

**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.)	

**REPLY OF ANNE ARUNDEL COUNTY
TO CINGULAR WIRELESS OPPOSITION**

Anne Arundel County, Maryland (“County”) hereby replies to the Opposition of Cingular Wireless, filed August 21, 2003, to the County’s Application for Review dated August 6, 2003.¹ The Application sought review by the full Commission of the Order of the Wireless Telecommunications Bureau Chief, DA 03-2196, released July 7, 2003.

In its Application (at 1), the County asked first and foremost for a new consideration of the law as applied to the special facts and aggravated circumstances amply demonstrated by the record in this case. Cingular contributed significantly to the aggravation by, alone among the six wireless carriers operating in the County, refusing initially to cooperate with the County’s efforts to mitigate massive interference to its public safety radio system at 800 MHz. (Order, ¶¶5, 26)

Cingular now adds insult to that injury by asserting variously that the County “walked away” (Opposition, 2, 9) or “ignored” (16) or failed to pursue to completion (8, 15, n.55) FCC suggestions or channels of complaint. In fact, the suggestions were useless and the channels were dead-ends of silence. The first serious and systematic attention to commercial interference

¹ An FCC Public Notice of August 26, 2003 called for comments 9/26/03, replies 10/14/03. The County’s Reply will serve as its Comment in response to the Public Notice.

to public safety radio systems represented by the current rulemaking in WT Docket 02-55² came nearly four years after the County first asked the FCC for help. The rulemaking will not be resolved for several months and is of little present assistance to the County.

The question posed by the County's Application (Summary, ii) is whether it was legally defensible for the Order "to take away the County's remedies without supplying a remedial mandate of its own." For the reasons discussed further below, we believe the answer is no.

We repeat our appreciation for the Order's encouragement of wireless carrier cooperation and its requirement of periodic reporting on the subject of interference mitigation. But the initial reports merely confirm the obvious: the encouragement and the reporting are not solutions. In fact, Nextel is markedly pessimistic about the prospects for continued mitigation,³ while Cingular over-optimistically imagines that dealing with the worst interference sites can await a County system upgrade which is years away and highly contingent.⁴

I. Exclusive authority without a remedy is no help to the County.

Cingular's Opposition (15) headlines "ample mechanisms at the Commission's disposal to remedy RFI disputes." The mechanisms may exist on paper but not in the real world. The controversial record in the 800 MHz Rulemaking proves this. Cingular itself acknowledges the impotence of the FCC's complaint process to deal with the peculiar circumstance of commercial licensees that violate no regulation or condition of license and still create dangerous "dead spots"

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 Letter of James B. Goldstein to Gary Oshinsky of the FCC, August 6, 2003.

⁴ Letter of Robert G. Kirk to Gary Oshinsky, August 6, 2003, at 1, attaching letter of August 5th from Karl Nelson to Linda Schuett.

in public safety radio systems: “Of course, any complaint filing would have to allege a specific violation of the FCC’s operating and/or interference rules.” (Opposition, 15, n.54).

A principal objective of the 800 MHz Rulemaking is to fill the present gap in enforceable remedies for commercial interference to public safety radio. However, by issuing its Order well in advance of the rulemaking decision, the FCC left the gap in place without a bridge.

This is legally unacceptable. If the Commission’s authority in radio frequency interference (“RFI”) matters is “exclusive” and “absolute,” as the Order and Cingular both claim, that power must be exercised to achieve the required result -- an end to commercial interference with the radio systems of the County and other afflicted public safety agencies.

The voluntary Best Practices Guide⁵ was put forward as a solution to the legal impasse. The County took the Guide’s advice to heart and did more than reasonably could have been expected to mitigate a deadly threat. The County hired an independent consultant and painstakingly drove the entire 416-square mile jurisdiction to measure commercial interference to the public safety radio system. It discovered a worse situation than it had imagined when the wireless zoning ordinance was first contemplated. The number of “dead spots” in the system, 61, nearly tripled the previously identified number of blacked-out areas.

On the basis of the record in this case, no fair-minded observer could accuse the County of abandoning or failing to stay the mitigation course. The County did not abandon the FCC’s complaint process. Rather, the process abandoned the County. In its place, the County has pursued to the fullest the recommended voluntary course of mitigation.

