

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)
)
Petition of Cingular Wireless LLC for a) WT Docket No. 02-100
Declaratory Ruling that Provisions of the Anne)
Arundel County Zoning Ordinance Are) DA 03-2196
Preempted as Impermissible Regulation of)
Radio Frequency Interference Reserved)
Exclusively to the Federal Communications)
Commission)

To: The Commission

OPPOSITION TO APPLICATION FOR REVIEW

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Cingular Wireless LLC (“Cingular”) hereby opposes the Application for Review (“Petition”) filed by Anne Arundel County, Maryland (“County”) regarding the *Memorandum Opinion and Order* (“Order”) in the captioned proceeding.¹ Consistent with the Communications Act of 1934, as amended (the “Act”), and long standing precedent, the Wireless Telecommunications Bureau (“Bureau”) properly concluded that (i) the Federal Communications Commission (“FCC” or “Commission”) has exclusive jurisdiction to regulate radio frequency interference (“RFI”) and (ii) the adoption of zoning amendments designed to authorize the County to regulate RFI is precluded by “field preemption” and ultimately the Supremacy Clause of the Constitution.

¹ *Petition of Cingular Wireless LLC*, WT Docket No. 02-100, *Memorandum Opinion and Order*, DA 03-2196 (WTB rel. July 7, 2003).

INTRODUCTION AND SUMMARY

The Petition is fatally flawed for a number of reasons. First, the FCC was created to “centraliz[e] authority” over “communications by wire and *radio*”² and, by enacting Title III, Congress established a pervasive regulatory scheme for the FCC to occupy the entire field of RFI regulation on a nationwide basis. The core of this regulatory scheme is set forth in Sections 301 (FCC regulation of radio transmission) and 302 (FCC jurisdiction to regulate RFI and devices that cause interference) of the Act, yet the Petition virtually disregards these provisions. Instead, the County admits that its zoning ordinance was designed to give it authority over RFI and urges the FCC (i) to disregard the federal statutory scheme and related court decisions, and (ii) to permit the County to resolve its own RFI concerns. Such an approach would produce the very cacophony that the Act was designed to prevent.

Second, the Petition is premised on the incorrect notion that the FCC is powerless to remedy RFI. The FCC’s complaint process is fully available to address RFI issues. As the County acknowledges, it previously availed itself of the Complaint process more than 5 years ago, but walked away when Commission staff indicated that many of the RFI problems were caused by the County. If there is concern over the RFI standard, this issue can be resolved via a petition for rulemaking or declaratory ruling. In fact, the County is presently a participant in the 800 MHz proceeding that was commenced to address RFI/public safety issues.

Third, contrary to the County’s assertions, the Commission had the jurisdiction necessary to issue the subject ruling. Section 554(e) of the Administrative Procedure Act gives the FCC full authority to issue declaratory rulings. The Commission recognized this authority by adopting Section 1.2 of its rules.

Accordingly, the Petition should be denied.

² 47 U.S.C. § 151 (emphasis added).

I. THE BUREAU PROPERLY CONCLUDED THAT THE COUNTY'S ATTEMPTS TO REGULATE RFI WERE PREEMPTED BECAUSE THE COMMISSION HAS EXCLUSIVE JURISDICTION OVER RFI

Throughout this proceeding, the County has acknowledged that the zoning amendments were the product of dissatisfaction with the FCC's handling of the County's RFI concerns.³ Because of this dissatisfaction, the County amended its zoning ordinance to give it authority to remedy RFI as it saw fit.⁴ As discussed below, the Bureau properly concluded that these "zoning" amendments were preempted by the Act's grant of exclusive jurisdiction over RFI to the FCC.

A. The Commission Has Exclusive Jurisdiction to Regulate RFI Under the Communications Act

Congress has granted the Commission exclusive jurisdiction to regulate RFI, and any attempt by a state or local government to infringe upon this authority is impermissible. Congress has the authority to preempt state and local law under the Supremacy Clause, which states that "the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."⁵

In general, there are three types of preemption: (1) express preemption, which occurs when the language of a federal statute reveals an express intent by Congress to preempt state law; (2) field preemption, which occurs when federal regulation is so pervasive as to evidence a Congressional intent to occupy the entire field, thereby leaving no room for the states to regulate; and (3) conflict preemption, which occurs when compliance with both federal and state law is impossible, or when state law stands as an obstacle to the accomplishment and execution of the

³ Anne Arundel County Comments, WT Docket No. 02-100, at 7 (filed June 10, 2002) ("County Comments"); Petition at 1-12.

