

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

In the Matter of)	
)	WT 02-100
Petition of Cingular Wireless)	
for a Declaratory Ruling, etc.)	

APPLICATION FOR REVIEW
OF ANNE ARUNDEL COUNTY, MARYLAND

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ITS ATTORNEYS

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SUMMARY

Relying chiefly on FCC administrative declarations of 15-20 years ago, and on two federal decisions that uncritically adopt the declarations, the Order asserts “exclusive jurisdiction” over radio frequency interference and preempts portions of a local zoning ordinance seeking to protect public safety radio from massive and dangerous disruptions caused by commercial wireless providers.

The Order is wrong as a matter of law. But its errors are magnified by a policy that amounted to inattention at best and neglect at worst.

If the FCC is to justify and maintain the supremacy it claims, it must act immediately to remedy the “dead spots” of zero public safety communication that daily risk the lives of citizens and emergency responders in Anne Arundel County, Maryland and in too many other communities across the country.

The County appreciates those portions of the Order that encourage wireless carriers to continue cooperating with us to mitigate commercial interference to public safety radio at 800 MHz. We appreciate the reporting requirements that call for documentation of those efforts on the part of the two worst offenders -- the Petitioner, Cingular Wireless, and Nextel. We are grateful for the informal meetings and oversight that lately have characterized the FCC’s re-engagement in our serious problems.

However, under the aggravated circumstances of this case -- and on the threshold of a rulemaking decision that recognizes the inadequacy of voluntary, post hoc mitigation of unpredictable and deadly interference -- it was legally insufficient for the Order to take away the County’s remedies without supplying a remedial mandate of its own.

The Order takes up a zoning complaint for which the courts, not the FCC, are assigned jurisdiction. Should the Commission nevertheless continue its involvement in the case, we ask that the Order be overturned and that an alternative means be ordered to deal with the kind of persistent interference identified in Exhibit A.

At a minimum, the Order should clarify the questions raised by Section V.

The Commission recognizes this dangerous state of affairs and is considering new rules to eliminate or reduce CMRS interference to public safety systems.² But a decision in the 800 MHz Rulemaking remains months away, and its presumably salutary effects will not be realized quickly. Although the Order (¶26) exhorts the six national wireless carriers operating in the County to “remain committed partners with the County in ongoing interference mitigation efforts,” and asks for 30-day and 90-day progress reports from two of the carriers, neither the County nor the CMRS providers can predict perfectly or control possible interference from new or augmented sites.³ Indeed, several of the known sites as presently equipped and operated have proven intractable to mitigation.⁴ They remain a threat to the safety of citizens and emergency responders and a looming source of liability for the County and the carriers.

For these reasons, we asked (Comments, 10-11, 17) that a decision on the Cingular Wireless preemption petition be deferred until the completion of the 800 MHz Rulemaking. The Order (¶24) gave the County’s request short shrift:

The Commission’s consideration of new ways to alleviate ongoing interference has no bearing on the fact that the County’s existing requirements unlawfully infringe on Commission jurisdiction.

We beg to differ. Until improved mitigation, including mandatory advance coordination between carriers and public safety and/or spectrum realignment are implemented through the

² Improving Public Safety Communications in the 800 MHz Band, WT Docket 02-55, FCC 02-81, released March 15, 2002. (“800 MHz Rulemaking”)

³ The County appreciates the Order’s exhortations and its reporting requirements, as well as the informal reinforcement from the Wireless Telecommunications Bureau Chief and his staff. This is welcome practice. But we need a surer legal foundation against CMRS interference.

⁴ Exhibit A hereto.

800 MHz Rulemaking, the County and similarly-situated local governments have no effective recourse against CMRS interference.

