

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

RECEIVED

OCT 14 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Petition of Cingular Wireless)
for a Declaratory Ruling, etc.)

WT 02-100

REPLY COMMENTS OF ANNE ARUNDEL COUNTY

Anne Arundel County, Maryland ("County") hereby replies to the comments of others on the County's Application for Review in the captioned proceeding.¹ Alone among the three wireless carriers and one association expressing views on September 26th, Nextel agrees with the County that the circumstances of massive interference to the County's public safety radio system at 800 MHz are extenuating and remain relevant.² By contrast, AT&T Wireless, Sprint and CTIA all insist that the special facts of interference in this case are irrelevant to the legal claim of exclusive FCC jurisdiction over radio frequency interference ("RFI").

We respectfully disagree. Facts must make a difference. It is intolerable to read the law to preserve an exclusive authority when that sole power is not used promptly or effectively to accomplish the purposes for which the authority was created. We cannot

¹ In its opening comments of September 26, 2003, the County replied to an Opposition of Cingular Wireless, dated 8/21/03 and submitted prior to the fixing of the current pleading cycle.

² Nextel Opposition, September 26, 2003, 6-13. Nextel uses these extenuating circumstances to boost its so-called "Consensus Parties" solution to interference at 800 MHz. The County's mixed views about that solution are on record and need not be repeated here. Letters to FCC Secretary of May 21, 2003 and July 29, 2003. Nextel also

atg

repeat often enough what the County said in its Application for Review (at ii): “It was legally insufficient for the Order to take away the County’s remedies without supplying a remedial mandate of its own.”

Let us repeat, also, our appreciation for the Order’s requirements that Nextel and Cingular submit 30-day and 90-day mitigation status reports and that all carriers operating in the County continue to cooperate with the County to mitigate interference and lessen the risk of interference. Well-intended as these requirements are, however, they do not constitute a mandated remedy. Unacceptable levels of interference remain at nearly 20 carrier sites, attributable to one carrier, or to combinations of two or three carriers. In any one of these “dead spots,” a failure of communication at any time could lead to tragic loss of life or property.

AT&T Wireless. Against this backdrop of danger to the County’s citizens, AT&T nevertheless insists (AT&T Comments, 2):

[N]either ongoing, unresolved RFI to public safety operators in Anne Arundel County nor the status of the Commission’s proceeding on interference to public safety operators in the 800 MHz band is a legitimate basis for encroaching on the FCC’s exclusive jurisdiction over RFI.

AT&T says in effect: “Don’t bother me with the facts; I’ll make up my mind through a legal abstraction called ‘field preemption.’” Contrary to AT&T’s argument at 3, Section 303(f)’s authorization of the FCC to “make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations” is not expressed in exclusive or preemptive terms. And the section surely cannot speak to the case where the

raises legal objections covered below in our replies to the comments of AT&T, Sprint and CTIA.

regulations the FCC has made on this point have failed to prevent interference between commercial and public safety systems at 800 MHz.

In connection with the fact that the Bureau's order forces local communities to expend their own resources to do the Commission's job, it is too facile and utterly unhelpful to observe (AT&T Comments, 4) that the FCC's regulation of RFI "does not require state governments to take any action at all." In reality, the FCC's failure to solve the problem has forced the County – an arm of the state – to act against the danger that public safety radios will fail when they are needed most. The County would have been derelict in its duty to emergency responders and citizens alike if it had failed to step in where the FCC had stayed out. AT&T's comment (at 4) that the County is "merely dissatisfied" reflects the cavalier attitude of a party that is not obliged to govern.

In both the *Johnson County* and *Burlington Broadcasters* decisions,³ the courts' ultimate reliance was not on the text of Section 332(c)(7)(A) but on its legislative history. However, the text reads on "placement" of wireless facilities; it does not say "placement for certain traditional zoning purposes only." It simply is not self-evident that a local government is barred from choosing one placement over another on the basis of more favorable RFI characteristics.

