

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

In the Matter of	)	
	)	
Petition of Cingular Wireless L.L.C. for a	)	WT Docket No. 02-100
Declaratory Ruling That Provisions of the Anne	)	
Arundel County Zoning Ordinance are Preempted	)	
as Impermissible Regulation of Radio Frequency	)	
Interference Reserved Exclusively to the Federal	)	
Communications Commission	)	
_____	)	

**SPRINT OPPOSITION TO APPLICATION FOR REVIEW**

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September 26, 2003

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### Summary

Sprint opposes the Application for Review of Anne Arundel County, Maryland, for the following reasons:

- **The preempted ordinance impeded service to the public.** Contrary to the assertions of Anne Arundel County, the preempted ordinance did impede service to the public. Sprint identified specific sites that were delayed for close to one year based on the ordinance's certification requirement. The County's refusal to approve these sites led to significant delay in the deployment of Sprint's wireless facilities and prevented the Company from offering more ubiquitous and reliable coverage to the County.
- **The Bureau's Order is amply supported by precedent.** The Wireless Bureau properly referenced federal appellate court decisions addressing the scope of the Commission's regulatory authority over radio frequency interference ("RFI"). These appellate decisions confirm that the Commission's jurisdiction over RFI is exclusive. There is no basis for the County's assertion that the Bureau's order is "wrong as a matter of law" and that the judicial precedents the Bureau cites do "not support exclusive FCC jurisdiction over RFI."
- **The Bureau possessed the authority to issue the declaratory ruling.** The Administrative Procedures Act expressly authorizes agencies like the FCC to "issue a declaratory order to terminate a controversy or remove uncertainty." Moreover, Congress has specified that declaratory orders have "like effect as in the case of other orders." Federal courts have repeatedly held that use of the declaratory ruling procedure is proper in rendering preemption decisions over state or local governments. And, it was Cingular's prerogative to submit its preemption claim with the Commission rather than a federal district court.
- **There is no basis to the County's requested clarification.** The Order requires no clarification because the Bureau explained fully the fault with Section 10-125(k)(1) of the ordinance -- the annual certification provision. Section 10-125(k) conflicts with Commission RF emissions requirements. Since the ordinance was preempted under the field preemption doctrine, there is no room for local regulation such as that put forth by the County. Moreover, local regulation of the sort evidenced by the County ordinance is unnecessary and undermines the very objectives that the Commission has sought to achieve with its RF rules.

For the foregoing reasons, Sprint requests that the Commission deny in its entirety the Application for Review.

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**SPRINT OPPOSITION TO APPLICATION FOR REVIEW**

Sprint Corporation, on behalf of its Wireless Division, (“Sprint”), hereby opposes the application for review submitted by Anne Arundel County, Maryland (“County”) on August 6, 2003.<sup>1</sup>

**I. THE PREEMPTED ORDINANCE IMPEDED SERVICE TO THE PUBLIC**

The Wireless Bureau determined that “the record includes ample evidence that the [challenged] Ordinance provisions are in fact impeding service in the County, contrary to Commission policy.”<sup>2</sup> The County now asserts in its application for review that its ordi-

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<sup>1</sup> See Application for Review of Anne Arundel County, Maryland, WT Docket 02-100 (Aug. 6, 2003)(“County Petition”). See also *Public Notice*, Wireless Telecommunications Bureau Seeks Comment on Application for Review of the Wireless Telecommunications Bureau’s Order Granting a Petition for Declaratory Ruling That Provisions of the Anne Arundel County, Maryland Zoning Ordinance Are Preempted as Impermissible Regulation of Radio Frequency Interference, WT Docket No. 02-100, DA 03-2734 (Aug. 26 2003).