The voluntary *Best Practices Guide* (Order, ¶25) is not a satisfactory “means to address interference issues in the near term.” If this were so, the 800 MHz Rulemaking would not be needed. The *Guide* provides no mechanism for shutting down a CMRS site that cannot be mitigated despite the parties’ best efforts. Thus the County is constrained to reiterate its former plea:

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 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.⁵

I. THE COMMISSION’S AUTHORITY OVER RFI CANNOT BE EXCLUSIVE WHERE THE POWER YIELDS NO EFFECTIVE REMEDY FOR THE HARM.

The Order finds (¶11) that “the challenged provisions of the County’s zoning Ordinance infringe on the Commission’s exclusive jurisdiction over RFI and are preempted under the doctrine of field preemption.” Judicial support for this assertion of exclusive jurisdiction is surprisingly scant. (Order, notes 41, 43) The two cases are discussed at Section II below.

Among the fundamental purposes of Congress’ grant of authority to the Commission is “promoting safety of life and property through the use of wire and radio communication.”⁶ One

⁵ County Reply Comments, June 25, 2002, 13.

⁶ Communications Act (“Act”) Section 1, 47 U.S.C. §151. In the County, the purpose of “the national defense” is closely linked to public safety. Anne Arundel is home to several installations that are vital to national security, including Fort Meade, the National Security Agency, Baltimore-Washington International Airport, the United States Naval Academy, and defense contractor Northrop Grumman. Thus, it is particularly important that our first responders be properly equipped and able to communicate in an emergency. We need to ensure that our public safety radio systems work properly and efficiently.

of the means to fulfill this purpose through reliable radio communication is stated generally at Section 303(f) of the Act: “Make such regulations not inconsistent with law as [the FCC] may deem necessary to prevent interference between stations and to carry out the provisions of this Act.” Such generalities, however, do not prove exclusive jurisdiction in the Commission. As the Supreme Court has counseled:

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.

And added in a footnote:

[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.⁷

The “controversial question” here, then, is whether Congress intended, through the FCC, to nullify any and all efforts by a state or its subordinate local governments to prevent or ameliorate interference to public safety radio systems when the FCC’s own efforts in the field have proven ineffective. The common-sense answer, of course, is that if the FCC insists on its

⁷ *Head v. New Mexico Board*, 374 U.S. 424, 429-430, n.6 (1963), upholding state regulation of radio advertising for optometry services. (emphasis added) The notion that Congress did not “occupy the field” of radio interference once, for all time, in the Act and its predecessor Federal Radio Act is borne out by such relatively recent amendments as the 1982 revisions to Section 302, P.L. 97-259, and the 1990 addition of Section 333, P.L. 101-396, authorizing the FCC to punish any person, not just licensees, for “willful or malicious interference” to radio communications.

sole authority over RFI, it has the duty to take charge, not simply leave mitigation to the happenstance of voluntary action.

It is clear beyond doubt that the judiciary in our federal system takes seriously the preemption of state authority; the more so where, as here, Congress has not spoken expressly on the point. (Order, 12, n.42)⁸ And especially where, as here, the subject of public safety, in many of its aspects, has been entrusted to the states. As the Supreme Court has reminded:

Given the presumption that state and local regulation related to matters of health and safety can normally co-exist with federal regulations, we will seldom infer, solely from the comprehensiveness of federal regulations, an intent to preempt in its entirety any field related to health and safety.⁹

We submit that the presumptions in favor of at least some small space for state authority are even stronger when the assertedly dominant federal authority has not acted effectively to suppress the threat to safety.

Tenth Amendment jurisprudence supports the concept that the withholding of federal resources in resolving a safety problem does not permit the FCC to “commandeer” state or local resources for the purpose.¹⁰ If states or their subdivisions such as the County were given a realistic alternative in the matter of RFI regulation, the constitutional issue would not arise:

⁸ *Chicago and Northwestern Transp. Co. v. Kalo Brick and Tile Co.*, 450 U.S. 311, 317 (1981) [“Preemption of state law by federal statute or regulation is not favored ‘in the absence of persuasive reasons -- either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained,’” quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143 (1963)].

⁹ *Hillsborough County, Fla. v. Automated Med. Laboratories*, 471 U.S. 707, 718 (1985).

¹⁰ *New York v. United States*, 505 U.S. 144, 175 (1992) (To compel states to accept radioactive waste, or its legal liabilities, from waste generators “would ‘commandeer’ state governments into the service of federal regulatory purposes, and would, for this reason, be inconsistent with the Constitution’s division of authority between federal and state governments.”).