AT&T, and other carriers in their comments, refer to non-interference certifications from "an independent consultant acceptable to the County." The ordinance at Sections 10-125(k) and (l) originally read as quoted, but the County later began to

³ *Southwestern Bell Wireless v. Johnson County Board of County Comm'rs*, 199 F.3d 1185 (10th Cir. 1999) ("*Johnson County*"); *Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311 (2d Cir. 2000) ("*Burlington*").

accept certifications from engineers employed by carriers. This has been true for at least eight months.⁴

AT&T repeats (Comments, 7) Cingular's baseless claim that "the County has ignored many of the remedies provided by the Commission for a number of years." We need not repeat here our response to Cingular's erroneous argument.⁵ In fact, one difference between Johnson County and Anne Arundel County is that the former did not seek any FCC help beyond an opinion about the acceptability of its proposed wireless siting ordinance.⁶ By contrast, Anne Arundel County sought Commission aid more than once, and only resorted to its ordinance when the assistance proved ineffectual.

Sprint. We have answered previously (Application for Review, 14) the claims Sprint repeats here (Sprint Opposition, 1-3) about delay of its wireless facility applications. As the County has pointed out before, the timing of action was in the carrier's hands. Sprint chose to complicate the process by advancing legalisms over pragmatic, short-term accommodations. The County no longer requires the use of "third-party engineers" (*see* note 4, *supra*). Even if it did, Sprint's evidence of cost (Sprint Opposition, note 9) comes from another party rather than its own experience. The County understands that software can be used to run interference simulations for very little incremental expense.

In responding to AT&T above, we addressed Sprint's argument (Sprint Opposition, 4) that the *Burlington* and *Johnson County* courts interpreted Section

⁴ Letter to FCC Secretary from James R. Hobson, February 5, 2003, at 2.

⁵ Reply to Cingular, September 26, 2003, 1-2.

332(c)(7)(A) unfavorably for the County's position. The text of the statute, as we noted above, has priority over the legislative history.

Contrary to Sprint's contention at 6, the litigant cannot choose his forum when the relevant statute specifies one venue only. Cingular's original petition was, fundamentally, a challenge to the County's zoning ordinance. Such challenges may only be brought to a court, unless the sole issue is one of RF radiation regulation – which is not the case here.

The FCC explanation cited at length (Sprint Opposition, 7) misses the point. The subject there is RFI, radio frequency interference. The subject of Section 10-125(k) of the County Code is RF radiation, as to which the County is permitted to satisfy itself that federal standards will be met. The citation to an FCC notice of proposed rulemaking in WT Docket 97-192, at notes 29-31 of Sprint's Opposition, is misplaced. That proposal left for another day the specification of limits on local satisfaction of RF compliance. The specifications were never issued, but became non-binding guidelines.⁷ Nothing in the eventual Docket 97-192 order precludes Section 10-125(k)(1) of the County's wireless zoning ordinance.⁸

Thus, discussion of field preemption (Sprint Opposition, 9) is irrelevant with respect to RF radiation because local governments are not barred from seeking carrier

⁶ Application for Review, 9.

⁷ *Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934*, WT 97-192, Report and Order, FCC 00-408 at ¶ 18 (November 17, 2000).

demonstrations of compliance. In particular, the FCC has never ruled that a local zoning authority may not seek evidence of compliance relating to a facility that is “categorically excluded” from an environmental assessment. (Sprint Opposition, 10).⁹

CTIA. None of the Title III provisions recited by CTIA (CTIA Opposition, 3) is, on its face, a preemptive authority. We grant that, in practice, the tasks at Section 303(c) through (e) are better performed under singular direction. We respectfully submit that Section 303(f) concerning interference is different, and that local regulation to fill a gap in federal oversight does not contravene federal law. This is particularly true because, contrary to CTIA’s assertion, the statutory framework has changed since 1996, notably with the addition of Section 332(c)(7)(A) to the Communications Act.