<sup>2</sup> *Petition of Cingular Wireless L.L.C. for a Declaratory Ruling that Provisions of the Anne Arundel County Zoning Ordinance are Preempt as Impermissible Regulations of Radio Frequency Interference Reserved Exclusively to the Federal Communications Commission*, WT Docket No. 02-100, *Memorandum Opinion and Order*, DA 03-2196, at ¶ 24 (July 7, 2003)(“County Preemption Order”).

nance “did not ... impede service” and that the evidence the Bureau relied upon supposedly was “flimsy,” “sketchy and insubstantial.”<sup>3</sup>

In fact, the evidence the Bureau relied upon was not “insubstantial,” sketchy” or “flimsy.” Sprint alone identified in the record three sites that the County refused to process and approve solely because of the requirements of the radio frequency interference ordinance.<sup>4</sup>

<u>Proposed Sprint Site</u>	<u>Date Sprint Submitted Application</u>	<u>Date of County Approval</u>	<u>Extent of Delay</u>
WA54XC677	August 2002	July 2003	11 months
WA54XC623	September 2002	July 2003	10 months
WA54XC724	November 2002	July 2003	9 months <sup>5</sup>

There is, accordingly, no merit to the County’s assertion that it is “not seeking to control carriers’ operations.”<sup>6</sup>

The County’s refusal to approve these sites led to significant delay in the deployment of Sprint’s wireless facilities and prevented the Company from offering more ubiquitous and reliable coverage to the County. In fact, the County’s enforcement of its ordinance blocked Sprint from providing enhanced coverage – to the detriment of Sprint subscribers living and working in Anne Arundel County

The County asserts that any harm is of a carrier’s own doing because a carrier could have complied with the unlawful ordinance by filing “the required non-interference

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<sup>3</sup> See County Petition at 13, 15 and 16.

<sup>4</sup> See Sprint Ex Parte Letter, WT Docket No. 02-100 (April 4, 2003); Sprint Ex Parte Letter, WT Docket No. 02-100 (Jan. 8, 2003).

<sup>5</sup> Sprint notes that it was only when the Company provided the required certification under protest that the County acted on these applications.

<sup>6</sup> County Petition at 11 n.19.

certifications, either unreservedly or ‘under protest.’”<sup>7</sup> Carriers, however, are not required to “live with” ordinances that are unlawful on their face. Nor is the County’s proposal reasonably characterized as a “pragmatic accommodation.”<sup>8</sup>

Preparing “non-interference certifications” of the sort the County has demanded are costly, especially when local governments require the use of third-party engineers.<sup>9</sup> Such requirements also delay the provision of services. Moreover, as Sprint noted in its comments, this problem is not limited to Anne Arundel County but is one that carriers increasingly face throughout the country.<sup>10</sup> As a practical matter, a carrier cannot “accommodate” one local government without accommodating similarly situated local governments. And the costs and delays associated with such “accommodations” ultimately hurt wireless customers.

## **II. THE BUREAU’S ORDER IS AMPLY SUPPORTED BY PRECEDENT**

Two federal appellate courts have addressed the scope of the Commission’s regulatory authority over radio frequency interference, and each court has confirmed that the Commission’s jurisdiction is exclusive.<sup>11</sup> The Wireless Bureau properly referenced these decisions in its order, noting they “clearly establish that the Commission has sole juris-

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<sup>7</sup> *Id.* at 13.

<sup>8</sup> *Id.* at 15.

<sup>9</sup> Pinnacle Tower Comments, WT Docket No. 02-100, at 3 (June 7, 2002), and attached Declaration of Michael P. Millard at ¶ 3 (“A consultant would charge between \$5000 - \$10,000 for each RFI [radio frequency interference] study and another \$5,000 for each RFR [radio frequency radiation] study.”)

<sup>10</sup> *See* Sprint Comments, WT Docket No. 02-100, at 4-9 (June 10, 2002).

<sup>11</sup> *See Freeman v. Burlington Broadcasters*, 204 F.3d 311 (2d Cir. 2000); *Southwestern Bell Wireless v. Johnson County*, 199 F.3d 1185 (10<sup>th</sup> Cir. 1999), *cert. denied*, 530 U.S. 1204 (2000).

diction to regulate RFI, to the exclusion of provisions in local zoning or other regulations.”<sup>12</sup>

The County now asserts that these judicial precedents do “not support exclusive FCC jurisdiction over RFI” and that, as a result, the Bureau’s order is “wrong as a matter of law.”<sup>13</sup> In support, the County argues that the facts in these two court decisions “differed markedly from those in Anne Arundel County.”<sup>14</sup> However, differences in the facts presented are not relevant to the clear legal conclusion reached by both courts: the FCC has exclusive authority over radio frequency interference.<sup>15</sup>

