

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Petition of Cingular Wireless L.L.C. for a)	
Declaratory Ruling that Provisions of the)	WT Docket No. 02-100
Anne Arundel County Zoning Ordinance are)	DA 03-2734
Preempted as Impermissible Regulation of)	
Radio Frequency Interference Reserved)	
Exclusively to the Federal Communications)	
Commission)	

To: The Commission

**OPPOSITION OF NEXTEL COMMUNICATIONS, INC.
TO APPLICATION FOR REVIEW**

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September 26, 2003

Summary

The Commission should deny Anne Arundel County's ("the County's") Application for Review, as the Wireless Telecommunications Bureau correctly preempted the County's effort to regulate radio frequency interference ("RFI") in the 800 MHz band. Congress, the Commission, and the courts have made clear that the regulation of RFI falls exclusively within federal jurisdiction. Numerous provisions of the Communications Act of 1934, as amended (the "Communications Act" or "Act"), establish that Congress intended to maintain sole federal control over the use of the radio spectrum and to grant the Commission broad authority to regulate spectrum use and RFI. The Commission and the courts have previously preempted efforts by local governments to regulate RFI. The County fails in its Application for Review to distinguish this well-established precedent or refute that Congress has granted the Commission broad authority to establish an exclusive, national regulatory regime governing RFI.

Local regulation of RFI, or any other case-by-case, localized approach to addressing 800 MHz interference, would undermine the strong federal policy in favor of clear, uniform spectrum rights and responsibilities. A federal regulatory framework is essential to avoiding conflicting local regulation and ensuring the most efficient and beneficial use of the spectrum. This principle has guided U.S. spectrum policy for 75 years, and must continue to guide the Commission as it addresses the CMRS – public safety interference problem on a nationwide basis. The CMRS – public safety interference problem is by no means limited to the County. Since January 2000, at least 155 public safety systems – approximately 10% of all public safety licensees – have experienced interference. This interference has occurred in over 25 states and in at least

28 of the largest 35 metropolitan areas. This is a pressing national problem that requires the Commission to adopt a *national* response.

Although the challenged provisions of the County’s ordinance must continue to be preempted, the County’s local efforts to pass and enforce the ordinance highlight the pressing need for the Commission to adopt an effective national remedy to the increasingly serious problem of CMRS – public safety interference. As the County states in its Application for Review, the Commission “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.”¹ Despite the use of “Best Practices” and case-by-case mitigation techniques, the number of public safety systems experiencing interference across the country grew by almost 500% between 2000 and 2002. Indeed, the County’s Application for Review and its experience over the past several years underscore a crucial reality: Best Practices and case-by-case mitigation for numerous reasons fall far short of providing an effective, permanent solution to the “intractable” 800 MHz interference problem. Often, site-by-site mitigation in a particular area will lose effectiveness as CMRS providers add new sites to meet growing demand for wireless services. Case-by-case mitigation only addresses public safety interference *after the fact*, jeopardizing first responders and the public they serve. Mitigation techniques and equipment upgrades impose enormous costs on public safety agencies, and ultimately harm consumers by degrading the quality of commercial wireless service. Finally,

¹ Application for Review of Anne Arundel County, Maryland, WT Docket No. 02-100, at ii (Aug. 6, 2003) (“Application for Review”).

reliance on case-by-case mitigation techniques will invariably result in disputes and a quagmire of interference complaints filed at the Commission.

The County's real-world experience demonstrates that an effective, permanent solution to 800 MHz interference requires attacking the underlying cause of 800 MHz interference: a badly outdated band plan that mixes and interleaves public safety and CMRS channels. To do this, the Commission must realign the 800 MHz band to separate public safety and CMRS systems into separate blocks via the Consensus Plan for 800 MHz Realignment. The sooner the Commission adopts the Consensus Plan, the sooner all first responders and the public they serve will no longer be at risk from the serious interference currently plaguing the band, and the sooner local jurisdictions will not attempt to regulate matters that are directly under the FCC's exclusive jurisdiction.