This need to take a close look at the specifics in the law is why the County cited *Head v. New Mexico Board* in the first place.¹⁰ That decision referred to exclusive federal control of “frequency allocation.” But the County does not seek to allocate frequencies here. Interference, especially under these aggravated facts, is a different matter. Thus, CTIA is incorrect to conclude (CTIA Opposition, 5) that the Supreme Court has spoken on the point.

⁸ The 2000 order (¶17) says only that “a local government may not require a facility to comply with *RF emissions or exposure limits* that are stricter than those set forth in the Commission’s rules” (emphasis added).

⁹ The value of local oversight is reinforced by the FCC’s decision to reexamine its rules on categorical exclusion out of concern that they do not account satisfactorily for lateral or spherical radiation. Notice of Proposed Rule Making, ET Docket 03-137, FCC 03-132, ¶8.

The discussion of *Printz*¹¹ (CTIA Opposition, 5-6, n. 20) misses the County's point. It is precisely because, in CTIA's view, "local and state officials [must] refrain from regulating RFI," that the subordinate authorities are then forced back upon their own resources to deal with a looming danger that the federal government has failed to meet. No local or state official faced with massive interference to public safety communications could responsibly neglect to act on the ground that it was none of his or her business.

Ultimately, CTIA answers as do its member carriers commenting in this case, with a tautology: The Order should not be overturned or revised as to exclusive FCC jurisdiction over RFI because the FCC's jurisdiction is exclusive. (CTIA Opposition, 7)

CONCLUSION

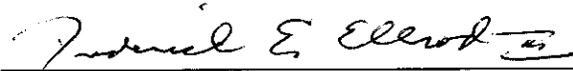
It is intolerable to read the law to preserve an exclusive authority when that sole power is not used promptly or effectively to accomplish the purposes for which the authority was created. For all the reasons discussed above, the County urges that the Order be overturned or revised in a manner that will allow either the County or the Commission to deal effectively with the danger of massively blacked-out public safety

¹⁰ *Head v. New Mexico Board*, 374 U.S. 424 (1963), *discussed in* Application for Review at 4.

¹¹ *Printz v. United States*, 512 U.S. 898 (1997).

communications in a critical region of the U.S. homeland.

Respectfully submitted,

A handwritten signature in cursive script, reading "Frederick E. Ellrod III", with a horizontal line underneath.

James R. Hobson
Frederick E. Ellrod III
Miller & Van Eaton, P.L.L.C.
1155 Connecticut Avenue, N.W. #1000
Washington, D.C. 20036-4306
202-785-0600

Counsel for Anne Arundel County, Md.

October 14, 2003

Certificate of Service

I hereby certify that I have caused to be mailed this 14th day of October, 2003, copies of the foregoing Reply Comments of Anne Arundel County, by first-class mail, postage prepaid, to the following persons:

L. Andrew Tollin
Catherine C. Butcher
Cingular Wireless
Wilkinson Barker Knauer, LLP
2300 N Street , N.W.
Washington, D.C. 20037

Luisa L. Lancette
Vice President, Wireless Regulatory Affairs
Sprint Corporation
401 9th Street, N.W.
Suite 400
Washington, D.C. 20004

Douglas I. Brandon
Vice President, External Affairs
AT&T Wireless Services, Inc.
1150 Connecticut Avenue, N.W.
Fourth Floor
Washington, D.C. 20036

John Muletta
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Christopher R. Day
Andrea Williams
Cellular Telecommunications and
Internet Association
1250 Connecticut Avenue
Suite 800
Washington, D.C. 20036

D'Wana Terry
Chief, Public Safety and
Private Wireless Division
Wireless Telecommunications Bureau
445 12th Street, S.W.
Washington, D.C. 20554

Regina M. Keeney
Attorney for Nextel Communications
Lawler, Metzger and Milkman, LLC
2001 K Street, N.W.
Suite 802
Washington, D.C. 20006



Frederick E. Ellrod III

Washington, D.C.
October 14, 2003

8481\02\JRH01706.DOC