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March 18, 2021

Louisville Metro Planning Commission
c/o Zach Schwager
Metro Development Center
444 S. 5th Street, Suite 300
Louisville, KY 40202

RE: Exclusion of Radio Frequency Considerations Regarding Application to Construct a Wireless Communications Facility
Location: 4513 Blevins Gap Road, Louisville, KY 40272
Applicant: New Cingular Wireless, PCS, LLC, d/b/a AT&T Mobility
Site Name: Headley Hollow
Docket Number: 21CELL0001

Dear Commission Members:

I am providing this correspondence for inclusion in the administrative record of the above proceeding and am providing a contemporaneous copy to Planning Commission Attorney. The purpose of this correspondence is to address a potential issue that the Planning Commission ("Commission") may face in the course of consideration of the above-referenced matter and to request for appropriate measures to be taken by the Commission and/or staff or legal counsel to exclude receipt of testimony and other evidence regarding the environmental effects of radio frequency emissions in connection with any public hearing held to review the Uniform Application for construction of a cellular tower.

From our experience handling similar applications we have come to anticipate the possibility that radio frequency interference issues or health effect concerns may be raised from time to time in the context of public hearings. However, these issues are outside the scope of the Commission's, since radio frequency emissions are the subject of federal regulation, including regulation by the Federal Communications Commission (the "FCC").

Local regulation of wireless communications facility siting based upon radio frequency issues is prohibited specifically by the Telecommunications Act of 1996 and generally as a result of the FCC's pervasive jurisdiction over this area of regulatory concern. The Telecommunications Act of 1996 flatly prohibits local regulation of wireless communications facilities on the basis of the environmental effects of radio

frequency emissions. This prohibition is codified at 47 USC Section 332(c)(7), as follows:

> "No State or local government or instrumentality thereof my regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communication] Commission's regulations concerning such emissions." (emphasis added). Id. at 47 U.S.C. Section 332(c)(7).

A copy of the relevant FCC license granted to Applicant for the area to be served by the proposed wireless telecommunications facility was provided as part of the Uniform Application. As an FCC licensee, Applicant is subject to the FCC regulation referenced at 47 U.S.C. Section 332(7)(B)(iv), and courts have recognized that the Telecommunications Act prohibits state and local governments from regulating wireless telecommunications facilities on the basis of radio frequency interference issues.

Even though federal law makes Kentucky planning commissions subject to the aforementioned statutory prohibition regardless of any companion state statute, the Kentucky Legislature has used almost identical language in adopting the same statutory prohibition in KRS 100.986(1).

For further reference by the Commission's attorney, I have attached a memorandum discussing case law authority on these issues.

In light of federal and state statutory prohibitions, it is clear that an inquiry into alleged radio frequency issues by the Commission as part of this review would put the Commission directly at odds with the Federal Communications Act, the Telecommunications Act of 1996, FCC policy, and Kentucky law. Consequently, the introduction of any radio frequency interference or health effects evidence during the public hearing would likely be improperly and unfairly prejudicial to the Applicant and outside the Commission's proper scope of review.

Applicant requests that the Commission implement affirmative measures to prevent introduction and consideration of testimony and other evidence on radio frequency issues at the public hearing and from its deliberations on the subject application. Excluding radio frequency and health effect evidence from the public hearing will avoid potential conflicts with federal law and the proper exercise of jurisdiction over these matters by the FCC and will protect the validity of the Commission's ultimate decision on my client's proposal. It is our expectation that the Commission will cut off and bar improper discussion in order to avoid the introduction of prohibited evidence so that the hearing will remain focused on the land use planning issues which are within the Commission's jurisdiction.

Please file this correspondence and enclosures in the administrative case file for the Application and do not hesitate to contact us should you have any questions or comments concerning this information.

Sincerely,

David A. Pike
Attorney for Applicant

Enclosure

MEMORANDUM

FEDERAL PROHIBITION ON LOCAL REGULATION OF WIRELESS COMMUNICATIONS FACILITIES ON THE BASIS OF THE ENVIRONMENTAL EFFECTS OF RADIO FREQUENCY EMISSIONS

Radio frequency considerations have been preempted specifically by the Telecommunications Act of 1996 and generally as a result of the Federal Communications Commission's ("FCC's") pervasive jurisdiction over this area of regulatory concern. Because of this preemption, local zoning bodies should take care to avoid the introduction of improper radio frequency evidence in proceedings on an application requesting approval for a wireless communications facility so that the focus remains on the land use planning issues that are the proper subject for review and decision.