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To: The Commission

**OPPOSITION OF NEXTEL COMMUNICATIONS, INC.
TO APPLICATION FOR REVIEW**

Nextel Communications, Inc. (“Nextel”) hereby opposes the Application for Review filed by Anne Arundel County, Maryland (“County”) regarding the Wireless Telecommunication Bureau’s *Memorandum Opinion and Order* in the above-captioned proceeding.² The Bureau correctly preempted the County’s effort to regulate RFI, and the Commission should deny the County’s Application for Review. The issues raised in this proceeding nonetheless highlight the urgent need for the Commission to adopt an effective, permanent, national solution to interference to public safety systems in the 800 MHz band. As the County’s experiences demonstrate, neither imposing local restrictions on CMRS carriers nor case-by-case mitigation measures and equipment upgrades will

² *Petition of Cingular Wireless L.L.C. for a 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*, Memorandum Opinion and Order, 18 FCC Rcd 13126 (DA 03-2196) (Wireless Tel. Bur. 2003) (“*MO&O*”).

provide such a solution. The Commission should instead realign the 800 MHz band as proposed in the Consensus Plan.³

I. THE BUREAU CORRECTLY FOUND THAT THE COUNTY'S ORDINANCE IS PREEMPTED UNDER THE COMMUNICATIONS ACT AND WELL-ESTABLISHED PRECEDENT

There can be no doubt that the challenged provisions of the County's local zoning ordinance attempt to regulate RFI. As described in the Bureau's decision, these provisions seek to require Nextel and other CMRS providers to demonstrate that their facilities will not degrade or interfere with the County's public safety communications system. They also provide that the County may revoke a zoning certificate if, *in the County's judgment*, degradation or interference occurs.

The Bureau correctly found that these matters fall within the exclusive jurisdiction of the Commission and therefore are preempted. Congress, the Commission, and the courts have made clear that RFI is a matter exclusively left to federal regulation. In enacting the Communications Act, Congress sought "to maintain the control of the United States over all the channels of radio transmission."⁴ An integral part of maintaining this federal control is the broad authority numerous provisions of the Act bestow on the Commission to regulate the use of the spectrum and RFI.⁵ Further

³ See Reply Comments of The Industrial Telecommunications Association, *et al.* ("the Consensus Parties"), WT Docket No. 02-55 (Aug. 7, 2002) ("Consensus Plan"). The Consensus Parties have clarified and amended the Consensus Plan in subsequent filings in WT Docket No. 02-55. See Consensus Comments of the Consensus Parties (Sept. 23, 2002); Supplemental Comments of the Consensus Parties (Dec. 24, 2002); Reply Comments of the Consensus Parties (Feb. 25, 2003); Ex Parte Submission of the Consensus Parties (Aug. 7, 2003).

⁴ 47 U.S.C. §§ 301.

⁵ See, e.g., *id.* §§ 302(a)(1), 303(d), 303(e), 303(f), 303(h), 307(b).

evidence of Congress's intent to grant the Commission exclusive jurisdiction over RFI complaints can be found in the legislative history of the Communications Amendments Act of 1982, which stated that "exclusive jurisdiction over RFI incidents (including preemption of state and local regulation of such phenomena) lies with the FCC."⁶

As described in the Bureau's *MO&O*, the Commission has previously preempted efforts by local governments to regulate RFI. A number of these Commission decisions involved local ordinances very similar to the ordinance adopted by the County.⁷ Federal courts are in full agreement that such local regulation is preempted. The U.S. Court of Appeals for the Tenth Circuit, for example, has analyzed the Communications Act and FCC rules and adjudicatory decisions and held that "Congress intended federal regulation of RFI issues to be so pervasive as to occupy the field," and that local efforts to regulate RFI are consequently "void as preempted."⁸

The County fails in its Application for Review to distinguish this well-established precedent or refute that Congress has granted the Commission broad authority to establish an exclusive, national regulatory regime governing RFI. The Bureau was

⁶ H.R. Conf. Rep. No. 97-765, at 23 (1982), reprinted in 1982 U.S.C.C.A.N. 2261, 2267. The Conference Report further states that "such matters [involving RFI] 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." *Id.* at 33, 1982 U.S.C.C.A.N. at 2277.