⁴ See Petition at 3-12.

⁵ U.S. Const. Art. VI, cl.2.

full purposes and objectives of Congress.⁶ The Bureau properly concluded 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.”⁷

One of the central reasons Congress adopted the Act and created the Commission was to end the chaos of interference that resulted from a free-for-all of spectrum usage.⁸ In Title III, Congress established a pervasive regulatory scheme for the FCC to occupy the entire field of RFI regulation. For example, Section 301 of the Act 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”⁹ Section 302 provides that the FCC 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”¹⁰ Section 303 explicitly details the FCC’s responsibilities with respect to radio transmission, including assigning frequencies, determining station power, and, most

⁶ *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984); *Southwestern Bell Wireless Inc. v. Johnson County Bd. of County Comm’rs*, 199 F.3d 1185, 1189-1191 (10th Cir. 1999) (“*Johnson County*”).

⁷ *Order* at ¶11.

⁸ *See Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 375-77 (1969); FCC Office of Network Study, Second Interim Report on Television Network Procurement, 65-66 (1965); *Nat’l Broad. Co. v. U.S.*, 319 U.S. 190, 212 (1943) (“*NBC*”) (“With everybody on the air, nobody could be heard.”). Title I of the Act created the FCC to “centralize authority” over “communications by wire and *radio*.” 47 U.S.C. § 151.

⁹ 47 U.S.C. § 301.

¹⁰ 47 U.S.C. § 302(a)(1).

significantly, “mak[ing] such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act.”¹¹

The breadth of these provisions results in absolute federal control over radio transmissions. A review of the legislative history of these provisions when they were originally adopted as part of the Federal Radio Act of 1927 confirms this fact: “[T]he bill affirmatively asserts and assumes jurisdiction in the Federal Government over all phases of radio communication. . . . [I]t retains complete control in the Federal Government of all channels of radio communication.”¹²

Congress amended the Communications Act in 1982 by broadening Section 302 to specifically authorize the FCC to require that home electronic equipment meet minimum RFI rejection standards. There, it reconfirmed that the FCC had exclusive jurisdiction over RFI, and that state and local regulation of this area was preempted:

The Conference Substitute is further intended to clarify the reservation of exclusive jurisdiction to the Federal Communications Commission over matters involving RFI. Such matters shall not be regulated by local or state law, nor shall radio transmitting apparatus be subject to local or state regulation as part of any effort to resolve an RFI complaint [T]he Conferees intend that regulation of RFI phenomena shall be imposed only by the Commission.¹³

¹¹ See 47 U.S.C. § 303(c)-(f).

¹²Statement of Herbert Hoover, Secretary of Commerce, to the House of Representatives, Committee on the Merchant Marine and Fisheries, regarding H.R. 5589 (Jan. 6, 1926).

¹³H.R. Conf. Rep. No. 765, 97th Congress, 2d Sess. 33 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2261, 2277 (emphasis added).

The Supreme Court has consistently interpreted the FCC’s jurisdiction “over technical matters,” such as the transmission of radio signals and RFI to be “clearly exhaustive.”¹⁴ In fact, the Court has stated that Congress, in adopting the Act, “formulated a unified and comprehensive regulatory system for the industry,”¹⁵ and that the Commission has “comprehensive powers to promote and realize the vast potentials of radio.”¹⁶

The County dismisses this overwhelming evidence of Congressional intent. It claims that the Bureau erred because “generalities . . . do not prove exclusive jurisdiction in the Commission.”¹⁷ This is an incorrect characterization. The Bureau cited specific provisions granting the FCC authority over radio transmissions, as well as legislative history confirming that Congress intended that the Commission have exclusive jurisdiction over RFI.¹⁸

B. The Bureau Applied Proper Precedent

In addition to specific statutory provisions and related legislative history, the Bureau relied on precedent spanning more than twenty years that consistently found the FCC to have exclusive jurisdiction over RFI.¹⁹ The County’s attempts to distinguish or dismiss the cases are unavailing.

¹⁴ *Head v. New Mexico Bd. of Exam’rs in Optometry*, 374 U.S. 424, 430 n.6 (1963).