[W]e have recognized Congress' power to offer States the choice of regulating that [private] activity according to federal standards or having state law preempted by federal regulation.¹¹

As regards protection of humans from radio frequency radiation (“RFR”) under Sections 1.1307, 1.1310, 2.1091 and 2.1093 of the Rules, *Cellular Phone Taskforce* concluded that such a choice had been offered. State and local governments could accept federal RFR standards.

The County had no such option. No final RFI regulations exist to govern the situation we faced. We first sought FCC help. When that proved ineffective, we attempted to help ourselves.

Demurring that both the County and the interfering CMRS providers in the County were operating in keeping with FCC rules and within the scopes of their respective licenses, the Commission first suggested impossible receiver improvements (County Comments, Exhibits A and F), then fell into a long period of silent inaction.

Eventually, the agency recognized that no single step was likely to remedy the ongoing (and increasing) CMRS interference. Eighteen months ago it opened the 800 MHz Rulemaking, whose decision appears to be several months away and whose full implementation is even farther off. The County remains now where it has been since 1998: compelled to administer a merely voluntary federal program, at the cost of hundreds of thousands of dollars of its own money and employee time. If RFI regulation is the exclusive province of the Commission, the County should never have been left to its own devices.

The potential liability the County has been living with all these years is very like the radioactive waste liability challenged by New York in the unconstitutional “take-title” provisions

¹¹ *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 96, quoting *New York v. United States*, 505 U.S. at 167, *cert. denied*, 531 U.S. 1070 (2001).

of the federal legislation discussed above.¹² In effect, the County has been asked to accept -- or left with no recourse but to accept -- ownership of and liability for the electromagnetic pollution created by CMRS “generators.”

This forced draft of County employees is akin to the commandeering of those Chief Law Enforcement Officers (“CLEOs”) who were unconstitutionally compelled by the Brady Handgun Violence Prevention Act to conduct background checks on handgun purchasers to carry out the purposes of the federal statute.¹³ The enlistment of local resources here, albeit transitional in light of the 800 MHz Rulemaking, is no more lawful than was the requirement in *Printz* that CLEOs conduct handgun purchaser background checks.

Section 333 of the Communications Act (note 7, *supra*) was enacted in 1990 when the FCC and Congress recognized a gap in the agency’s enforcement powers. Radio licensees could be disciplined for interference with other licensees, but only after protracted and costly revocation hearings. Other perpetrators were left unmentioned.¹⁴ Now the law reads:

No person shall willfully or maliciously interfere with or cause interference to any radio communications of any station licensed or authorized by or under this Act or operated by the United States Government.

¹² *New York v. United States*, 505 U.S. at 174-177. It is no answer to say that the FCC’s only program is “voluntary” and therefore does not commandeer or compel the County to do anything. The ongoing interference to the County’s public safety radio system is real and dangerous. Our obligation to our citizens and emergency responders demands our efforts to mitigate the threat.

¹³ *Printz v. United States*, 521 U.S. 898, 900 (1997) (Whether directed to the states as such or to individual public employees: “The Federal Government may not compel the States to enact or administer a federal regulatory program,” quoting *New York v. U.S.*, 505 U.S. at 188.)

¹⁴ H.R. Rep. 101-316, *reprinted in* 1990 USCCAN 1294, 1301-02 (“The Committee finds that the provision . . . will assist the Commission in curtailing willful and malicious interference” and making this subject to criminal penalties.) Although the report language uses the conjunctive “and,” the statute itself uses the alternative “or” and does not speak of penalties on its face. It would thus appear that the statute may be enforced criminally or civilly.

At least with respect to civil enforcement of the statute, it would appear that “willfully” means what it has come to signify, for example, in the imposition of forfeitures under Section 503(b) of the Act: an intent to perform the act complained of.¹⁵

Section 333 tersely reinforces the obligation of Sections 1 and 303(f): to prevent or remedy RFI in the interest of public health and safety. We do not read the Act or its several sections as requiring the Commission to be perfect in its prevention or mitigation of RFI.