The Federal Telecommunications Act of 1996, as codified at 47 U.S.C. Section 332(7)(B)(iv) (the "Act"), provides: "No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communication] Commission's regulations concerning such emissions." Accordingly, federal and state courts have recognized that the Telecommunications Act prohibits state and local governments from regulating wireless telecommunications facilities on the basis of radio frequency interference issues.

Case precedent supports the Federal statutory prohibition in reference to applications of the type now pending. The U.S. Supreme Court's 2015 Opinion in T-Mobile South, LLC v. City of Roswell Georgia, 135 S.Ct. 808, 190 L.Ed.2d 679 (U.S. 2015) explains: "The Act provides that localities ... may not regulate the construction of personal wireless service facilities "on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communications Commission's] regulations concerning such emissions." §§332(c)(7)(B)(i)(I), (iv)." Id. at 688-689.

As far back as 2000, the U.S. Court of Appeals for the Sixth Circuit[1] recognized the statutory exclusion of radio frequency emissions issues in wireless site permitting cases in its Opinion in Telespectrum, Inc. v. PSC, 227 F.3d 414 (6th Cir. 2000).[2] The U.S. Court of Appeals explained:

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[1] Kentucky, Tennessee, Ohio, and Michigan are in the jurisdiction of the Sixth Circuit.

[2]Even before the Act's specific exemption as to wireless service facilities, FCC preemption on emissions issues had long since been established. Broyde v. Gotham Tower, Inc., 13 F.3rd 994 (6th Cir. 1994) explained the preeminence of FCC regulation:

"... [W]e recognize that concerns of health risks due to the emissions may not constitute substantial evidence in support of denial by statutory rule, as no state or local government or instrumentality thereof may regulate the construction of personal wireless facilities "on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions." 47 U.S.C. § 332(c)(7)(B)(iv)." Id. at 424.

Another controlling precedent supporting the prohibition is the U.S. Court of Appeals for the Sixth Circuit Opinion in New Par d/b/a Verizon Wireless v. City of Saginaw, 301 F.3d 390 (6th Circuit 2002). In a decision overturning a local government denial of a tower permit, the U.S. Court of Appeals stated:

"We conclude that the Board's denial of New Par's variance request was not supported by substantial evidence contained in a written record. Only three concerns about the cellular tower were raised at the Board meetings: (1) aesthetics, (2) health and safety issues regarding electromagnetic emissions; and (3) whether New Par could instead put the tower on railroad property owned by CSX. .... [T]he Act explicitly prohibits local board decision making "on the basis of the environmental effects of radio frequency emissions to the extent such facilities comply with the Commission's regulations concerning such emissions." Id at 398.

Of course, in any judicial review of a denial of the Uniform Application by the Commission, a District Court would apply the law of the Sixth Circuit. Fortunately, the Sixth Circuit's direction is unambiguous. In 2012, the U.S. Court of Appeals for the Sixth Circuit in its T-Mobile Central, LLC v. Charter Township of West Bloomfield, 691 F.3d 794, 800 (6th Cir. 2012) Opinion was very clear regarding the express application of the Telecommunications Act's limitations on local governments authority to consider RF

The plaintiffs, residents of a nearby neighborhood, claim that the radio signals broadcast from Gotham Tower cross their property, leaving behind a wake of malfunctioning household appliances.

...

Resolution of this matter, however, turns on a single issue: the existence of an irreconcilable conflict between the FCC's exercise of exclusive jurisdiction over the regulation of radio frequency interference and the imposition of common law standards in a damages action. As the Supreme Court recognizes, the FCC jurisdiction "over technical matters" associated with the transmission of radio signals "is clearly exclusive." *Head v. New Mexico [Board/Commission] of City Councils in Optometry*, 374 U.S. 424, 430 n. 6, ... (1963)) ... The radio signal interference at issue here falls within the FCC's technical domain. Id. at 996-997.

emissions evidence. In reviewing a local government denial of a wireless facility application, the Sixth Circuit explained:

> "... There was no evidence whatsoever that the wireless facility would have any impact on the conifers, beyond Mr. Grondin's accusation. Further, concerns that RF emissions could potentially impact trees or children at the daycare were prohibited by statute as grounds to deny a wireless permit. "No state or local government or instrumentality thereof may regulate the construction of personal wireless facilities on the basis of environmental effects of RF emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions. 47 U.S.C. Section 332(c)(7)(B)(iv)...." (Emphasis added) Id. at 800.