¹⁵ *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 137 (1940).

¹⁶ *Nat’l Broad. Co. v. U.S.*, 319 U.S. 190, 217 (1943).

¹⁷ Petition at 4 (citing *Head*, 374 U.S. at 429-30, n.6 (1963)). The County’s reliance on *Head* is inappropriate. It dealt with the FCC’s jurisdiction over advertising, not radio transmissions and RFI. As the Court noted: “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.” 374 U.S. at 430.

¹⁸ *Order* at ¶14.

¹⁹ *Order* at ¶¶14-16.

Southwestern Bell Wireless v. Johnson County

The County claims that the Bureau placed too much emphasis on *Johnson County*²⁰ and that the case should not govern because “the facts differed markedly from those in Anne Arundel County” and because the court failed to consider the implications of Section 332(c)(7)(A) of the Act. Both of these claims are without merit.

In *Johnson County*, an ordinance was enacted to prohibit communications towers from operating in a manner that interfered with public safety communications. The ordinance also granted the zoning administrator authority to determine when interference existed and to force the carrier to cease operations. These provisions, which mirror Sections 10-125(j)(1)-(2) and (k)(1)-(2) of the Anne Arundel County Ordinance, were brought to the attention of FCC staff and the County was advised that (i) the zoning regulations were preempted, and (ii) “the FCC had specific procedures in place to handle *public safety interference complaints*.”²¹ Rather than repeal the ordinance and take advantage of the FCC’s complaint procedures, Johnson County ignored the FCC’s advice. The United States Court of Appeals for the Tenth Circuit determined that preemption of the ordinance was appropriate because “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.”²²

²⁰ See *Southwestern Bell Wireless Inc. v. Board of County Comm’rs*, 17 F.Supp. 2d 1221 (D.Kan. 1998).

²¹ *Id.* at 1223.

²² *Johnson County*, 199 F.3d 1185, 1193, 1194 (10th Cir. 1999); see also *Freeman v. Burlington Broad, Inc.*, 204 F.3d 311, 325 (2nd Cir. 2000) (“[A]llowing local zoning authorities to condition construction and use permits on any requirement to eliminate or remedy RF interference ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”); *In re 960 Radio, Inc.*, FCC 85-578, 1985 WL 193883 (1985) (“[T]he issue is whether or not the Communications Act has preempted the role of state and local governments in resolving specific interference disputes involving federally licensed broadcasting stations. . . . [W]e conclude that state and local governments are preempted in that area.”)

The facts here are quite similar. Anne Arundel County was aware that its proposed zoning amendments were preempted, but adopted them 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.”²³ Councilwoman Beidle (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.”²⁴ 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.”²⁵

In addition, as in *Johnson County*, Anne Arundel County was aware of the FCC’s complaint process. The County contacted the FCC about public safety interference issues in late 1998.²⁶ After reviewing materials and visiting various sites, however, FCC staff concluded that “from the beginning, it appeared that the [County’s] receivers were at fault and not the cellular transmitters.”²⁷ The FCC suggested methods that the County could employ to eliminate the interference problems²⁸ but, rather than complete the resolution process, the County concluded

²³ Audio Tape #2, Jan. 22, 2002 Public Hearing. Copies of this tape were provided in Cingular’s Reply Comments (filed June 25, 2002). An official copy of the tape recording may be obtained from the Office of the County Council, which can be contacted at (410) 222-1401.

²⁴ *Id.*

²⁵ *Id.*

²⁶ Petition at 9.

²⁷ County Comments, WT Docket No. 02-100, at 7 (filed June 10, 2002).

²⁸ *See id.*

that it “was left without a remedy for the interference” and walked away.²⁹ Thereafter, the County adopted the subject zoning amendments 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

The facts in *Johnson County* are virtually indistinguishable from the present situation. Moreover, as discussed in Section I.D. below, the Court’s decision was not defective for failing to address Section 332(c)(7)(A) because that provision has no relevance to the FCC’s RFI authority.