Even so, 20 dead spots remain, 12 of them involving Cingular. (Application, Exhibit A) It is misleading of Cingular to tie the ultimate resolution of the most difficult interference sites to

⁵ The Guide (Order, note 4) may be found at http://apco911.org/frequency/project_39/

the completion, several years hence, of the County's anticipated system upgrade.⁶ The upgrade is primarily intended to improve the radio signal levels of the County's system and not to remedy interference. Naturally, the County hopes and expects that interference mitigation will be a secondary benefit of the upgrade.⁷

For these reasons, the County explicitly rejected (Application, 9-10) Cingular's likening of its case to that described by a 10th Circuit panel in *Johnson County*.⁸ (Opposition, 15) From the Court's description of the case, Johnson County had tried none of the remedies said to be available to it. And the level of understanding of the interference problem was surely no better than that illustrated by the FCC in 1999 when it recommended that the County purchase radio receivers not commercially available or practicable. (County Comments on Cingular Petition, June 10, 2002, Exhibits A and F)

Cingular's rendition (Opposition, 16-17) of the County's deployment of radio receivers leaves the false impression that we ignored good advice for years, failed to keep up with technology, and only recently purchased the correct equipment. Cingular's engineers who have been working with County technicians would not have made so disingenuous a statement. In fact, the County has been conscientious in following the state of the art in public safety

⁶ Letter of August 6, 2003, note 3, *supra*.

⁷ Letter to FCC Secretary of James R. Hobson, August 6, 2003, 2. The letter refers to the County's 7/17/03 ex parte communication identifying four sites not expected to be resolved by new receivers or system upgrade. Those sites are # 7, City Dock/Academy; # 61, Mt. Carmel/Lake Shore; # 87, Ferndale; and # 127, Speedway/Conaways. All but #87 exhibit some interference contribution from Cingular.

⁸ *Southwestern Bell Wireless v. Johnson County Board of County Commissioners*, 199 F.3d 1185 (10th Cir. 1999).

transceivers, and has purchased innovative equipment as it became available.⁹ The discussion in the first full paragraph of the Cingular Opposition at 17 reads like the carrier's continuing refusal to acknowledge its contribution to the interference problem.

Cingular, then, is not a good witness for the assertion (Opposition, 17) that "these issues do not form a legal basis for the County's regulation of RFI." Given the persistence of a potentially deadly interference problem and the absence of help from the FCC as the designated remedial authority, we believe our actions were reasonable and tailored to the situation at hand. The County certainly should not be judged by administrative decisions dating from a time of two cellular carriers to a market -- if service existed at all -- when Nextel's predecessor was still a provider of strictly private communications.

II. The law is flexible enough to allow its creative application to changed circumstances.

Cingular mistakenly asserts (Opposition, 10) that the County has not challenged the FCC's *960 Radio* and *MobileComm* decisions of 1985 and 1987, relied upon both by the Order (¶¶13-14) and *Johnson County and Burlington Broadcasters*.¹⁰ The County explained early its reasons for discounting those decisions (Motion to Dismiss, May 24, 2002, 4) and repeated (Application, Summary, ii) the view that the rulings were too old and too broadcast-oriented to speak to the radically different commercial wireless environment of 2003. The County cannot accept equating the threat of interference to public safety radio with the issue of FM radio

⁹ Comments of June 10, 2002, Exhibit F; Letter of County Attorney to FCC Secretary, July 30, 2003. Over the past two years, testing for interference has used state-of-the-art equipment. When commercial carrier sites are silenced, even the older receivers perform quite well. When these sites are on the air, use of the most modern equipment does not remove all interference.

¹⁰ *Freeman v. Burlington Broadcasters*, 204 F.3d 311 (2d Cir. 2000).

interference to TV translators (*960 Radio*) or of radio paging carrier interference to local radio and TV (*MobileComm*).¹¹

The administrative decisions, however, share one feature of critical importance that is lacking here: the promise of remedy. It was important to the Commission that 960 Radio had promised to eliminate “interference to preexisting facilities” and that MobileComm used both filtering techniques and alternative delivery by cable TV to eliminate interference to local broadcast television.¹² As indicated in our Application (Exhibit A) and discussed above, continued cooperative mitigation and status reports on that effort are unable to resolve the County’s most intractable sites.