⁷ See, e.g., *960 Radio, Inc.*, Memorandum Opinion and Declaratory Ruling, FCC 85-578, 1985 WL 193883, 1985 FCC LEXIS 2342 (Nov. 4, 1985); *Mobilecomm of New York Inc.*, Memorandum Opinion and Declaratory Ruling, 2 FCC Rcd 5519 (Com. Car. Bur. 1987).

⁸ See, e.g., *Southwestern Bell Wireless Inc. v. Johnson County Board of County Commissioners*, 199 F.3d 1185, 1193 (10th Cir. 1999). See also *Freeman v. Burlington Broadcasters*, 204 F.3d 311 (2d Cir. 2000).

consequently on solid legal ground in preempting the challenged provisions of the County's ordinance.

II. THE COUNTY'S ORDINANCE AND OTHER LOCALIZED, CASE-BY-CASE MEASURES WOULD UNDERMINE THE STRONG FEDERAL POLICY IN FAVOR OF SPECTRUM EFFICIENCY AND CLEAR, COMPREHENSIVE SPECTRUM RIGHTS AND RESPONSIBILITIES

Besides the overwhelming legal precedent cited in the Bureau's *MO&O*, there are strong policy reasons for continuing to preempt the challenged provisions of the County's ordinance. As the Supreme Court has stated, one of Congress's central purposes in enacting the Communications Act (and its predecessor, the Radio Act of 1927) was to establish a "unified and comprehensive regulatory system" to govern spectrum use in the United States.⁹ A consistent federal regulatory framework is essential to avoiding conflicting local regulation and ensuring the most efficient and beneficial use of the spectrum. The FCC is charged with carrying out this framework, and has adopted numerous rules and procedures governing spectrum use throughout the country, including the use of the Cellular Radiotelephone spectrum band and the adjacent 800 MHz Land Mobile Radio band used and relied upon by public safety, private wireless, and CMRS operators such as Nextel.

The RFI in the 800 MHz band that the County's local ordinance seeks to address is the subject of a pending rulemaking proceeding at the Commission.¹⁰ The problem of CMRS – public safety interference in the 800 MHz band is by no means limited to the

⁹ *National Broadcasting Co. v. United States*, 319 U.S. 190, 214 (1943).

¹⁰ *Improving Public Safety Communications in the 800 MHz Band; Consolidating the 900 MHz Industrial/Land Transportation and Business Pool Channels*, Notice of Proposed Rulemaking, 17 FCC Rcd 4873 (2002) ("800 MHz Public Safety NPRM").

County – it is a nationwide problem. Since January 2000, at least 155 public safety systems – approximately 10% of all public safety licensees – have experienced CMRS – public safety interference. This interference has occurred in over 25 states and in at least 28 of the largest 35 metropolitan areas.¹¹ This is a pressing national problem that requires the Commission to adopt a *national* response.

The County’s local efforts to regulate 800 MHz interference, or any other approach to the problem that varies from place to place, will result in the very “confusion and chaos” in spectrum use that the Communications Act was intended to avoid.¹² The County’s ordinance lacks any standard for defining “interference,” let alone any proactive formula for remedying interference. It certainly falls far short of the “clear and exhaustive definition of spectrum rights and responsibilities” recommended by the Commission’s Spectrum Policy Task Force.¹³ Even assuming the County adopted discernable standards, other local governments would undoubtedly craft their own standards, subjecting wireless carriers to a baffling array of inconsistent operational requirements. As the Cellular Telecommunications & Internet Association has stated, “it would place licensees in the position of having to comply with a multitude of potentially conflicting rules.”¹⁴ This would substantially undermine the purpose of the

¹¹ See Ex Parte Submission of the Consensus Parties, WT Docket No. 02-55, at 24-26 (Aug. 7, 2003); Letter from Robert Foosaner, Nextel, to Marlene Dortch, FCC Secretary, WT Docket No. 02-55, at 4-6 (May 16, 2003).