Freeman v. Burlington Broadcasters

The Bureau also relied on *Freeman v. Burlington Broadcasters*, 204 F.3d 311 (2d Cir. 2000) to support its conclusion that the FCC has exclusive jurisdiction over RFI.³¹ There, the Court confirmed that a locality may not regulate RFI under the guise of exercising its zoning authority: “Congress did preserve some local zoning authority over the placement of wireless services transmitters. . . . However, we conclude that Congress did not intend by this provision to repeal the FCC’s exclusive jurisdiction over RF interference complaints.”³²

The County claims that the reliance on *Freeman* was error.³³ According to the County, *Freeman* is inapplicable because it was predicated on broadcast technology rather than CMRS

²⁹ *Id.*

³⁰ *Id.* at 5.

³¹ *Order* at ¶16.

³² *Freeman*, 204 F.3d at 323 (emphasis added). The Court noted that the Act establishes a system for resolving interference disputes whereby a party – including a local authority which holds a license – may file a complaint with the FCC. *Id.*

³³ Petition at 12.

technology.³⁴ Although the County correctly identifies the technology involved in *Freeman*, the case was not predicated on the technology used, but rather on the pervasive regulatory scheme set forth in Sections 301-303 and 307 of the Act.³⁵ These sections apply to all radio services, including CMRS. Therefore, the Bureau properly relied on the case.

Other Precedent Relied on by the Bureau

In addition to *Johnson County* and *Freeman*, the Bureau relied upon *960 Radio, Inc.* and *MobileComm of New York, Inc.*³⁶ In *960 Radio*, the Commission concluded that it had exclusive jurisdiction over RFI and preempted a local zoning ordinance that attempted to regulate RFI caused by FM radio operations.³⁷ In *MobileComm*, the Common Carrier Bureau concluded that this preemption authority extended to RFI issues relating to mobile services.³⁸ The County does not challenge the applicability of either of these decisions.³⁹

³⁴ Petition at 12.

³⁵ *Freeman*, 204 F.3d at 320. The court placed particular emphasis on Section 302.

³⁶ *960 Radio, Inc., Memorandum Opinion and Declaratory Ruling*, FCC 85-578, 1985 WL 193883 (Nov. 4, 1985) (“*960 Radio*”); *Mobilecomm of New York*, 2 F.C.C.R. 5519 (CCB 1987) (“*Mobilecomm*”).

³⁷ *960 Radio*, at ¶¶4-5.

³⁸ *MobileComm*, 2 F.C.C.R. at 5520. *MobileComm* involved 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 FCC’s opinion noted that these notification provisions constituted an attempt to regulate interference and were, therefore, “null and void.” *Id.*

³⁹ The County fails to contest the applicability of the FCC decisions. See Petition at 9.

C. The Commission’s Exclusive Jurisdiction Over RFI Does Not Violate the Tenth Amendment

The County claims that the preemption of the Ordinance violates the Tenth Amendment.⁴⁰ This very claim was rejected in *Johnson County*:

The [county] argues that preemption of the [ordinance] violates the Tenth Amendment and federalism principles because zoning and public safety are traditional powers reserved to the states. Although the [county] relies on *Hillsborough County v. Automated Med. Lab., Inc.*, 471 U.S. 707 . . . (1985) the case does not support their argument. The Supreme Court in *Hillsborough* upheld a county ordinance regulating health – an area of traditional state power – despite federal regulation in the area. However, the Court found no implied preemption because the federal agency explicitly stated its intention not to preempt state and local regulations. *See id.* at 714, 716. Thus, *Hillsborough* is inapplicable here because the FCC has explicitly stated its intention to preempt local regulations on RFI, *see In re Mobilecomm*, 2 FCC Rcd. 5519; *In re 960 Radio*, FCC 85-578, 1985 WL 193883, and the statutes and legislative history support Congress’s intent to occupy the field of RFI issues.

“[H]istoric police powers of the States” are not to be preempted by federal law “unless that was the clear and manifest purpose of Congress.” *Mortier*, 501 U.S. at 605 (quoting *Rice*, 331 U.S. 218 at 230). However, as the Supreme Court has noted, preemption principles apply even to a “matter of special concern to the States: ‘The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.’” *Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153 . . . (1982) (evaluating preemption of state real property law) (quoting *Free v. Bland*, 369 U.S. 663, 666 . . . (1962)). Although the [county] characterizes the issue as local police power, RFI regulation is not a traditional local interest but a national interest preempted by federal legislation. Congress can regulate communications pursuant to the Commerce Clause. *See FCC v. League of Women Voters*, 468 U.S. 364, 375 . . . (1984). Indeed, as the [county] concedes, the local police and fire departments obtain their communication licenses from the FCC. A patchwork of varied local regulations across the country would prevent a functional national telecommunications network. *Thus, federal*

⁴⁰ Petition at 5-7.

