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Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, S.W., TW-A325  
Washington, DC 20554

Re: *Ex Parte – WT Docket No. 02-100*  
*Draft Order*

Dear Ms. Dortch:

Cingular Wireless LLC has prepared the attached draft order in connection with its Petition requesting that the Commission issue a Declaratory Ruling preempting recent amendments to the Anne Arundel County zoning ordinance.

Should you have any questions regarding the filing, please contact the undersigned.

Sincerely,

WILKINSON BARKER KNAUER, LLP

/s/

By: L. Andrew Tollin  
Robert G. Kirk

cc: Gary Oshinski

Enclosures

FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

September 25, 2002

Frederick E. Ellrod, Esq.  
James R. Hobson, Esq.  
Miller & Van Eaton, P.L.L.C.  
Attorneys for Anne Arundel County, Maryland  
1155 Connecticut Avenue, NW  
Suite 1100  
Washington, DC 20036-4320

Dear Mssrs. Ellrod and Hobson:

I am writing in response to the Petition for Declaratory Ruling ("Petition") filed with the Commission by Cingular Wireless LLC ("Cingular") on April 23, 2002. Cingular has requested that the Commission issue a Declaratory Ruling preempting recent amendments to the Anne Arundel County zoning ordinance under the Communications Act of 1934, as amended ("the Act"). 47 U.S.C. § 101 *et seq.* On May 7, 2002, the Commission issued a Public Notice seeking comments on Cingular's Petition. *Wireless Telecommunications Bureau Seeks Comment on Petition for Declaratory Ruling*, Public Notice, WT 02-100, DA 02-144 (May 7, 2002). Thirteen entities filed comments, and, with the exception of Anne Arundel County, whose Ordinance the Petition sought to preempt, all commenters supported Cingular's preemption request. In fact, carriers have pointed out that the jurisdictional problems raised in the Petition are not isolated and extend to other areas of the country. Thus, we take this opportunity to clarify our authority with regard to the regulation of radiofrequency interference ("RFI").

The Division has reviewed Anne Arundel County's zoning Ordinance, as well as the Petition, comments and applicable law. As evidenced by the preamble to the bill amending the Ordinance, statements of Anne Arundel County Council members, and submissions by the County itself (both before and after enactment of the amendments), the contested portions of the Ordinance were enacted to regulate RFI. These provisions restrict the ability of Commission licensees to operate their telecommunications systems under Federal law and confer authority on the County to make interference determinations. These provisions are preempted under Section 301 *et seq.* of the Act and caselaw thereunder. Specifically, the Division considers the following provisions to be preempted:

- Article 28, Section 1-101(14B), which defines telecommunications facilities to include antennas, microwave dishes, and in-building wireless communications systems;
- Article 28, Sections 1-128(a), (c), which require owners and users of telecommunications facilities to obtain zoning certificates of use prior to making "any change in configuration, transmit frequency, or power level;"

- Article 28, Section 10-125(j)(1), which requires an applicant for a zoning certificate to obtain an independent certification that the proposed facility will not degrade or interfere with the County’s public safety communications system;
- Article 28, Section 10-125(k)(1), requiring holders of zoning certificates to submit, on an annual basis, an independent certification of the radio frequency radiation actually measured at the facility, that the measurements provided are accurate, and that the measurements meet the applicable Commission standards and guidelines for those emissions; and
- Article 28, Sections 10-125(j)(2) and (k)(2), allowing the County to revoke a zoning certificate for a given facility if it determines that the facility interferes with the County’s public safety communications system.

The Commission’s exclusive jurisdiction over RFI is well established by statute and caselaw. Title III of the Act establishes a pervasive regulatory scheme for the Commission to occupy the entire field of RFI regulation. For example, Section 301 states that “[i]t is the purpose of this Act . . . to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels . . . under licenses granted by Federal authority.” Section 302 provides that the Commission has the power to “make reasonable regulations . . . governing the interference potential of devices which in their operation are capable of emitting radio frequency energy . . . in sufficient degree to cause harmful interference to radio communications.” Section 303 explicitly details the Commission’s responsibilities with respect to radio transmission, including assigning frequencies, determining station power, and “mak[ing] such regulations not inconsistent with law as it may deem necessary to prevent interference between stations.” *See, e.g.*, 47 U.S.C. §§ 301, 302(a)(1) & 303(c)-(f).