However, for all the reasons discussed above, if the privilege of exclusive FCC control of RFI is believed to be in the public interest, this singular authority must be exercised in the public interest. Given the extent of commercial RFI faced by the County and several other jurisdictions in this country lately, the Commission’s obligation could not lawfully be satisfied by demurring that CMRS and public safety licensees are operating within the scope of their licenses¹⁶ and by encouraging merely voluntary methods of mitigation.

Should current cooperative efforts fail to eliminate or substantially reduce the seemingly intractable interference identified in Exhibit A, we would expect the FCC to consider enforcement action under Section 333 or any other available authority. If Section 333 contemplates any private right of action, the County will consider it.

¹⁵ *Southern California Broadcasting*, 6 FCC Rcd 4387-88 (1991), discussing definition of “willful” in Section 312(f) as it also applies to Section 503(b) forfeitures.

¹⁶ *Best Practices Guide*, at 3, cited at Order, ¶25, n.114.

II. THE PRECEDENTS CITED IN THE ORDER DO NOT SUPPORT EXCLUSIVE FCC JURISDICTION OVER RFI IN THESE CIRCUMSTANCES.

The Order's legal analysis (§§18-20) relies chiefly on two federal appellate court decisions and a pair of FCC rulings that are nearly 20 years old. Since both the federal decisions take account of the FCC rulings, we focus on the former.

The first of the federal decisions is *Southwestern Bell Wireless v. Johnson County Board of County Commissioners*, 199 F.3d 1185 (10th Cir. 1999). As described in the decision, the facts differed markedly from those in Anne Arundel County. There is no indication that Johnson County was experiencing the kind of horrendous interference to its public safety radio system encountered in Anne Arundel. Nor was the FCC as disengaged there as it has been here for much of past five years. By telephone and in writing, the agency discussed with Johnson County the issues arising from an interference Stipulation and zoning ordinance and described available complaint procedures. 199 F. 3d at 1189.¹⁷ So far as we are aware, no interference complaints were filed thereafter.

By contrast, Anne Arundel was mostly left to fend for itself. Its initial complaints to the FCC in 1998 produced site visits in early 1999, which led the agency to conclude erroneously that the County's receivers were at fault, even though the manufacturer reached a different conclusion (County Comments, Exhibit A) and despite the County's follow-up appeal to the

¹⁷ At note 4 of its order, the *Johnson County* court responded to the local government's fear that the FCC would not "adequately address its RFI concerns." It said Johnson County could petition the FCC, seek a declaratory ruling or file informal complaints; or it could go after the wireless carrier's license. That may have sounded to the judges like a formidable arsenal of weapons against prospective interference. To Anne Arundel in retrospect, having complained fruitlessly since 1998, the remedies are not effective. As to seeking revocation of a carrier's license, Congress' adoption of Section 333, discussed *supra*, acknowledged the laborious nature of that process.

Chairman’s Office explaining why the recommendations of the FCC’s Charles Magin were not helpful. (Comments, Exhibit F) From that point in early 2000 onward, we heard little if anything from the FCC. On our own, we hired a technical consultant and found that the problem of “dead spots” was much more serious than we had suspected, and was getting worse.

Surprisingly, *Johnson County* does not discuss Section 332(c)(7) by textual analysis.

Section 332(c)(7)(A) reads:

Except as provided in this paragraph, nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction and modification of personal wireless service facilities.

Congress did not qualify this statement with any discussion of reasons or motives for local placement decisions. The face of the statute is clear and unequivocal. RFI is a permissible basis for placement decisions so long as carriers are not prohibited from service or discriminated against unreasonably.

Instead of focusing on the words of Section 332, the Court relies significantly on legislative history and on prior FCC declarations of the agency’s exclusive authority over RFI. 199 F.3d at 1191-92. We repeat (Comments, 16) that a Congressional enactment of 1996 should at least have been considered for its possible effects on FCC rulings of a decade earlier.