*preemption of RFI regulation does not violate the Tenth Amendment.*⁴¹

The County has added, however, a unique twist to this argument. Although unclear, the County appears to claim that if it is precluded from protecting humans from radio frequency (“RF”) *emissions*, the Commission effectively would be “commandeering” state and local resources in violation of the Tenth Amendment.⁴² Despite the County’s classification, the instant case does not turn on *emission* regulation. The subject case deals with RFI regulation which is necessary for communications over federally licensed spectrum.

Ironically, if emission issues were involved, Section 332(c)(7)(B)(iv) states:

No state or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission’s regulations concerning such emissions.⁴³

⁴¹ *Johnson County*, 199 F.3d at 1193-94 (emphasis added). The County places great emphasis on *Hillsborough* but fails to mention that *Johnson County* found this case inapplicable in the context of RFI and specifically rejected the Tenth Amendment argument that the County is now raising before the Commission.

⁴² Petition at 5-7 (citing *New York v. United States*, 505 U.S. 144, 175 (1992) (stating that a federal requirement that states accept radioactive waste or related liabilities “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.”)).

⁴³ 47 U.S.C. § 332(c)(7)(B)(iv); see *Order* at nn. 90, 98. Moreover, to the extent the County argues that federal regulation of RF emissions violates the Tenth Amendment, the United States Court of Appeals for the Second Circuit has already rejected this claim. See *Cellular Phone Taskforce*, 205 F.3d 82, 96 (2d Cir. 2000); accord *USCOC of Virginia RSA#3, Inc. v. Montgomery County Bd. Of Supervisors*, 245 F.Supp.2d 817, 833 (W.D. Va 2003). Although the County references *Cellular Phone Taskforce*, it fails to mention that the court specifically considered and rejected a Tenth Amendment challenge to the statute. See Petition at 6. Moreover, the court also rejected the claim that federal regulation of RF emissions was barred by *New York v. United States*, 505 U.S. 144 (1992).

Unfortunately for the County, this case involves RFI – technical *interference* – rather than the health effects of *emissions*, and therefore Sections 301 and 302 govern.⁴⁴

D. Section 332(c)(7)(B)(v) is Inapplicable

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 within 30 days of the effective date of the Ordinance or after adverse action is taken by the County against Cingular.⁴⁵ This theory is meritless. No court deadline has been missed because Section 332(c)(7)(B)(v) is inapplicable.⁴⁶

As demonstrated in Cingular’s Opposition to the County’s Motion to Dismiss the Petition for Declaratory Ruling:

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.⁴⁷

⁴⁴ Accordingly, the County’s reliance on *New York SMSA Ltd. Pshp. v. Clarkstown*, 99 F.Supp.2d 381, 392 (S.D.N.Y. 2000) to support its proposition that zoning decisions can consider the effects of RF emissions is misplaced. Moreover, given the clear directive of Section 332(c)(7)(B)(iv), the district court was incorrect.

⁴⁵ Petition at 16; *see also* County Comments at 4.

⁴⁶ *See Order* at ¶21; *Cf. Port of Boston Marine Terminal Ass’n et al. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 69 (1970) (holding that agency preemption decisions are binding on district courts unless overturned by courts of appeals).

⁴⁷ *See Cingular’s Opposition to Motion to Dismiss*, at 6 (received June 3, 2002).

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.⁴⁸ The County concedes that there has been no carrier-specific action under the Ordinance.⁴⁹ Thus, Section 332(c)(7)(B)(v) is inapplicable.

Section 332(c)(7) of the Act does not undermine the Commission's exclusive jurisdiction over RFI. Rather, this section merely preserves local authority over *traditional zoning functions*, such as the placement, construction, and modification of facilities.⁵⁰ In fact, Section 332(c)(7)(B) actually *limits* the use of local zoning authority in the telecommunications area by:

- (1) prohibiting unreasonable discrimination by local authorities among providers;
- (2) prohibiting the use of zoning authority to preclude the provision of personal wireless services;
- (3) requiring local zoning authorities to act on zoning requests within a reasonable period of time; and
- (4) requiring that all denials of permits to construct CMRS facilities be in writing and supported by substantial evidence.⁵¹

⁴⁸ 286 F.3d 687, 695 (3d Cir. 2002).