The County also appears to argue that Congress narrowed the FCC’s authority over RFI in adopting Section 704 in the Telecommunications Act of 1996, and it criticizes one of the federal courts because its decision supposedly does “not discuss Section 332(c)(7) by textual analysis.”<sup>16</sup> In point of fact, both courts considered this very argument, and each court rejected the argument that the County repeats.<sup>17</sup>

There is no basis to the County’s assertion that the Bureau’s order is “wrong as a matter of law.” Judicial precedents support exclusive FCC jurisdiction over RFI.

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<sup>12</sup> See *County Preemption Order* at ¶¶ 15-17.

<sup>13</sup> County Petition at ii and 9.

<sup>14</sup> *Id.*

<sup>15</sup> Actually, the “facts in *Johnson County* are virtually indistinguishable from the present situation,” as Cingular demonstrates. See Cingular Opposition at 7-9 (Aug. 21, 2003).

<sup>16</sup> County Petition at 10.

<sup>17</sup> See *Freeman*, 204 F.3d at 323-24; *Johnson County*, 199 F.3d at 1191. Federal courts have similarly rejected the County’s Tenth Amendment argument. See Cingular Opposition at 11-13.

### III. THE BUREAU POSSESSED THE AUTHORITY TO ISSUE THE DECLARATORY RULING

The County also contends that the Commission “lacks jurisdiction to decide Cingular’s Petition” – that is, the Bureau lacked the authority to issue the RFI preemption declaratory ruling.<sup>18</sup> According to the County, it would “make most sense” if carriers instead filed RFI complaints with courts – although, as the County recognizes, these courts would then be “free . . . to refer matters to the Commission under the doctrine of primary jurisdiction.”<sup>19</sup> This County argument is baseless.<sup>20</sup>

The Administrative Procedures Act (“APA”) expressly authorizes agencies like the FCC to “issue a declaratory order to terminate a controversy or remove uncertainty,” with Congress further specifying that declaratory orders have “like effect as in the case of other orders.”<sup>21</sup> Federal courts have repeatedly held that use of the declaratory ruling procedure is proper in rendering preemption decisions over state or local governments.<sup>22</sup>

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<sup>18</sup> County Petition at 16-17.

<sup>19</sup> *Id.* at 17.

<sup>20</sup> Similarly without merit is the County’s challenge to the *ex parte* rules as applied to declaratory ruling proceedings. *See* County Petition at 13 n.22. Indeed, the FCC need not even entertain this argument because it constitutes “an untimely collateral attack on prior rulemakings.” *Minnesota PCS*, 17 FCC Rcd 126, 131 ¶ 11 (2001).

<sup>21</sup> 5 U.S.C. § 554(e). *See also* 47 C.F.R. § 1.2. The Wireless Telecommunications Bureau has, moreover, ample delegated authority to act on petitions of the sort that Cingular filed. *See id.* at §§ 0.131, 0.331.

<sup>22</sup> *See, e.g., North Carolina Utilities Comm’n v. FCC*, 537 F.2d 787, 791 n.2 (4<sup>th</sup> Cir), *cert. denied*, 429 U.S. 1027 (1976); *New York State Comm’n v. FCC*, 749 F.2d 804 (D.C. Cir. 1984); *New York State Comm’n v. FCC*, 669 F.2d 58, 62 n.9 (2d Cir. 1982); *Texas PUC v. FCC*, 886 F.2d 1325 (D.C. Cir. 1989); *North Carolina Utilities Comm’n v. FCC*, 746 F.2d 1492 (D.C. Cir. 1984); *Illinois Bell v. FCC*, 883 F.2d 104 (D.C. Cir. 1989).

It is, moreover, irrelevant that Cingular (or another wireless carrier) could have filed a federal preemption claim in federal court.<sup>23</sup> It is a settled principle of jurisprudence that a “plaintiff has the right to ‘control’ his own litigation and to choose his own forum.”<sup>24</sup> A federal district court ruling would have applied at most to local authorities within the judicial district, but the problem with ordinances like the County is nationwide in scope.<sup>25</sup> Because the Commission’s order has nationwide applicability, it made eminent sense for Cingular to submit its preemption claim with the Commission rather than in a federal district court. No purpose is served by having dozens of federal courts address the same legal issue, and the Bureau’s Order was entirely lawful.