¹² *National Broadcasting Co.*, 319 U.S. at 212.

¹³ Report of the Spectrum Policy Task Force, ET Docket No. 02-135, at 17-18 (filed Nov. 15, 2002).

¹⁴ Comments of CTIA in Support of the Cingular Wireless Petition for Declaratory Ruling, WT Docket No. 02-100, at 8 (June 10, 2002).

Communications Act, which recognized that “RFI is a federal interest and requires a national approach to regulate the field.”¹⁵

The County’s ordinance also ignores that radio transmissions do not stop at county borders. Localized efforts to remedy interference and regulate spectrum use in one county – e.g., channel usage restrictions and adjustments to power and antenna configurations – may very well result in interference to public safety systems in adjoining jurisdictions. Such efforts would consequently have the perverse effect of making CMRS – public safety interference worse rather than better.

Localized efforts to address CMRS – public safety interference can also impose unjustified costs on CMRS carriers. As the Bureau stated in its decision preempting the County’s ordinance, “the proliferation of similar but potentially inconsistent local government regulations across the nation could impose substantial costs that would retard the spread of wireless systems.”¹⁶ Simply tracking the thousands of potential county RFI regulatory requirements would impose an enormous burden on CMRS carriers. These burdens would make CMRS service more expensive, less available, and less innovative, thus harming consumers.

III. THE COUNTY IS CORRECT IN URGING THE FCC TO ADOPT AN EFFECTIVE REMEDY TO CMRS – PUBLIC SAFETY INTERFERENCE AS SOON AS POSSIBLE

Although the challenged provisions of the County’s ordinance must continue to be preempted, the County’s local efforts to pass and enforce the ordinance highlight the pressing need for the Commission to adopt an effective national remedy to the

¹⁵ *Johnson County*, 199 F.3d at 1192.

¹⁶ *MO&O* ¶ 24.

increasingly serious problem of CMRS – public safety interference. As the County states in its Application for Review, the Commission “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.*”¹⁷ Despite the use of “Best Practices” and case-by-case mitigation techniques, the number of public safety systems experiencing interference nationwide grew by almost 500% between 2000 and 2002. Until an effective national solution is implemented, this alarming trend will continue as new CMRS and public safety systems are deployed.

The Commission recognized this when it issued the *800 MHz Public Safety NPRM* in March 2002:

New public safety communications systems are being constructed in [the 800 MHz] band This growth in the implementation of 800 MHz public safety systems is being accompanied by growth in the number of potentially interfering 800 MHz and 900 MHz CMRS transmitters, particularly in urban areas. Documented existing interference problems taken in combination with these growth patterns underlie our tentative conclusion that, unless significant remedial action is taken immediately, increased harmful and potentially hazardous interference will be caused to 800 MHz public safety systems at a time when public safety agencies most need reliable communications capability.¹⁸

The County’s Application for Review underscores another fact: efforts to remedy 800 MHz interference through case-by-case mitigation techniques or public safety equipment upgrades alone will not address the problem. The County, Nextel, and

¹⁷ Application for Review at ii (Emphasis added).

¹⁸ *800 MHz Public Safety NPRM* ¶ 87. See also *id.* ¶ 18 (“These factors – the growth of 800 MHz public safety systems and the proliferation of CMRS cell sites – when taken together, indicate that the interference problems ... will become more severe in the near future unless we take significant corrective action.”).