Cingular responds to the Tenth Amendment arguments in the County’s Application in a fashion that is alternately obtuse and obfuscating. (Opposition, 11-13) The Opposition is obtuse because it focuses on the *Johnson County* court’s treatment of a different Supreme Court case than the two the County relies upon. There is simply no discussion of the County’s entrapment in an ineffective FCC program of voluntary mitigation, with its own resources “commandeered” to that purpose and its radio engineers effectively drafted into tasks the Commission is failing to perform. (Application, 5-7)

The Opposition is obfuscating (12, n.43) because it blatantly misrepresents our use of the *Cellular Phone Taskforce* case. The County quoted from that federal appellate decision (Application, 6) to show that when given an effective choice of federal standards, localities cannot complain of abridgment of Tenth Amendment rights. We then stated:

¹¹ Similarly, we do not read the 1982 legislative history of amendments to Section 302 of the Act as reaching beyond the subject at hand there -- interference to RFI-susceptible equipment. (County Reply Comments, June 25, 2002, 14-15)

¹² *MobileComm of New York*, 2 FCC Rcd 5519, 5521, notes 9 and 7, respectively.

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. *Id.* (emphasis added)

Cingular continues to confuse radio frequency radiation (“RFR”) -- which it calls “emissions” -- with RFI, as it did in its initial Petition. (County Comments of June 10, 2002, 12-13) The County is not confused. We understand that preemptive federal standards apply to RFR, subject to local checks on carrier compliance with those standards. (Application, 18, n.31) We maintain that Section 10.125(k)(1) of the County Code was a permissible local check on compliance. Our complaint is with the absence of federal standards sufficient to prevent commercial RFI from wreaking havoc on our public safety radio system.

There are several graceful exits from the dilemma created by a premature Order that has left a gap in FCC remedial authority without a bridge. As discussed below, the Commission legitimately can find that Cingular is claiming prohibition of service governed by Section 332(c)(7)(B)(i), and its redress must be in a court under (B)(v). The Commission legitimately can find (Application, 10-11) that Congress has not expressly precluded local zoning decisions involving choices of placement, construction or modification based on RFI concerns -- so long as the result of those choices is not prohibition of commercial wireless service.

If a textual reading of Section 332(7)(A) is too much for the Commission -- fearing (Order, ¶24) that a flood of local ordinances would “retard the spread of wireless systems”¹³ -- it may, upon review, uphold its asserted exclusive authority but find a way to delegate some of that authority or exercise the responsibility differently. For that matter, the full Commission could

¹³ There is no independent documentation of this fear, only a citation to the comments of two wireless carriers. (Order, n.113)

suspend the effectiveness of the Order pending, for example, a decision in the 800 MHz Rulemaking, followed by instructions to the County and its carriers consistent with that decision.

Surely the effective operation of public safety radio systems is a higher priority than the commercial “spread of wireless systems.” It is the uncontrolled spread of commercial RFI that has produced this unacceptable danger in the first place.

III. Cingular’s claim of service prohibition belongs in court.

Cingular cannot have it both ways: Either the carrier is asserting disruption of its wireless service or not. Despite the contradictions in the original petition and later pleadings (Application, 15), the facts strongly suggest a claim of prohibition of service under Section 332(c)(7)(B)(i), for which the remedy lies in court under subparagraph B(v). The Opposition (at 19) removes any doubt:

Cingular has unequivocally shown that it has suffered, and will continue to suffer harm as long as the County’s Ordinance remains in effect.

Peculiarly, the Opposition (19-20) raises the straw man of a standing argument that the County has never mentioned. We do not quarrel with the substance of the Commission’s general authority to issue declaratory rulings. Our opposition has remained procedural. A declaratory ruling here is for a court to issue. Even if the Commission chooses to rule, it should not do so prematurely. (County Comments of June 10, 2002, 9-11)

By remanding petitioners such as Cingular to their appropriate statutory relief in court, the FCC loses nothing in the way of fair and prompt decision-making. If the Commission is correct in its reliance on *Johnson County* and *Burlington Broadcasters* it has nothing to fear from judicial disposition of wireless zoning disputes. Instead, the agency stands to gain relief from the tedious business of trying to sort out whether a zoning ordinance is motivated by improper local

concerns over RFI. (Application, 16-17) The courts are well equipped to handle all the questions arising from a challenged ordinance -- the “traditional” and the FCC exclusives.

IV. Cingular’s own confusion prompts the need for clarification.

Without analysis, the Order adopts Cingular’s proffered menu of preemption, even though it includes seemingly harmless definitions and other portions of the County ordinance having nothing to do with RFI. (Application, 17-18) The chief confusion originated with the Cingular petition, which challenges an RFR compliance provision at Section 10.125(k)(1) of the County Code as if it were RFI regulation. The Cingular Opposition (at 20) is merely conclusory and offers no reason for the Commission to withhold our requested clarifications.

V. Conclusion

For the reasons discussed above, the Order should be reversed or revised. Even if not changed in substance, it should be clarified as requested.

Respectfully submitted,

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By _____

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