The breadth of these provisions results in complete federal control over radio transmissions. Such matters shall not be regulated by local or state law, even as an attempt to resolve an RFI complaint. *See* H.R. Rep. No. 765, 97<sup>th</sup> Cong. 2d Sess. 33 (1982), *reprinted in* 1982 U.S. Code Cong. & Ad. News 2277 (regarding the amendment of Section 302 to specifically authorize the FCC to require that home electronic equipment meets minimum RFI rejection standards); Letter from David L. Furth, Chief, Commercial Wireless Division, Wireless Telecommunications Bureau, to Roger Kroh, Director of Planning and Development, Johnson County Office of Planning, Development and Codes (July 2, 1997). The Supreme Court has held that Congress, in adopting the Act, “formulated a unified and comprehensive regulatory system for the industry,” and that the Commission has “comprehensive powers to promote and realize the vast potentials of radio.” *See FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 137 (1940); *Nat’l Broad. Co. v. U.S.*, 319 U.S. 190, 217 (1943).

The Commission has preempted several ordinances similar to that of Anne Arundel County. For example, in *Southwestern Bell Wireless Inc. v. Johnson County Board of County Commissioners*, the County enacted an ordinance that prohibited communications towers from operating in a manner that interfered with public safety communications. *Southwestern Bell Wireless Inc. v. Johnson County Board of County Commissioners*, 199 F3d 1185 (10<sup>th</sup> Cir. 1999). The ordinance also granted the zoning administrator authority to determine when interference existed and to force the carrier to cease operations. These provisions mirror Sections 10-125(j)(1)-(2) and (k)(1)-(2) of the Anne Arundel County Ordinance. After reviewing the ordinance, the Commission determined that the County’s “effort

to regulate . . . RFI [was] preempted” by the Act. Letter from David L. Furth to Roger Kroh (July 2, 1997). The United States Court of Appeals for the Tenth Circuit agreed with the Commission’s determination, stating that “Congress intended federal regulation of RFI issues to be so pervasive as to occupy the field. . . . RFI regulation is not a traditional local interest but a national interest preempted by federal legislation.” 199 F3d at 1193 & 1194.

The Commission also has declared another ordinance unlawful because it contained a notification provision similar to that contained in Section 1-128(a) of Anne Arundel County’s Ordinance. Specifically, Wilton, Connecticut enacted an ordinance that required carriers to notify the local zoning board before making any power and/or frequency changes. The Commission determined that this provision constituted an attempt to regulate interference and was, therefore, “null and void.” *Mobilecomm of New York*, 2 F.C.C.R. 5519, 5520 (CCB 1987).

The Commission has procedures in place to respond to public safety interference complaints, and resolution of such complaints is given the highest priority. Any such complaint must allege a specific violation of the Commission’s operating and/or interference rules, and may be directed to your local field office at 9300 East Hampton Drive in Capitol Heights, Maryland 20743. In an emergency, you may contact the Crisis Management Center at (202) 418-1122, twenty-four hours a day, seven days a week.

As the County is aware, the Commission recently adopted a *Notice of Proposed Rulemaking* to consider rule changes to remedy interference issues between Commercial Mobile Radio Service licensees and public safety systems. *Improving Public Safety Communications in the 800 MHz Band, Consolidating the 900 MHz Industrial/Land Transportation and Business Pool Channels*, WT Docket No. 02-55, *Notice of Proposed Rule Making*, FCC 02-81 (rel. Mar. 15, 2002). That ongoing proceeding is the appropriate forum for the County to raise any generalized interference concerns it may want addressed.

Should you have any questions or would like additional information regarding this matter, please contact the Wireless Telecommunications Bureau.

Sincerely,

William Kunze  
Chief, Commercial Wireless Division  
Wireless Telecommunications Bureau