⁴⁹ Petition at 13- 16; County Comments at 9, 10.

⁵⁰ 47 U.S.C. § 332(c)(7); *see also Freeman*, 204 F.3d at 323 (concluding that Congress, in enacting Section 332(c)(7), "did not intend . . .to repeal the FCC's exclusive jurisdiction over RF interference complaints," and that Section 152 expressly prohibits the use of Section 332(c)(7) to impliedly repeal the FCC's exclusive authority to regulate RF interference).

⁵¹ 47 U.S.C. § 332(c)(7)(B)(i)-(iv).

As the legislative history makes clear, Section 332(c)(7) only “relates[s] to local land use regulations and [is] not intended to limit or affect the Commission’s general authority over radio telecommunications.”⁵²

II. THERE ARE AMPLE MECHANISMS AT THE COMMISSION’S DISPOSAL TO REMEDY RFI DISPUTES

The County claims that the FCC has “no effective remedy” for the RFI experienced by the County.⁵³ This assertion is baseless. What the County is really arguing is that preemption does not apply when a county disagrees with FCC dispute resolution. The Act establishes a system for resolving interference disputes whereby a party – including a local authority which holds a license – may file a complaint with the FCC.⁵⁴ As discussed above, the County originally sought relief pursuant to the complaint process but abandoned its efforts when the Commission indicated that the County was likely at fault for most of the interference.⁵⁵

Moreover, as the County acknowledges,⁵⁶ the court in *Johnson County* previously rejected identical claims. There, the county had argued that preemption would leave it “without

⁵² H.R. Conf. Rep. No. 104-458, at 209 (1996), *reprinted in* U.S.C.C.A.N. 124, at 223.

⁵³ Petition at 3.

⁵⁴ *See* 47 U.S.C. § 208. The Commission’s rules provide specific guidance regarding resolution of interference complaints, when licensees may make technical modifications to their systems, and what approvals and filings are required. *See, e.g.*, 47 C.F.R. §§ 1.929, 1.947, 22.352, and 22.353. In this regard, Cingular notes that the FCC has significant resources available to resolve interference complaints, including FCC field offices that may provide on-site support and a 24-hour emergency contact. Of course, any complaint filing would have to allege a specific violation of the FCC’s operating and/or interference rules.

⁵⁵ *See* County Comments at 7; Petition at 9. Ironically, the County now threatens litigation pursuant to Section 333 of the Act. Petition at 7-8. If the County had pursued its prior complaint to completion, there would have been no need for the subject *Order* or further litigation pursuant to Section 333.

⁵⁶ Petition at 9, n.17.

a remedy because the FCC allegedly cannot adequately address its RFI concerns.”⁵⁷ The Court determined, however, that there were an abundance of administrative remedies available:

The [county] can petition the FCC to resolve interference problems. *See, e.g.*, 47 C.F.R. §§ 0.471, 0.473. The FCC can hold proceedings for investigation, *see* 47 C.F.R. § 1.1, *issue declaratory rulings*, *see* 47 C.F.R. §1.2, and consider informal written complaints, *see* 47 C.F.R. §1.41. The [county] may also file petitions to deny [the alleged offender’s] license or renewal applications filed with the FCC. *See* 47 U.S.C. § 309(d). After taking such action, aggrieved parties may seek review of FCC decisions and orders in the United States Court of Appeals for the District of Columbia Circuit. *See* 47 U.S.C. § 402(b)(6). In addition, the FCC recently announced a Memoranda of Understanding between the FCC Compliance and Information Bureau, the FCC Wireless Telecommunications Bureau, the Industrial Telecommunications Association, and the Association of Public Safety Communications Officials “to dramatically streamline the Commission’s compliance and enforcement process in the resolution of interference complaints.” FCC Compliance and Information Action, Rept. No. CI 98-7, 1998 WL 207911 (Apr. 29, 1998); Rept. No. CI 98-12, 1998 WL 396675 (July 17, 1998).⁵⁸

The County claims that these remedies are not effective because it “complained fruitlessly since 1998.”⁵⁹ This is not true. The County was told by the FCC that most of the interference issues were caused by the County’s radios.⁶⁰ The County ignored this advice for years until, just recently, it began deploying new radios. This deployment confirmed the FCC’s prior conclusion: prior to deploying the new radios, the County claimed that it was experiencing interference from 61 sites; after deployment the number of allegedly interfering sites will be

⁵⁷ *Johnson County*, 199 F.3d at 1193, n.4.

