



December 23, 2005

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: ***In the Matter of Proposed Changes to the Commission's Rules Regarding Human Exposure to Radiofrequency Electromagnetic Fields***, ET Docket No. 03-137,
Ex Parte Presentation

Dear Ms. Dortch:

More than two years ago, the Commission initiated the above-referenced proceeding to harmonize its rules for evaluating whether transmitters are compliant with the Commission's RF exposure limits. The record demonstrates that some localities are requiring FCC licensees seeking zoning approval for transmitter installation to establish compliance with extensive technical and operational regulations. These requirements delay public access to valued services, as well as undermine the FCC's statutory authority to evaluate licensee compliance with its technical rules and to manage spectrum in the public interest. T-Mobile USA, Inc. ("T-Mobile") has maintained that it is necessary and appropriate for this proceeding's *Report and Order* to reaffirm the FCC's exclusive jurisdiction to determine whether its spectrum licensees are compliant with its operational and technical rules, including those governing RF exposure limits.

A trend in local zoning reveals the extent to which localities have drifted into the field of authority exclusively occupied by the FCC. Local jurisdictions have begun employing zoning ordinances to establish qualitative limits on the service contours of FCC licensees. These ordinance illustrate how localities are encroaching on the FCC's jurisdiction by using the zoning process to regulate spectrum management, unilaterally modify FCC licenses, and undercut the FCC's market-based model for CMRS competition.

The Lenox, Massachusetts and Clarkstown, New York zoning regimes are instructive.¹ Lenox applies its Personal Wireless Service Facilities and Towers Bylaw ("Bylaw") to placement, construction, modification, and removal of personal wireless service facilities and towers.² Much like the other ordinances T-Mobile has introduced into the record of this proceeding, the Bylaw requires siting applicants to prepare extensive technical showings intended to demonstrate compliance with Lenox's interpretation of the Commission's RF emissions rules. The applicant must also pay for the cost of Lenox's independent technical consultant to review these technical showings, make RF compliance determinations, and monitor RF compliance on an ongoing basis. Through introduction of the Wireless Telecommunications Overlay District ("WTOD"),

¹ We supplement the record with the attached Lenox zoning materials as well as correspondence relating to implementation of a comparable zoning regime by Clarkstown, New York.

² See Footnote 1, *supra*.



the Bylaw also expands the reach of local jurisdiction into management of CMRS spectrum use and competition.

The WTOD is a specific geographic area in Lenox determined by "engineering analysis" that contains sites where "adequate coverage" can be provided to Lenox. Coverage is considered "adequate" if the signal field strength of the base station is greater than -95 dBm for at least 75% of the area served. On its face, Lenox's "adequate coverage" standard reflects a fundamental misunderstanding of engineering performance design for commercial wireless networks. But, more importantly, it belies the fact that localities simply have no jurisdiction to regulate the technical and operational elements of the Commission's spectrum licensees.

Lenox and Clarkstown contend that the Communications Act is "silent" regarding a qualitative definition for personal wireless coverage, therefore state and local governments are free to define coverage in terms of signal strength. This argument ignores that for more than a decade, the Commission has decided the public interest is best served through a flexible, market-oriented approach towards regulation of personal wireless services. Central to that concept is freeing different service providers to vigorously compete for market share on a number of different fronts. The Commission has recently recognized that as commercial mobile penetration moves closer to the saturation point, the key to attracting new customers and retaining existing customers is improving network coverage, capacity, and capabilities. The principal way providers have improved network coverage and quality is by increasing the number of cell sites. *Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Tenth Report, 36 CR 1157 (2005).

Local regulations that serve as absolute bars to service quality improvement directly undercut the Commission's competitive model for personal wireless services and long-standing national spectrum management policies³. A conscious decision to deregulate spectrum-based services is not "federal silence," and under those circumstances, localities cannot substitute their regulatory and public policy judgments for those made by the Commission.⁴

³ The FCC has routinely emphasized that its control over the technical aspects of the wireless network applies on a national basis and precludes conflicting state and local regulation. Even before it authorized commercial cellular deployment, the FCC made clear that its technical standards for cellular communication *must* "apply nationwide . . . without regard to state boundaries or varying local jurisdictions." *Future Use of Frequency Band 806-960 MHz*, 46 FCC 2d 752, 766-67 (1974). In 1981, the FCC reaffirmed that the "essential objective" of its wireless rules was to "achieve nationwide compatibility," and as a result again "assert[ed] federal primacy over the areas of technical standards and competitive market structure for cellular service." *Use of the Bands 825-845 MHz and 870-890 MHz*, 86 FCC 2d 469, 503- 505 (1981); *See* 47 U.S.C. § 332(c)(7)(B)(i)(II).. On reconsideration, the FCC reiterated that "[i]t is imperative that no additional requirements be imposed by the states which could conflict with our standards and frustrate the federal scheme for the provision of nationwide cellular service." *Use of the Bands 825-845 MHz and 870-890 MHz*, 89 FCC 2d 58, 66 (1982).

⁴ *See National Cable Telecommunications Association v. Brand X Internet Services*, 125 S. Ct. 2688 (2005) (FCC lawfully exercised its statutory authority in deciding that cable modem service is not a



The WTOD is also portrayed as a tool for balancing the need for additional wireless services against municipal land use prerogatives. Again, in practice, the WTOD is aimed at a different set of priorities. Clarkstown's technical advisor views the WTOD as limiting "proliferation of cellular towers on private residential properties or near *occupied buildings*" [emphasis added]. From this characterization it is fair to conclude that concerns about the effects of RF emissions on human health also contributed to imposition of the WTOD criteria in Clarkstown.

The continuing growth of local ordinances that encroach on the Commission's exclusive jurisdiction over technical and operational regulation of its licensees underscore the need for action. These jurisdictions are impeding the delivery of enhanced services, including wireless broadband, wireless E-911, and wireless priority access service with no countervailing public interest benefits. The public is also being denied the level of improvement in network quality and capabilities that today's market demands. The Commission can reverse this trend by clarifying in this proceeding that subjecting licensees to the technical and operation compliance determinations or regulations of many different jurisdictions undermined the interstate nature of licensing and managing spectrum in the public interest.

Pursuant to Section 1.1206(b) of the Commission's Rules, 47 C.F.R. § 1.1206(b), this letter is being filed electronically for inclusion in the public record of the above-referenced proceeding.

Respectfully submitted,

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telecommunications service, and is therefore exempt from mandatory common carrier regulation, noting Commission's broad discretion to determine that a minimal regulatory environment best promotes investment and innovation in a competitive market).