#### **IV. THERE IS NO BASIS TO THE COUNTY’S REQUESTED CLARIFICATION**

The County contends that the “scope of the Order requires some clarification” because, it argues, the Bureau order “never explains the fault with 10-125(k)(1) – providing for initial, then, annual certifications of compliance with federal Radio Frequency Radiation (“RFR”) standards.”<sup>26</sup> Sprint submits that the order requires no clarification because the Bureau explained fully the “fault” with this provision and why the provision was preempted.

There are two parts of County Ordinance 10-125(k) that the Bureau preempted.<sup>27</sup> Section 10-125(k)(1) requires annual “certifications,” specifying that these certifications

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<sup>23</sup> As Cingular notes, however, it is doubtful a wireless carrier could have based its challenge to the County’s ordinance under Section 332(c)(7). *See* Cingular Opposition at 14.

<sup>24</sup> *AT&T v. BellSouth*, 238 F.3d 636, 658 (5<sup>th</sup> Cir. 2001). *See also Consumers Union v. Consumers Product Safety Comm’n*, 590 F.2d 1209, 1222 (D.C. Cir. 1978).

<sup>25</sup> *See* Sprint Comments, WT Docket No. 02-100, at 4-9 (June 10, 2002).

<sup>26</sup> County Petition at 17-18.

<sup>27</sup> *See County Preemption Order* at n.1 and n.83.

must be submitted by “an engineer acceptable to” the County and requiring that this engineer “actually measure” radio frequency measurements at the antenna in question and certify that these measurements “meet the applicable [FCC] standards and guidelines for those emissions.” Section 10-125(k)(2) specifies that an FCC licensee will lose its local authorization to operate if it does not comply with Section 10-125(k)(1):

If at any time the owner or user of the telecommunications facility cannot provide the certification required by paragraph (1) of this subsection, then the certificate of use may be revoked.

Contrary to the County’s undocumented assertion, the Bureau explained fully the “fault” with Section 10-125(k) of the County’s ordinance:

We disagree with the County’s argument that the provisions are not a direct regulation of RFI, but rather a “perfectly lawful effort to assure itself that a carrier is complying with FCC standards.” . . . Although the County does not purport to prescribe particular technical parameters, however, the fact remains that by asserting authority to prohibit operation that it determines causes public safety interference, the County is effectively regulating federally licensed operation, much as in *Johnson County* and *Mobilecomm*. Such regulation of operation is different in kind from traditional zoning regulation of the physical facility such as height limitations, setback requirements, screening or painting guidelines, structural safety standards, and the like. Therefore, we find that the County’s Ordinance regulates beyond traditional zoning functions and impermissibly extends into the regulation of RFI.<sup>28</sup>

Indeed, this County ordinance is the very kind of local regulation that the Commission previously advised local governments would likely be preempted. The Commission has determined that local governments may “inquire as to whether a specific personal wireless service facility will comply with our RF emissions guidelines,” but that there “should be some limit as to the type of information that a state or local authority

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<sup>28</sup> *County Preemption Order* at ¶ 19 and n.85, quoting the County’s Comments.

may seek from a personal wireless service provider.”<sup>29</sup> It further noted the need for “uniform standards” that would impose “a minimal burden on service providers.”<sup>30</sup> The Commission therefore developed “uniform demonstration of compliance” guidelines specifying “the most that a state or local government should be permitted to request.”<sup>31</sup>

Section 10-125(k) is at complete odds with these Commission guidelines. The guidelines make clear that a demonstration of compliance may be “signed by the personal wireless service provider,”<sup>32</sup> while the County’s ordinance gives local officials the option to require the use of third-party engineers. The Commission’s guidelines further make clear that an FCC licensee may use a variety of methods to demonstrate compliance, including “calculational methods . . . computer simulations, [and] actual field measurements.”<sup>33</sup> The County’s ordinance, in contrast, requires carriers to use actual field measurements and to conduct these tests annually. And finally, the Commission’s guidelines do not ever intimate that a local government can strip an FCC licensee of operational authority if the licensee does not satisfy whatever demands the local authority makes.