⁵⁸ *Id.* (emphasis added).

⁵⁹ Petition at 9, n.17.

⁶⁰ County Comments at 7.

further reduced to 8.⁶¹ Thus, if the County had not walked away from the complaint process and had heeded the Commission's advice, the interference problem would have been substantially resolved years ago.

Moreover, since the original design and deployment of the County's system, the population within the County has increased and new neighborhoods have been built in previously-undeveloped areas. The inability of the County's system to serve these areas thus could be due to a number of factors: no coverage; blocking due to "new" construction; CMRS signal strength that drowns out the marginal signal; or other factors. The number of remaining interference sites after additional County tower sites are deployed will be reduced to 4. Cingular remains optimistic that, with the full cooperation of the parties, the interference problems associated with the remaining sites will be successfully mitigated and that there will be no intractable sites. Although Cingular may not agree that the County has reached the proper interference conclusion, it remains committed to working with the County to mitigate interference in these areas. Nevertheless, these issues do not form a legal basis for the County's regulation of RFI. Accordingly, the *Order* properly preempted the County's attempts to so regulate.

III. THE BUREAU HAD JURISDICTION TO ISSUE THE DECLARATORY RULING

The County further contends that the Commission lacks jurisdiction to consider Cingular's Petition and issue a declaratory ruling.⁶² The County's argument chiefly rests on a single premise – that Cingular's Petition falls within the purview of Section 332(c)(7)(B)(v) of the Communications Act, thus divesting the Commission of its jurisdiction to issue a declaratory

⁶¹ 30-day Status Report, WT Docket 02-100, at 1 (filed Aug. 6, 2003); Petition, Exhibit A.

⁶² See Petition at 13.

ruling. As discussed above, Section 332(c)(7)(B)(v) only reserves to the courts exclusive jurisdiction over final zoning actions of local governments concerning “*placement, construction and modification of personal wireless facilities.*”⁶³ Once again, the County entirely disregards the basis upon which Cingular filed its Petition. Cingular is not challenging the County’s regulations concerning *where or how* it constructs its physical facilities. It instead seeks preemption of a local ordinance that unlawfully attempts to regulate radio frequency.

In this regard, the Commission has broad authority to issue declaratory rulings under the Administrative Procedures Act (APA) and Section 1.2 of its Rules.⁶⁴ Section 5(e) of the APA provides that a federal administrative agency, such as the Commission, “may issue a declaratory order to terminate a controversy or remove uncertainty.”⁶⁵ Moreover, Section 1.2 of the Rules provides that the Commission on motion or on its own motion may issue a declaratory ruling.⁶⁶

Despite this broad authority, the County argues that the Commission lacks jurisdiction to issue a declaratory ruling because Cingular has supposedly failed to show that the Ordinance has caused it some requisite harm or injury.⁶⁷ In the County’s words, “The Order finds that the County impeded CMRS service. But the evidence for this is insubstantial or sketchy.”⁶⁸ And

⁶³ See 47 U.S.C. §§ 332(c)(7)(B)(i)&(v) (emphasis added).

⁶⁴ See *e.g.*, *Johnson County*, 199 F.3d at 1193.

⁶⁵ Section 554(e) provides: “The agency . . . in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.” 5 U.S.C. §554(e).

⁶⁶ 47 C.F.R. §1.2.

⁶⁷ Petition at 13.

⁶⁸ *Id.*

while acknowledging that Cingular may be unable to modify certain cell sites as a direct result of the Ordinance, in the County's view, this *type* of injury is insufficient to confer standing.⁶⁹

Cingular has unequivocally shown that it has suffered, and will continue to suffer harm as long as the County's Ordinance remains in effect. In providing wireless service throughout the County, Cingular has expended substantial effort and resources to provide high-quality coverage to the region. In this vein, Cingular also has made substantial progress towards providing E-911 service to the County. The Ordinance only serves as a barrier to providing quality service in the region. Since its enactment, Cingular and other carriers have been threatened with enforcement action for their refusal to file with the County certification letters as required by the Ordinance.⁷⁰ Because the Ordinance empowers the County to unilaterally order the CMRS licensee to eliminate the interference or shut down the facilities the County feels are causing interference, Cingular will undoubtedly suffer significant hardship if it does not comply with its provisions.

