

Denise Berger

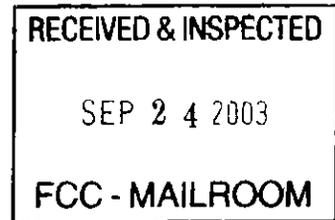
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From: Gina H Lee [Glee@crblaw.com]
Sent: Wednesday, September 24, 2003 3:36 PM
To: WTBSecretary
Cc: Milton Price
Subject: WT 02-100

Attached please find the PCIA's comments for the above referenced application

Thank you

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Marlene H Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

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SEP 24 2003

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**Re: Comments on Anne Arundel County, Maryland's Application for Review
Docket No. WT 02-100 and DA -3-2734**

Dear Ms Dortch

On behalf of PCIA, the Wireless Infrastructure Association, I am writing to convey the comments of PCIA regarding the Application for Review filed by Anne Arundel County, Maryland (the "County") in the captioned proceeding. PCIA recognizes that this matter has been pending decision for some time, and that a great number of interested parties have previously filed briefs and comments. While PCIA did not previously enter its appearance or submit material, as an organization and among its many members, we have closely followed this case. Given the importance of the case to the wireless industry, we now wish to submit comments in opposition to the Application for Review.

PCIA is interested in this matter because we are the principal trade association representing the wireless infrastructure industry. PCIA represents companies that manage and develop communications towers and antenna facilities for all types of wireless and broadcast services. PCIA members currently own or manage over 50,000 towers throughout the United States. PCIA makes a deliberate and concerted effort to help advance an understanding of the issues facing its members, and the importance of the wireless network infrastructure to the nation as a whole.

Before proceeding with the merits of the case, PCIA wishes to endorse and support the comments made in the Memorandum Opinion and Order ("Order") regarding the significant concern the FCC has for radio frequency interference ("RFI") with public safety communications systems. Regardless of the legal issues involved, the Order recognizes the seriousness of the issue and, toward that end, directs the parties to report to the FCC on mitigation measures and efforts. PCIA agrees that resolution of the issue requires cooperative efforts between the cities and counties, and the wireless carriers, similar to those that have taken place in the County. Moreover, PCIA feels that until the FCC resolves the larger issues under consideration in the 800 MHz proceedings, RFI will continue to be a problem.

I. The Memorandum Opinion and Order Correctly Ruled that the County's Ordinance is Preempted by Federal Law

The Wireless Bureau issued its Order on July 7, 2003 following its deliberation and due consideration of Cingular Wireless' Petition and briefs by Cingular, the County and more than a dozen commenters. The Order correctly decides that while interference with emergency services communications systems is of utmost concern to all parties, the regulation of RFI is under the

sole jurisdiction of the FCC, "to the exclusion of provisions in local zoning or other regulations" *Order* at 10 PCIA supports the Commission's position that the regulation of RFI by the FCC is so pervasive as to occupy the entire field. As stated in the *Order*, federal court decisions support the Commission's position that "Congress intended federal regulation of RFI issues to be so pervasive as to occupy the field" *Order* at 9 (quoting *Southwestern Bell Wireless vs Johnson County*, 199 F.3d 1185, 1193 (10th Cir. 1999)).

Based on Commission precedent and federal court decisions, the Commission found that "the County's provisions constitute an attempt to regulate RFI and, therefore, are preempted under the doctrine of field preemption" *Order* at 10. PCIA agrees with the Commission's finding. To accept the position put forth by the County would be to allow every locality to regulate RFI in its own fashion, thereby creating such a multitude of regulations under which no wireless carrier could ever operate. A nationwide regulation of the issue is the only appropriate solution and it is what Congress intended through its adoption of the Communications Act and its delegation of authority to the Commission.

