory:

- First, the County argues that the Commission should defer review until the County takes action under the Ordinance, but later claims that only the courts can review such actions under Section 332(c)(7)(B)(v).⁶
- The County states that the Ordinance was enacted because the FCC did not grant it the radio frequency interference ("RFI") relief requested, but later claims the Ordinance does not regulate RFI.⁷
- The County's position that the FCC should defer to the Ordinance⁸ is equally inconsistent with its comments in the 800 MHz proceeding.⁹

The Ordinance regulates RFI by its terms and, as Sprint indicates, requires the collection of data germane to the FCC's exclusive jurisdiction. Preemption of the Ordinance is necessary and appropriate now. Failure to issue the preemption ruling requested in the Petition will result in the proliferation of similar ordinances, as evidenced by Sprint and other commenters, will force the FCC to review local rulings on a case-by-case basis, and ultimately will force the Commission to protect its jurisdiction in the courts nationwide. A preemption ruling now will avoid such a costly and unnecessary expenditure of resources.

⁵ See Anne Arundel County, Motion to Dismiss, WT 02-100 (filed May 24, 2002). Cingular's Opposition is hereby incorporated by reference. Cingular Wireless LLC, Opposition to Motion to Dismiss, WT 02-100 (filed June 2, 2002) ("Opposition").

⁶ County Comments at 9, 13.

⁷ *Id.* at 5, 7-8, 11-13. See also Motion to Dismiss at 2.

⁸ *Id.* at 8.

⁹ See Public Safety Improvement Coalition Comments, WT Docket No. 02-55, at 2 (May 6, 2002). The County is a member of the coalition, which took the position that a "national solution" is needed to address the public safety interference problem and "more is needed than the *ad hoc*, community-by-community approach."

I. THE COUNTY'S CLAIM THAT IT *MIGHT* ALTER THE ORDINANCE IN THE FUTURE DOES NOT JUSTIFY DISMISSAL OF THE PETITION

The County's first argument is that the Commission should defer ruling on the preemption Petition because:

- the "ordinance is a work in progress,"¹⁰
- "the County has taken no action on specific carrier applications under the revised ordinance;"¹¹ and
- the County may not exercise its discretion to revoke zoning certifications for Ordinance violations.¹²

The fact that the County may change its Ordinance in the future or exercise enforcement discretion does not alter the fact that the Ordinance impermissibly intrudes into the FCC's exclusive jurisdiction to regulate RFI.¹³ The Ordinance is not a work in progress because it has been adopted by the County Council. Shortly after adoption, the County indicated that the Ordinance "is an existing law and will be enforced until we are told otherwise."¹⁴ Thus, unless the County immediately rescinds the Ordinance, preemption is required.

As the commenters demonstrate, the County's Ordinance is not unique.¹⁵ A number of other jurisdictions have also adopted ordinances designed to regulate RFI. The County itself noted that in drafting its Ordinance, it often "drew upon language in the ordinances of

¹⁰ County Comments at iii, 9.

¹¹ *Id.* at iii.

¹² *Id.* at 10.

¹³ *See* Petition at 1, 3; Opposition at 3-5.

¹⁴ Melissa Montealegre, *Cingular Fights Cell Tower Law*, *The Capital Gazette*, May 12, 2002, at A1 (quoting County Attorney Linda Schuett).

¹⁵ *See* Sprint Comments at 6-9; Verizon Comments at 5-6.

neighboring jurisdictions.”¹⁶ It appears that at least some of these jurisdictions adopted ordinances designed to regulate RFI based on the claims of certain telecommunications “consultants” that communities may so regulate.¹⁷ Thus, if the Commission declines to rule on the Petition, it is likely that additional ordinances will be adopted.¹⁸ This will trigger endless litigation that would be largely obviated by an Order preempting the subject Ordinance.

II. SECTION 332(c)(7)(B)(v) IS INAPPLICABLE AND THEREFORE CINGULAR PROPERLY SOUGHT RELIEF FROM THE COMMISSION

The County claims that Section 332(c)(7)(B)(v) of the Communications Act required Cingular to challenge the Ordinance in a court of competent jurisdiction no later than April 8, 2002 – 30 days after the effective date of the Ordinance.¹⁹ This theory is meritless. No court deadline has been missed because Section 332(c)(7)(B)(v) is inapplicable.

As Cingular demonstrated in its Opposition:

Section 332(c)(7)(B)(v) provides for expedited court review for any person “adversely affected by any final action or failure to act by a state or local government” which violates one of the[] four specific requirements [set forth in Section 332(c)(7)(B)]. Cingular’s Petition does not allege that the County violated any of the provisions enumerated in Section 332(c)(7)(B), nor does Cingular challenge a final zoning decision. Rather, Cingular alleges that the County exceeded its traditional zoning authority by adopting an Ordinance that attempts to regulate RFI. Thus, the judicial review provisions of Section 332(c)(7)(B)(v) are inapplicable.²⁰

¹⁶ County Comments at 6.

¹⁷ See Sprint Comments at 8-9.