The Order’s resort to legislative history (¶21) is unavailing. If Congress speaks directly to the issue, that is the end of the inquiry.¹⁸ Moreover, the legislative history is unhelpful because it does not explain what is meant by “general authority over radio telecommunications”

¹⁸ *Chevron v. Natural Res. Def. Council*, 467 U.S. 837 (1984). The Order’s reliance (Order, ¶21) on the caption of Section 332(c)(7) for the proposition that Congress was merely saving, not extending, local zoning authority begs the question of the content of that authority. The Order’s reference to “traditional zoning authority” is an artifice not found in the statute. We prefer to rely on the injunction in the body of subparagraph 7(A): “nothing in this Act.”

but simply mentions the “authority to regulate the construction, modification and operation of radio facilities” -- much the same subject matter recited in the pronouncement of exclusive local authority at Section 332(c)(7)(A).¹⁹ Indeed, the “sharing” of federal and local authority in these matters is no better evidenced than by the unqualified common use of the terms “construction” and “modification” in both the statute and the legislative history.

The FCC is inexplicably confident (Order, ¶21) that it can distinguish construction and modification in its general authority from that construction and modification reserved to local and state zoning authorities. The agency is inexplicably sure that the “regulation of operation is different in kind from traditional zoning regulation of the physical facility.” (Order, ¶19) There are at least two problems with this reasoning: first, Congress did not use or define “traditional zoning regulation of the physical facility” in the statute or the legislative history; second, the FCC’s approach requires the agency to scrutinize (or speculate about) local government motives. We say more about this below.

Although federal RFR standards are preemptive to the extent stated in Section 332(c)(7)(B)(iv), a federal court has found lawful a local government’s decision to approve one wireless tower placement over another based on judgments about relative protection against RFR:

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.²⁰

¹⁹ H.R. Conf. Rep. No. 104-458, at 209 (1996). The change is the word “operation.” But for reasons already discussed (Reply Comments, 7-9), the County is not seeking to control carriers’ operations, only their feasibly optional placements of CMRS transmitters.

²⁰ *New York SMSA Ltd. P’ship v. Town of Clarkstown*, 99 F.Supp.2d 381, 392 (S.D.N.Y., 2000).

The lesson to be drawn from *Town of Clarkstown* is simply this: The Town's "motive" for its tower placement decision -- radiation hazard -- was not unlawful simply because the FCC's standards are preemptive. So it is here. The County's reasons for seeking RFI protection within the preemptive federal framework of technical standards for wireless carrier operation should not be considered a violation of law unless and until the regulation is applied to prohibit service or cause unreasonable discrimination.

The County respects the decision in *Freeman v. Burlington Broadcasters*, 204 F.3d 311 (2d Cir. 2000), but maintains its earlier suggestion (Comments, 15) that the case simply is not apposite here. It is predicated on the "FCC's pervasive regulation of broadcast technology," 204 F.3d at 323, and chiefly involves interference to home appliances and office equipment. Its purported restriction of localities "to exercise zoning powers based on matters not directly regulated by the FCC," *Id.*, begs the central legal question of whether RFI from a non-broadcasting source, such as CMRS carriers, may only be directly regulated by the FCC. The need to confront the question is all the more critical where the FCC's efforts at eliminating CMRS interference to public safety radio systems have been ineffective or remain provisional, as in the 800 MHz Rulemaking.²¹

²¹ Both *Burlington Broadcasters* and the Order (¶13) point to legislative history of amendments to Section 302 of the Act, referencing "interference appearing in home electronic equipment or systems." That was the kind of interference at issue in the court case, but interference to public safety radio is a different and more serious problem that deserves more than a formulaic approach to precedent.

III. THE COUNTY DID NOT APPLY ITS ORDINANCE TO IMPEDE SERVICE.

The Order finds that the County impeded CMRS service. But the evidence for this is insubstantial or sketchy.²² The wireless carriers understood from the outset that they could, if they chose, file the required non-interference certifications, either unreservedly or “under protest,” and several did so to avoid delay. (Order, ¶18, n.29) Among those who did not was the petitioner, Cingular Wireless. *Id.*, n.28. Pertinently, the Cingular ex parte communication cited by the Commission as evidence of obstructive enforcement of the zoning code states:

Cingular has not filed an application to modify this site, or any other sites, as required by the County’s unlawful Zoning Ordinance.