The current situation in Anne Arundel County is not the first instance in which a county has attempted to regulate RFI. As Cingular points out in its Opposition to Application for Review and as the *Order* also makes note, the facts in the Johnson County case are very similar to those in Anne Arundel. The Johnson County ordinance was enacted to prohibit communications towers and antennas from interfering with public safety communications, and it gave the local zoning administrator authority to force the communications company to cease operations. The Tenth Circuit found that "RFI regulation is not a traditional local interest but a national interest preempted by federal legislation" *Johnson County* at 1193. The decision in Anne Arundel County is merely the most recent statement of the long-established principle that the FCC has exclusive authority over the regulation of radio frequency interference and emissions.

The *Order* also found that, while the text was styled as an amendment to the County's zoning ordinance, in fact it was not "traditional zoning," but rather an impermissible intrusion into the preempted authority of the FCC. *See Order* at 6. PCIA agrees with the *Order's* finding that by asserting authority to prohibit operations that it determines cause public safety interference, the County is, in fact, regulating federally licensed operations. *See Order* at 11. In its Application for Review, the County attempts to characterize the dispute as "a zoning dispute for which the courts, not the FCC, are assigned jurisdiction." The County claims that Section 332(c)(7)(B)(v) of the Communications Act denies the Commission jurisdiction over this matter. However, as stated in Cingular's Opposition, this position has no merit. Section 332 is not applicable. This section merely preserves local authority over traditional zoning functions; it does not undermine the Commission's exclusive jurisdiction over RFI. *See Cingular's Opposition* at 14. PCIA believes it has been made clear that the County attempted to extend its authority past traditional zoning functions to directly regulate RFI.

In its Application for Review, the County also contends that the Commission's authority over RFI cannot be exclusive because it feels that there is no effective remedy available to it. The FCC has a process in place for resolving interference disputes. As stated in Cingular's Opposition, what the County really appears to be arguing is that this established process should

not apply when the County disagrees with it. PCIA believes that the appropriate place to resolve this dispute is before the Commission and that the Commission indeed has ample resources, ability and authority to fully resolve the dispute.

II. The FCC Should Recognize the Bigger Picture and Resolve the Questions Concerning the 800 MHz Spectrum

PCIA wants to go on record as agreeing with the statements in the Order that interference with radio signals from police, fire, EMS and all "first responders" is a serious and ongoing issue of concern. As more municipalities deploy networks in the 800 MHz range, the issue will continue to crop up. We need not repeat the problems associated with the interleaved spectrum. The FCC has a proceeding to deal with the issue and an order is pending in that Docket (WT 02-55). As a member of the Private Wireless Coalition and direct supporter of the *Consensus Plan*, PCIA, together with Nextel Communications and members of the public safety community, encourages prompt and comprehensive resolution of those proceedings. As do many others, we believe that lives are at stake, and any unnecessary delay in those proceedings furthers the risks to citizens and emergency service providers alike.

PCIA would also like to make clear that many municipalities recognize the benefits of sharing municipal properties, such as ball fields, police and fire stations, with wireless service providers. The benefits go beyond the revenue from rents paid by the tower companies and wireless providers. There are land use benefits: large regional parks often offer better screening than smaller, private parcels, there are shared-use opportunities - municipal antennas can be allowed to collocate on a tower at reduced rent or no rent, and there is more local control over siting decisions - allowing one tower or other support structure with one compound with access and other operational characteristics controlled by the municipality is often a better solution than several tower sites. To protect this valuable public/private relationship and to promote continued cooperation, the overarching issues involved in the 800MHz proceeding must be resolved. Otherwise, conflicts and disputes such as those that have arisen in Anne Arundel County will continue to spring up around the nation and will hinder this special public/private alliance. PCIA encourages the Commission to act decisively on the 800 MHz issue and with all deliberate speed.

PCIA, as the association for wireless infrastructure providers, while recognizing the serious concerns of the County, registers its support for the Order issued by the Wireless Bureau. The Commission has the exclusive jurisdiction over this dispute that is properly before it and has the ability to appropriately resolve the dispute under its authority. On behalf of PCIA, thank you for this opportunity to comment on this proceeding.

Sincerely,

Jay Kitchen
President and Chief Executive Officer

cc Milton Price, FCC
Connie Durcsak, PCIA

PCIA Comments.doc