¹⁸ Accord Verizon Comments at 1.

¹⁹ County Comments at 4.

²⁰ Opposition at 6. Contrary to the County’s claim, Cingular’s local counsel did *not* indicate at the January 22, 2002 hearing that the proper forum for challenging the Ordinance was a court. Rather, in response to questions from Councilman Klocko regarding enforcement of the ordinance, counsel for Nextel and VoiceStream surmised that a court may be the appropriate

(continued on next page)

This analysis is consistent with *Nextel Partners, Inc. v. Kingston Township*, in which the court indicated that the judicial review provision is not triggered unless there is an adverse decision against a specific carrier or a failure to act on a carrier's request.²¹ The County concedes that there has been no carrier-specific action under the Ordinance.²² Thus, Section 332(c)(7)(B)(v) is inapplicable. The County also concedes that under the Administrative Procedure Act, the FCC is empowered to issue declaratory rulings.²³ Therefore, this controversy is properly before the FCC.

Nevertheless, the County urges the Commission to delay action on Cingular's Petition until after carrier-specific decisions have been made pursuant to the Ordinance.²⁴ The County later argues, however, that such determinations would be outside of the FCC's jurisdiction and would instead be subject to the judicial review provision contained in Section 332(c)(7)(B)(v). Moreover, such an approach is inconsistent with the County's position in the 800 MHz proceeding that a "national solution" is needed to address the CMRS/public safety interference problem and that "more is needed than the *ad hoc*, community-by-community approach" to resolving public safety communications issues.²⁵ Thus, if the Commission defers ruling here in

forum for resolving a County "action" ordering a carrier to suspend operations or shut down its facilities. The issue of which forum was appropriate for challenging the Ordinance itself simply never came up. Audio tape #1, Jan. 22, 2002, Public Hearing (copy attached). An official copy of the tape recording of this hearing may be obtained from the Office of the County Council, which can be contacted at (410) 222-1401.

²¹ 286 F.3d 687, 695 (3d Cir. 2002). See AT&T Comments at n.3.

²² County Comments at 9, 10.

²³ *Id.* at 9.

²⁴ *Id.* at 10.

²⁵ Public Safety Improvement Coalition Comments, WT Docket No. 02-55, at 2 (May 6, 2002).

favor of a community-by-community approach, the FCC and/or wireless carriers would be forced to litigate specific zoning decisions of thousands of jurisdictions across the country. The FCC can avoid this piecemeal approach by issuing the requested declaratory ruling.

III. THE COUNTY ADMITS THAT THE ORDINANCE WAS ENACTED TO BY-PASS THE FCC'S EXCLUSIVE JURISDICTION OVER RFI

The County acknowledges that the Ordinance was the product of dissatisfaction with the FCC's handling of the County's RFI concerns.²⁶ According to the County, the FCC was contacted about its interference issues in late 1998 and concluded that "from the beginning, it appeared that the [County's] receivers were at fault and not the cellular transmitters."²⁷ Although the FCC suggested methods that the County could employ to eliminate the interference problems,²⁸ the County concluded that it "was left without a remedy for the interference."²⁹ As a result, the County adopted the Ordinance because "there were no easy fixes to the interference problem, and that degradation would increase unless the County could address the situation through zoning."³⁰

²⁶ County Comments at 7.

²⁷ *Id.*

²⁸ *See id.* at 7.

²⁹ *Id.*

³⁰ *Id.* at 5. The January 22, 2002 hearing tapes referenced in the County's comments confirm that County Council members were aware of the preemption problems associated with the Ordinance, yet adopted it anyway. For example, Councilwoman Vitale (Fifth District), who voted in favor of the Ordinance, stated, "I believe that the Bill has some flaws. I think we may have some FCC problems." Councilwoman Biedle (First District) agreed that there may be an FCC preemption issue, but stated that "it's time to change that . . . Just like sometimes we change the code, sometimes we need to change the Constitution." Councilman Klocko (Seventh District), urged his colleagues to oppose the Ordinance, stating that "[w]e are confronting a federal preemption issue. . . . [A]t no point should we be adopting laws that we know violate the Constitution. . . . [T]his is about protecting the basis for our laws, and for that reason I will vote no." Audio Tape #2, Jan. 22, 2002 Public Hearing.

The County has never taken advantage of the most obvious remedies available to it – replacing or modifying its equipment as suggested by the FCC or filing a complaint with the FCC. If the County disagreed with the Commission’s informal determination, it could have filed a complaint seeking resolution of the interference issue. Instead, rather than bear the burden of demonstrating that the cellular transmitters were causing the interference, the County engaged in self-help outside its jurisdiction. It enacted an Ordinance giving it absolute authority to determine whether wireless carriers were causing interference to its own communications system. This end-run around the FCC’s jurisdiction should not be countenanced.