* * *

For the record, Cingular has not filed any Certifications. Nevertheless, Cingular continues to work cooperatively and diligently with the County to resolve any interference issues.

The application history for the five other carriers under the new County ordinance was summarized by the County Director of Inspections and Permits:

The following providers have applied for and received building permits for a telecommunications facility since March 2002. This means that they have submitted non-interference certifications. AT&T had 16 permits, Omnipoint had 7 permits, Verizon had 2 permits and Sprint had 2 permits issued.²³

The Director added:

²² The County objected informally, and renews its objection here formally, to the decision to treat an adjudicative petition for declaratory ruling as a “permit-but-disclose” proceeding under Section 1.1206 of the Rules, as if it were a notice-and-comment rulemaking. The sketchiness of the evidentiary record, in the County’s view, is attributable in part to the terseness and vagueness of some of the ex parte communications. *See, e.g.*, the letter of October 1, 2002 from Cingular counsel. The County complained about this kind of non-communication on at least two occasions: Letter of October 4, 2002, at 2; repeated orally in the meeting described in Letter of April 15, 2003.

²³ County Letter of 2/5/03, cited at Order, n.29.

Since March 2002, the following providers have made application, but have not provided all the information to get the building permits issued: AT&T has made 14 applications, Nextel has made 3 applications and Sprint has made 5 applications. *Id.*²⁴

From the above, it is fair to infer that four of the carriers -- AT&T, Omnipoint (now T-Mobile), Verizon Wireless and Sprint -- were willing at one time to supply non-interference certifications, but two of them, AT&T and Sprint PCS, stopped doing so. In Sprint's case, we can go beyond inference, for that carrier later put the matter directly:

Regarding the approval of building permits since ordinance was enacted, you are correct. But these permits came only after certain non-legal Sprint employees unknowingly complied with the ordinance. We have since advised our siting personnel that we believe the ordinance is unlawful and that they should not comply with the Rf-related provisions unless instructed otherwise.²⁵

This particular Sprint explanation of its change from certification to non-certification is not on the record, but we believe the essential information was known to Commission staff. As we understand it, Commission staff asked those carriers who previously had submitted certifications why they were no longer doing so. On information and belief, the carriers replied much as Sprint answered in the quoted e-mail.

In an ex parte letter of October 4, 2002, before any carrier complaints of stalled applications had surfaced, the County suggested:

[G]iven the good-faith mitigation efforts continuing with the two interfering carriers, Cingular and Nextel, there ought to be a way to move forward on any new sites they need without compromising

²⁴ Like Cingular, Nextel never submitted any certifications of non-interference. However, because the County was working with Nextel and Cingular day by day to mitigate RFI at existing sites, we always held out the possibility for some form of surrogate approval or filing under protest. *See*, County ex parte of 10/4/02, *infra* at note 26.

²⁵ E-mail to the County's counsel, James R. Hobson, from Sprint counsel, Roger Sherman, 2/5/03.

their principles or the County's legislative authority. A beginning would be the filing of certifications under protest, fully reserving the carriers' rights.²⁶

Of course, the County does not dispute the carriers' entitlement to call a halt to pragmatic accommodation in favor of their chosen legal principle. We object, however, to the Order's conclusion (§24) that "the Ordinance provisions are in fact impeding service in the County." Four of the six carriers found a way to live with the zoning code and could have protected themselves by legal reservation of right. They chose not to continue on that basis. The other two carriers, Nextel and Cingular, were offered the same opportunity but refused it. (note 26, *supra*)