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<sup>29</sup> *Second Radiofrequency Radiation Order*, 12 FCC Rcd 13494, 13553 ¶ 142 (1997), *aff’d Cellular Phone Taskforce v. FCC*, 205 F.3d 82 (2d Cir. 2000).

<sup>30</sup> *Id.* at 13443 ¶ 144.

<sup>31</sup> *Id.* at 13555 ¶ 146. The County cites *A Local Government Official’s Guide to Transmitting Antenna RF Emission Safety* (June 2, 2000), for the proposition that it can impose whatever compliance requirements it chooses to impose. *See* County Petition at 18 n.31. This, of course, is not the case. The *Guide* explicitly states on its first page that it is “not intended to replace OET Bulletin 65.” The FCC has also noted that the *Guide* is “not legally binding” because it was adopted without complying with the APA notice and comment procedures required for new rules. *See Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act*, 15 FCC Rcd 22821, 22828 ¶ 18 (2000).

<sup>32</sup> *Second Radiofrequency Radiation Order*, 12 FCC Rcd at 13553 ¶ 146.

<sup>33</sup> *Id.*

Two points bear emphasis. First, the Bureau preempted the County's ordinance under the field preemption doctrine.<sup>34</sup> The Supreme Court has held that under this doctrine, federal law so occupies the entire field of regulation over a subject that "no room remains for any state regulation."<sup>35</sup> Field preemption thus preempts not only state or local laws that conflict with federal law, but also "complementary or supplementary state regulation" as well.<sup>36</sup> As the Commission has noted, with field preemption, federal law "completely occup[ies] the field to the exclusion of local and state governments" and that even local government "attempts to regulate . . . are preempted."<sup>37</sup> Under the field preemption doctrine, therefore, Section 10-125(k) is preempted because "no room remains for any [local] regulation."<sup>38</sup>

Second and even ignoring applicable legal principles, local regulation of the sort evidenced by County Ordinance 10-125(k) is not only unnecessary, but it also undermines the very objectives the Commission has sought to achieve with its RF rules.<sup>39</sup> The

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<sup>34</sup> See *County Preemption Order* at ¶ 12. This Bureau ruling is consistent with the holdings of all of the federal courts have that addressed this issue. See *id.* at n.44.

<sup>35</sup> *Metropolitan Life Ins v. Taylor*, 481 U.S. 58, 63-64 (1987). See also *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 605 (1991); *R.J. Reynolds Tobacco v. Durham County*, 479 U.S. 130, 140 (1986); *Pacific Gas & Electric v. State Energy Resources Comm'n*, 461 U.S. 190, 203-04 (1983); *Fidelity Federal Savings & Loan v. De la Cuesta*, 358 U.S. 141, 153 (1982); *Rice v. Santa Fe Elevator*, 331 U.S. 218, 230 (1947); *Bastien v. AT&T Wireless*, 205 F.3d 983, 986 (7<sup>th</sup> Cir. 2000).

<sup>36</sup> *KVUE v. Moore*, 709 F.2d 922, 931 (5<sup>th</sup> Cir. 1983).

<sup>37</sup> *960 Radio Order*, FCC 85-578, at ¶¶ 4 and 7 (Nov. 4, 1985). See also *MobileComm of New York*, 2 FCC Rcd 5519, 5520 ¶ 8 (1987)("[F]ederal power in the area of radio frequency interference is exclusive and to the extent that any state or local government attempts to regulate in this area, their regulations are preempted.").

<sup>38</sup> Field preemption does not, as the County asserts (without citing a single case), allow "some small space for state authority." County Petition at 5.