The County also claims that its regulation of interference should not be preempted until the Commission concludes its 800 MHz proceeding which addresses public safety interference issues.³¹ The County indicates that its involvement in RFI is necessary because the proceeding will not be resolved quickly.³² The County cannot “justify” its regulation of RFI due to concerns over the length of time the proceeding may take, yet fail to put before the Commission problems specific to the County.³³

IV. THE COUNTY’S RE-CHARACTERIZATION OF VARIOUS SECTIONS OF THE ORDINANCE DOES NOT CHANGE THE FACT THAT RFI REGULATION IS INVOLVED

Despite the fact that the County admits it enacted the Ordinance because the FCC’s resolution of the RFI issues did not please the County, it also claims that the Ordinance was lawful because the specific provisions referenced in the Petition were not intended to regulate RFI.³⁴ The County would have the Commission believe that the provisions were innocently

³¹ County Comments at 10-11.

³² *Id.*

³³ *See id.* at 10-11.

³⁴ *Id.* at 11-13.

designed to merely collect RFI-related information.³⁵ One of the primary County objectives was to regulate RFI and the Ordinance itself makes this clear.

A. Definition of Commercial Telecommunications Facility

Cingular urged the FCC to preempt Section 1-101(14B) of the Ordinance because it was clearly designed to regulate RFI. This provision broadly defines a “telecommunications facility” to include towers, antennas, microwave dishes, and *even in-building wireless communications systems*. Thus, the simple installation of a microcell within an office building would require the approval of the zoning board. No traditional zoning purpose would be served by requiring approval for such a device. Moreover, this provision was part of comprehensive amendments recently enacted by the County, which the County acknowledges were designed to regulate RFI.³⁶

B. Zoning Certificates of Use

Section 1-128(a) of the Ordinance requires CMRS carriers to obtain zoning approval prior to making “*any change in configuration, transmit frequency, or power level*” at a facility. Although the County implies that this provision merely requests information and was not designed to regulate RFI, it specifically states that this provision was “essential to local efforts to mitigate commercial interference to 800 MHz public safety radio systems.”³⁷ Moreover, this provision is not merely a reporting requirement because a CMRS carrier must obtain approval from the County – in the form of a certificate of use – prior to making any of the referenced changes:

³⁵ County Comments at 12-13.

³⁶ *See id.* at 5.

³⁷ *Id.* at 12.

no premises or structure, including a COMMERCIAL TELECOMMUNICATIONS FACILITY . . . may be used or altered until a zoning certificate of use is issued. . . .³⁸

Thus, the County's claim that this provision "is not a direct regulation of RFI" must be rejected.³⁹

As noted in the Petition and in the County's Comments,⁴⁰ the Commission has previously reviewed at least one similar ordinance and concluded that it was an attempt to regulate interference and therefore "null and void."⁴¹

C. Compliance with Radio Frequency Radiation Safeguards

Section 10-125(K) requires CMRS carriers to certify compliance with the FCC's guidelines for RF emissions and authorizes the County to revoke a CMRS carrier's certificate of use – its local authorization to operate – if a carrier cannot provide the certification. This provision should be stricken as an impermissible attempt to regulate RFI. In addition to the reasons for revocation noted in the Petition, this provision should be preempted because it authorizes the County to penalize a carrier for non-compliance with the FCC's emission guidelines even if the FCC determined that the infraction was minor and that no penalty was necessary. The FCC has ample authority to police its regulations and does not need the help of state and local jurisdictions across the country. This is not what Congress envisioned when it centralized RFI authority in one national body – the FCC.

Cingular agrees with Sprint that the Commission should preempt local zoning ordinances that require CMRS carriers to certify compliance with federal law.⁴² These certifications are

³⁸ See Article 28, §1-128(a).

³⁹ See County Comments at 12.

⁴⁰ Petition at 7-8; County Comments at 12.

⁴¹ *Mobilecomm of New York*, 2 F.C.C.R. 5519, 5520 (CCB 1987).

⁴² Sprint Comments at 9-12.

becoming increasingly common and impose unnecessary costs on carriers. The certifications are also unnecessary because penalties for violating federal law should be imposed at the federal, not the state or local, level.

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition and Opposition, the FCC should preempt the subject Ordinance insofar as it regulates RFI. The FCC has exclusive jurisdiction over RFI under Section 301 *et seq.* of the Communications Act. Section 554(e) of the Administrative Procedure Act and Section 1.2 of the Commission's rules give the FCC full authority to issue declaratory rulings.

Respectfully submitted,

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June 25, 2002

CERTIFICATE OF SERVICE

I, Ernestine M. Screven, do hereby certify that on this 25th day of June, 2002, a copy of the foregoing "Reply Comments" of Cingular Wireless, LLC was served by U.S. mail, first-class postage prepaid on the following parties. The referenced audio tapes of the January 22, 2002 Public Hearings have not been served on these parties. An official copy of these tapes may be obtained from the Office of the County Council, which can be contacted at (410) 222-1401.

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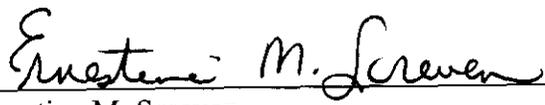
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