Cingular have aggressively pursued a wide range of case-by-case mitigation techniques over the past several years, and yet “intractable” interference remains. These extensive efforts have, for several reasons, fallen far short of providing an effective, permanent solution to 800 MHz interference. The Commission must keep these lessons in mind in assessing the various proposals submitted in the pending 800 MHz rulemaking proceeding. In particular, as described below, the County’s real-world experience demonstrates that the serious problem of 800 MHz interference cannot be addressed by the continued use of mitigation techniques as proposed by a group of parties led by the Cellular Telecommunications & Internet Association (“CTIA”) and the United Telecom Council (“UTC”),¹⁹ or by an approach that relies solely on Motorola’s “technical toolbox.”²⁰

First, mitigation measures and equipment upgrades have failed to remedy the interference experienced by the County. As the County has pointed out, although mitigation steps have helped address some interference incidents, “[t]hose that are temporarily lessened are certainly not permanently resolved.”²¹ Even a minor adjustment to a CMRS site or the County’s public safety system configuration can cause the

¹⁹ See Letter from Diane Cornell, CTIA, to Marlene Dortch, FCC Secretary, WT Docket No. 02-55 (June 11, 2003).

²⁰ See Letter from Steve Sharkey, Motorola, to Edmond Thomas, Chief, Office of Engineering and Technology, FCC, WT Docket No. 02-55 (May 6, 2003).

²¹ Letter from Linda Schuett, County Attorney, to Marlene Dortch, FCC Secretary, WT Docket No. 02-100, at 2 (July 29, 2003) (filed July 30, 2003) (“July 29 County Letter”).

interference to resurface.²² Moreover, mitigation measures and the County’s equipment upgrades have failed to remedy some dead spots even temporarily. According to the County, “even under a ‘best case’ scenario – including new and improved radio equipment, completion of the frequency swap with Nextel and build out of a new and more robust communications system, as well as continued ‘Best Practices’ and mitigation measures with County CMRS carriers, *intractable interference to our public safety system will remain.*”²³ The County has identified at least four such sites, and, until a permanent solution is implemented, this number is likely to grow in the coming years as CMRS systems expand to meet the growing consumer demand for wireless services.²⁴ The County has stated that “[g]iven the continuing growth of demand for wireless communications services, we suspect that the situation will reach the point that site-by-site technical modifications will no longer be effective.”²⁵

Second, even when mitigation techniques address a particular interference incident, they do so only after-the-fact. As the County has stated, “site-by-site steps are reactive – often occurring only after interference incidents, which jeopardize County

²² *Id.* (“[M]inor subsequent changes by CMRS carriers necessary to meet the growing service requirements of our citizens can sometimes eliminate the benefits of other technical measures taken at the sites, requiring yet another round of site-by-site testing and technical modifications.”).

²³ *Id.* at 3 (Emphasis in original). *See also* Application for Review at 2 (“[S]everal of the known sites as presently equipped and operated have proven intractable to mitigation.”).

²⁴ July 29 County Letter at 2.

²⁵ *Id.*

personnel and the public they service.”²⁶ No amount of coordination or Best Practices can alter the fact that “neither the County nor the CMRS providers can predict perfectly or control possible interference from new or augmented sites.”²⁷ An approach that relies on mitigation and equipment improvements is consequently doomed to responding to interference only *after* it has occurred – when it may already be too late for a first responder confronted with an emergency. As the County concluded, “[c]orrecting interference problems only after the fact is unacceptable for public safety radio systems. Any time there is interference to a public safety radio system, there is the danger that life-saving communications will be disrupted.”²⁸

Third, mitigation techniques and equipment upgrades impose enormous costs on public safety agencies. The County has estimated that it has spent “hundreds of thousands of dollars of its own money and employee time” on interference mitigation efforts over the past several years.²⁹ These efforts have included hiring an engineering consultant, purchasing more interference-resistant equipment from Motorola, and many hours of County employee time identifying the interference problems and working with CMRS carriers to find solutions. These burdens have come at a time when state and local governments are straining to balance their budgets by curtailing government services and

²⁶ *Id.* at 2.

²⁷ Application for Review at 2.

²⁸ Reply Comments of the County, WT Docket No. 02-100, at 5 (June 25, 2002) (quoting comments filed by the Association of Public-Safety Communications Officials-International, Inc. (“APCO”) in WT Docket No. 02-55, at 10 (May 6, 2002)).

²⁹ Application for Review at 6.

laying off employees.³⁰ Yet, parties proposing continuing case-by-case mitigation techniques and public safety equipment upgrades have failed to offer any plan to fund the substantial costs they would impose on public safety agencies.