In any event, it is well established that the principles of standing and ripeness developed by federal courts do not apply to adjudications by federal administrative agencies such as the Commission.⁷¹ “[S]ections 4(i), 4(j), and 403 of the Communications Act confer upon the Commission broad power to issue orders appropriate for implementing and enforcing the

⁶⁹ *Id.* at 14-15.

⁷⁰ For example, on January 24, 2003, Cingular received a notice dated January 16, 2003 from Nicole E. Dozier, Zoning Enforcement Supervisor regarding an existing commercial telecommunication facility (designated as the “Pumphrey Site”) at 832 Oregon Avenue, Linthicum, Anne Arundel County, Maryland. This notice demanded that Cingular provide, among other things, a “[c]ertification that the facility or use of the facility will not degrade or interfere with the county's public safety communications system.” As a result, Cingular is threatened with a revocation of the certificate of use for the Pumphrey site. *See* Article 28, § 10-125(K)(1). Absent this certificate, Cingular would be prohibited from operating the Pumphrey site. Article 28, 1-128(a).

⁷¹ *American Communications Services Inc.*, CC Docket No. 97-100, *Memorandum Opinion and Order*, 14 F.C.C.R. 21579, 21589 (1999).

Communications Act.”⁷² As discussed above, the APA and Section 1.2 of the rules provide that federal agencies, including the Commission, can adjudicate petitions for declaratory rulings.⁷³ This includes “petitions for declaratory rulings regarding preemption -- when the requirements of the standing and ripeness doctrines are not strictly met.”⁷⁴ Section 1.2 of the Rules further states that the Commission has authority to preempt upon its own motion.⁷⁵ As such, Cingular is not required to make a showing of actual harm or injury for the Commission to consider its Petition and preempt the County’s Ordinance.

IV. CLARIFICATION IS NOT WARRANTED

In yet another effort to undermine the *Order*, the County seeks “clarification” of certain aspects of the *Order*. Clarification is not necessary. Cingular sought preemption of zoning amendments that, based on the face of the ordinance, were adopted as part of a comprehensive scheme created by the County to regulate RFI.⁷⁶ The *Order* preempts those amendments. The basis for preempting each of the provisions identified in the County’s Application for Review was supplied in Cingular’s Petition for Declaratory Ruling, which was granted by the Bureau, and subsequent filings.⁷⁷

⁷² *Id.*

⁷³ *See* 5 U.S.C. §554(e).

⁷⁴ *See American Communications Services Inc.*, 14 F.C.C.R. at 21589.

⁷⁵ 47 C.F.R. §1.2 (“The Commission may . . . on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.”).

⁷⁶ The preamble to the amendments clearly states that they were designed to “require[e] applicants for certificates of use for commercial telecommunication facilities to provide certification that their use will not degrade or interfere with the County’s public safety radio systems” and to “post security for the removal of the facilities” if they interfere with the County’s system. *See* Article 28, Preamble; *see also* County Comments at 5.

⁷⁷ *See e.g.*, Cingular Wireless LLC’s Petition for Declaratory Ruling (received Apr. 23, 2002) (challenging Section 101(14B) of the Ordinance defining “telecommunications facilities”)
(continued on next page)

CONCLUSION

For the foregoing reasons, the Commission should deny the Petition. The FCC has exclusive jurisdiction over RFI under Section 301 *et seq.* of the Communications Act and has the ability to address and remedy RFI. Moreover, 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. Finally, clarification is not warranted. The problems with each of the provisions referenced in the Petition were thoroughly identified in the record.

Respectfully submitted,

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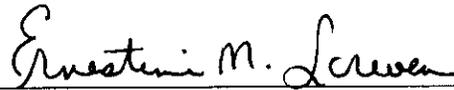
August 21, 2003

at 2; (opposing Section 10-125(j)(2) and (k)(1)-(2)) at 1-3; (seeking preemption of Sections 1-128(a), (c)) at 1-3.

CERTIFICATE OF SERVICE

I, Ernestine M. Screven, do hereby certify that on this 21st day of August, 2003, a copy of the foregoing **Opposition To Application For Review** was served by hand delivery to the following:

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