We repeat that the evidence the Order relies on for its finding that the County was impeding wireless service is sketchy and insubstantial. One of Cingular's early claims (Order, n. 110) later was retracted. In its Petition (9, n.33), Cingular said that "it has been unable to modify certain cell sites within Anne Arundel County as a direct result of this Ordinance." That sounds like a claim of prohibition under Section 332(c)(7)(B)(i), and a couple of Cingular's allies certainly argued that the Ordinance was unlawfully prohibitive of wireless service. (County Reply Comments, 2) Later, in opposing the County's Motion to Dismiss, Cingular denied any allegation that the County had "violated any of the provisions enumerated in Section 332(c)(7)(B)."²⁷

In sum, the four carriers not associated with any substantial interference to the County radio system had it within their power and prerogative to certify to continuing non-interference under whatever reservation of right they chose to express. Each of the four had certified at least

²⁶ Letter from James R. Hobson to the FCC Secretary, cited in the Order at n.29. *See also*, Letter of April 15, 2003, from Gerald L. Lederer to the FCC Secretary.

²⁷ Opposition, 6. The reason for the carrier's careful parsing of its position is not far to seek. If the assertion of prohibition of service in the Petition is taken as it surely stands, Cingular is in the wrong forum and the County's Motion to Dismiss must be granted. *See*, Section IV, *infra*.

twice previously. Even the two carriers charged with ongoing, significant interference had every opportunity to establish some surrogate for the required certifications -- simply because their existing operations already were under cooperative scrutiny.

For its part, the Commission could have fostered or mediated a way forward for the carriers and the County, pending the broader resolution of the 800 MHz Proceeding. Instead, it rushed to judgment on flimsy evidence, despite the contrary recommendation of the Local and State Government Advisory Committee. (“LSGAC”)²⁸

IV. THE COMMISSION LACKS JURISDICTION TO DECIDE CINGULAR’S PETITION.

The question here, of course, is not whether the County’s amendments to its zoning code governing wireless telecommunications facilities will escape legal scrutiny. The issue is where the scrutiny will take place, at the FCC or in a “court of competent jurisdiction” pursuant to Section 332(c)(7)(B)(v) of the Act. Even if Cingular missed the 30-day deadline in the statute to challenge the particular ordinance, such that the FCC became a forum of convenience (County Comments, 4, n.9), the opportunity remains to complain against the zoning regulation as applied.

We have discussed earlier (pages 11-12), and need not repeat here, the reasons why it would be unwise to look to the motives of local zoning authorities in the enactment of ordinances that are otherwise proper in form and contain ample content relating to what the Order (¶2) calls “traditional zoning functions.” If there are elements of preemptible RFI regulation within that content, they surely will be ferreted out by petitioning wireless carriers and/or the courts.

²⁸ Order, ¶9. The 15-month interval from the filing of the Cingular petition to the Order was not a “rush” in the sense of inordinate speed, but the decision was precipitous in light of the pending 800 MHz Rulemaking and the ample opportunity for informal interim solutions.

It would make most sense if future zoning complaints could be brought to the forum best equipped to deal with them whole. The courts are authorized to consider all the issues -- so-called traditional zoning, RFI and RFR. This larger judicial scope is not changed (Order, ¶21, n.98) by the FCC's sharing with the courts of jurisdiction over RFR issues. Naturally, the courts are free, in proper cases, to refer matters to the Commission under the doctrine of primary jurisdiction.²⁹

At bottom, the complaints of Cingular and its allies are about prohibition of service. Thus, they fit neatly within the Congressional reservation to the judiciary of local zoning actions that are "inconsistent with" Section 332(c)(7)(B). For all these reasons, the Commission should decline jurisdiction over the Cingular petition.

V. THE COMMISSION SHOULD CLARIFY CERTAIN ASPECTS OF THE ORDER.

As indicated in the County's initial Comments (11), Cingular first asked for preemption of the entire wireless zoning ordinance, then narrowed the request to the portions of the code allegedly regulating RFI. The scope of the Order requires some clarification.