Fourth, mitigation techniques degrade CMRS service and hurt consumers. Nextel has temporarily degraded its service in the County as part of its effort to minimize interference to the County's system pending the Commission's adoption of a permanent solution to the problem. At the same time, the County's adoption and enforcement of the Ordinance have prevented Nextel and other CMRS competitors from expanding and improving its network coverage and capacity. These technical measures cannot be sustained for the long term, as they seriously undermine CMRS carriers' ability to meet the rising demand for wireless services. Indeed, the County has recognized that "[e]xpecting commercial carriers to maintain a static environment over the long-term is increasingly unrealistic and unworkable."³¹

Fifth, reliance on case-by-case mitigation techniques will invariably result in disputes and a quagmire of interference complaints filed at the Commission. Mitigation techniques, whether voluntary or mandatory, depend on the good faith cooperation of all parties involved to assess the origins of the interference and develop an appropriate remedial response. The County's experience has unfortunately proven that some parties can choose recalcitrance over cooperation. This has been the case with Cingular, which,

³⁰ See generally Warren Rudman, Richard Clarke & Jamie Metzl, *Emergency Responders: Drastically Underfunded, Dangerously Unprepared*, Report of an Independent Task Force Sponsored by the Council on Foreign Relations (June 29, 2003) (available at: <http://www.cfr.org/pdf/Responders_TF.pdf>).

³¹ July 29 County Letter at 2.

ironically, has been a leading proponent of continued use of mitigation techniques in the Commission's 800 MHz proceeding – yet dragged its feet when asked to apply the very same techniques to the County's interference problem.³²

Case-by-case mitigation efforts are vital to managing CMRS – public safety interference *temporarily*, but they should not be mistaken for an effective, permanent solution. The fact is that the underlying cause of 800 MHz CMRS – public safety interference is a badly outdated band plan that mixes and interleaves public safety and CMRS channels. Accordingly, the Commission must attack the root cause of this problem by realigning the band to separate public safety and private wireless and CMRS systems into separate blocks consistent with the Consensus Plan for Realignment that has extensive support from the public safety community. As the County has stated, “[c]reating sufficient separation between the County’s 800 MHz frequencies and the CMRS carriers’ frequencies is the best method to permanently resolve the interference we are facing today. ... Until the spectrum is ‘de-interleaved’ and the disparate technologies used by CMRS carriers and public safety systems are separated, we cannot predict every possible ‘dead spot’ caused by our incompatible systems and our public safety personnel will be at risk.”³³ As fully documented in the Commission’s pending

³² According to the County, “[t]esting revealed that Cingular was a major source of interference with and degradation of the County’s system. The County approached Cingular, and for quite some time, Cingular was not cooperative. From July to mid-November of 2001, Cingular would neither provide information needed to assess the situation nor cooperate with testing.” Letter from James Hobson, Counsel for Anne Arundel County, to Marlene Dortch, FCC Secretary, WT Docket No. 02-100, Att. at 2 (Sept. 11, 2002). This prompted the Commission staff to observe that “Cingular in the past has not always cooperated fully in the County’s efforts to resolve interference problems with its public safety communications network.” *MO&O* ¶ 26.

³³ July 29 County Letter at 2.

rulemaking proceeding, the Consensus Plan is a permanent, workable solution to the national CMRS – public safety interference problem and should be adopted expeditiously.

IV. CONCLUSION

The Commission should affirm the Bureau’s decision preempting the challenged provisions of the County’s Ordinance. It should also act immediately to address the serious public safety interference issues that gave rise to the Ordinance. As the County’s experience has demonstrated, the best means to do this is for the Commission to adopt the Consensus Plan.

Respectfully submitted,

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September 26, 2003

Certificate of Service

I hereby certify that on this 26th day of September, 2003, I caused true and correct copies of the foregoing Opposition of Nextel Communications, Inc. to Application for Review to be mailed, by first class U.S. Postal Service mail or by electronic mail, to:

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