<sup>39</sup> Thus, the FCC could have also preempted Section 10-125(k) under the conflicts preemption doctrine. Under this doctrine, state or local laws are preempted when they "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Fright-*

Commission's radio engineers in the Office of Engineering and Technology ("OET") have determined the circumstances under which cellular and PCS base station antennas require routine evaluation for radio frequency exposure.<sup>40</sup> For example, OET engineers have determined that there is "no evidence" that tower-mounted cellular or PCS antennas "cause ground level exposures in excess of the MPE limits."<sup>41</sup> Nevertheless, "out of an abundance of caution," the Commission "requires that tower-mounted installations be evaluated if antennas are mounted lower than 10 meters above ground and the total power of all channels being used is over . . . 2000 W ERP for broadband PCS."<sup>42</sup> In contrast, carriers need not conduct any routine evaluation of antennas mounted higher than 10 meters because ground-level power densities typically are "hundreds to thousands of times below the new MPE limits."<sup>43</sup> As the Commission has further stated:

Many governmental agencies, scientists, engineers and professional associations have conducted studies of exposure levels due to RF emissions from cellular transmitter facilities. *These levels have been found to be typically thousands of times below the levels considered safe by expert entities* such as the Institute of Electrical and Electronics Engineers, Inc. (IEEE), and the National Council on Radiation Protection and Measurements (NDRP), as reflected in the Commission's rules governing RF emissions.<sup>44</sup>

The Commission has noted that, in applying the environmental protection laws, federal regulations "require federal agencies to use categorical exclusions, where appro-

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*liner Corp. v. Myrick*, 514 U.S. 280, 287 (1995). See also *Pacific Gas & Electric v. State Energy Resources Comm'n*, 461 U.S. 190, 203-04 (1983).

<sup>40</sup> See Office of Engineering and Technology, *Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency Electromagnetic Fields*, OET Bulletin 65, Edition 97-01 (Aug. 1997)("OET Bulletin 65").

<sup>41</sup> *Id.* at 13.

<sup>42</sup> *Id.* at 13-14.

<sup>43</sup> *Id.* at 14.

<sup>44</sup> Fact Sheet No. 2, National Wireless Siting Policies, at 12 (Sept. 17, 1996)(emphasis added).

appropriate, to reduce excessive paperwork and delay.”<sup>45</sup> The Commission, based on extensive scientific evidence, has determined which cellular and PCS antennas should be subject to routine evaluation and which antennas require no evaluation because there is “no evidence” they pose any risk of harm to members of the public.<sup>46</sup> A federal appellate court has affirmed these FCC rules.<sup>47</sup>

Local regulations like County Ordinance 10-125(k) are unnecessary because they seek the performance of tests when the Commission has already determined there is no possibility of any harm. But local regulations like County Ordinance 10-125(k) are also more pernicious. Evidence in the record documents that studies of the sort the County is demanding are “extremely costly,”<sup>48</sup> and such studies eviscerate the very categorical exclusions that the Commission has determined are required under federal law.<sup>49</sup>

In summary, the Bureau explained fully its reason for preempting Section 10-125(k) of the County’s ordinance, and its decision is consistent with both law and policy. The County’s request for a clarification of the order should be denied.

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<sup>45</sup> *Public Employees for Environmental Responsibility*, 16 FCC Rcd 21439, 21448 ¶ 17 (2001).

<sup>46</sup> See OET Bulletin at 13.

<sup>47</sup> See *Cellular Phone Taskforce v. FCC*, 205 F.3d 82 (2d Cir. 2000).

<sup>48</sup> Pinnacle Tower Comments at ¶ 3.

<sup>49</sup> Of course, local authorities are always free to conduct their own ground-level emissions studies.

**V. CONCLUSION**

For the foregoing reasons, Sprint respectfully requests that the Commission deny in its entirety the Application for Review filed by Anne Arundel County, Maryland.

Respectfully submitted,

**SPRINT CORPORATION**

A handwritten signature in black ink, appearing to read "Luisa L. Lancetti", written over a horizontal line.

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September 26, 2003

## CERTIFICATE OF SERVICE

I, Joyce Y. Walker, hereby certify that I have on this 26<sup>th</sup> day September 2003, served via U.S. First Class Mail, postage prepaid, or Hand Delivery, a copy of the foregoing letter," In the Matter of Cingular Wireless' Petition for a Declaratory Ruling., WT Docket No.02-100", filed this date with the Secretary, Federal Communications Commission, to the persons listed below.

  
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