At the outset (¶1, n.1), the Order purports to preempt provisions "involving" RFI, and footnotes the sections of the County Code it has in mind. The discussion at ¶18 takes up these sections again, but does not always explain what it finds so offensive as to warrant preemption. The ordering clause at ¶27, however, grants the Cingular petition as first filed. Although the petition recites the same sections found in note 1 of the Order (Petition, 8), the prayer for relief speaks to the entire "zoning Ordinance." (Petition, 9)

²⁹ See, generally, Pierce, Richard J., Jr., II *Administrative Law Treatise*, Ch. 14 (Aspen Law and Business, 2002).

It remains puzzling to the County that the definition of “commercial telecommunications facility” at 1-101 (14B) should be faulted. The Order (¶18) states only that the definition includes “facilities that would not normally be subject to zoning ordinances such as in-building wireless communications systems.”³⁰ Is the Commission claiming that zoning for the interior of structures, including related building codes, is no longer permitted? If so, why? Assume, for the sake of discussion, that a local government were concerned about in-building levels of RFR and determined to assure itself of compliance with federal guidelines. What would be wrong with including in-building wireless communications systems in a zoning review? How would this differ from the safety concerns underpinning building codes?

The Commission’s problems with the zoning certificate of use at Section 1-128(a) are explained (Order, ¶18, n.80) but the reference to 1-128(c), at note 83, is cryptic. Subsection (c) can hardly be said to focus on RF regulation rather than land use. To the contrary, it defines a “use” in non-technical terms.

Although the Order is direct in its discussion of the certification and revocation provisions of Section 10-125(j), and the comparable revocation portion of 10-125(k), the staff decision never explains the fault with 10-125(k)(1) -- providing for initial, then annual, certifications of compliance with federal RFR standards. Since the statute at Section 332(c)(7)(B)(iv) plainly permits local governments to satisfy themselves as to compliance, the County asks the Commission to clarify the extent of that permission.³¹

³⁰ Cingular’s view on the point is emphatic, but unhelpful. (Reply, 8) Nor does the carrier demonstrate any harm from this provision that would support standing to challenge it.

³¹ See, *A Local Government Official’s Guide to Transmitting Antenna RF Emission Safety*, June, 2000, 1 (Notwithstanding federal enforcement procedures, “state and local governments may wish to verify compliance with the FCC’s exposure limits in order to protect their own citizens.”) The Guide is a joint publication of the Commission and the Local and State Government Advisory Committee, and may be found at <http://www.fcc.gov/oet/rfsafety/>.

VI. CONCLUSION.

For the reasons stated above and in the County's Comments and Reply Comments, as well as our ex parte communications in WT 02-100, we believe that the Order should be reversed or modified. Alternatively, at a minimum, the Commission should clarify those portions of the Order discussed in Section V.

Respectfully submitted,

ANNE ARUNDEL COUNTY

By _____

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ITS ATTORNEYS

August 6, 2003

CERTIFICATE OF SERVICE

This Application for Review has been served by e-mail upon counsel for Cingular Wireless:

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August 6, 2003

James R. Hobson

Original Interference Statistics

Original Number of Interference Sites: 61

Mitigation To Date (7-15/03)

Number of Remaining Interference Sites: **20**

Contributions from Carriers

Nextel Only	6
Cingular Only (A)	0
Verizon Only (B)	0
Nextel/Cingular	6
Cingular/Verizon	2
Nextel/Verizon	2
All three	4

Future Mitigation Efforts

Number of Remaining Interference Sites
after new portables are deployed 8/15/03 to 11/15/03: 8

The new receivers associated with the new 800 Mhz Radio System Upgrade Project have additional interference rejection characteristics.

Contributions from Carriers

Nextel Only	2
Cingular Only (A)	0
Verizon Only (B)	0
Nextel/Cingular	2
Cingular/Verizon	0
Nextel/Verizon	0
All three	4

Number of Remaining Interference Sites *after*
additional tower sites are deployed over next three years: **4**

The County is deploying additional tower sites for in-building coverage performance over the next three years. These towers will provide additional signal for the portables although many of these problem areas currently have signal levels greater than -85 dBm.

Contributions from Carriers

Nextel Only	1
Cingular Only (A)	0
Verizon Only (B)	0
Nextel/Cingular	1
Cingular/Verizon	0
Nextel/Verizon	0
All three	2