Thus, the U.S. District Courts and local governments in the Sixth Circuit have unequivocal guidance from the relevant U.S. Court of Appeals on the continuing validity of the prohibition on regulation of the permitting of wireless facilities on the basis of purported environmental effects of radio frequency emissions. Other federal circuits have similarly applied the statutory prohibition.[3] The U.S. District Courts in the Sixth Circuit are obligated to and have followed this guidance.[4]

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[3] T-Mobile Northeast LLC v. Loudon County Board of Supervisors, 748 F.3d 185 (4th Cir. 2014), the Fourth Circuit Court of Appeals strongly supported the statutory prohibition on reliance on radio frequency emissions testimony:

> "The Board contends on appeal that the district court erred in ordering it to grant T-Mobile permits to construct the facility at the Silo Site in Lovettsville on the basis that the Board illegally relied on the environmental effects of radio frequency emissions. See 47 U.S.C. § 332(c)(7)(B)(iv). The Board argues that this reason, albeit illegal, was given by only one Board member and therefore was "not binding on the Board as a whole." The Board also argues that even if this reason were binding on it, its decision to deny the application was also based on valid reasons that were sufficient to deny the application, and that therefore the court's injunction was simply punishment for the inclusion of an illegal reason.
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> At its October 17, 2011 meeting, the Board rejected T-Mobile's application for the Silo Site, citing the silo's "significant structural presence" and related aesthetic complaints. At the suggestion of Supervisor Miller, the Board also included as a reason for rejection the antenna's "negative environmental impact." As Supervisor Miller explained, "We've had speaker after speaker come in here and talk to us about their concerns of being exposed to radiation from an evolving, dynamic technology." With particular relevance to the issue before us, in proposing his amendment, Supervisor Miller told the Board that it was made "notwithstanding the prohibition on what I'm going to propose [i]n the Telecommunications Act of 1996."

The Sixth Circuit recently reemphasized the federal statutory prohibition of consideration of radio frequency emissions effects in its 2017 Opinion styled Robbins v. New Cingular Wireless PSC, LLC, 854 F.3d 315 (6th Cir. 2017):

> "Congress passed the TCA to foster industry competition in local markets, encourage the development of telecommunications technology, and provide consumers with affordable access to telecommunications services. *Telecommunications Act of 1996*, Preamble, *Pub. L. No. 104-104, 110 Stat. 56 (1996)*. The TCA furthers those goals by preventing

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> Based on this record, it is thus indisputable that the Board as a whole regulated on the basis of radio frequency emissions, a prohibited basis under the Act. See 47 U.S.C. § 332(c)(7)(B)(iv). This explicit statutory prohibition against regulating the placement, construction, and modification of wireless facilities "on the basis of the environmental effects of radio frequency emissions" is a limitation imposed by the Act on the Board's authority. And the fact that the Board relied on valid reasons to support its decision does not immunize its violation of a statutory limitation."
>
> We also agree with the district court that in the circumstances presented -- where radio frequency emissions were a genuine and substantial concern of the Board and where the County Planning Commission, when considering factors other than radio frequency emissions, found the Silo Site application in compliance with the existing criteria for evaluating such applications -- the matter should not be remanded to the Board. The district court properly interpreted the record in concluding that while the Board would, on remand, omit its concerns over radiation when giving reasons for denial of the application, the radiation concerns would nonetheless persist as part of the decision making process. To reject the district court's conclusions in the circumstances presented in this case would mock Congress's prohibition against the use of radio frequency emissions as a basis for regulating wireless facilities when those emissions were in compliance with FCC regulations. See 47 U.S.C. § 332(c)(7)(B)(iv)." Id. at 192-195.

[4]Am. Towers, Inc. v. Wilson County, 2014 U.S. Dis. LEXIS 131 (M.D. Tenn. 2014)("The legal problem for Wilson County - and the reason the stated worries about the tower's impact on the school are not substantial evidence that can support the county's denials - is that health concerns are an impermissible ground of denial under the TCA. See 47 U.S.C. Section 332(c)(7)(B)(iv)...."); T-Mobile Central, LLC v. City of Fraser, 675 F.Supp.2d 721, 732 (S.D. Michigan 2009).

local governments from impeding the siting and construction of cell towers that conform to the FCC's RF-emissions standards. *See 47 U.S.C. § 332(c)(7)(B)(iv)*. By delegating the task of setting RF-emissions levels to the FCC, Congress authorized the federal government—and not local governments—to strike the proper balance between protecting the public from RF-emissions exposure and promoting a robust telecommunications infrastructure. *See id.; In the Matter of Procedures for Reviewing Requests for Relief from State & Local Regulations Pursuant to Section 332(c)(7)(b)(v) of the Commc'ns Act of 1934 in the Matter of Guidelines for Evaluating the Envtl. Effects of Radiofrequency Radiation, 12 F.C.C. Rcd. 13494, 13505 (1997)*." Id. at 319-320.

In short, the U.S. Court of Appeals for the Sixth Circuit, in multiple published opinions from 2000 to 2017 has upheld and enforced the federal Telecommunications Act of 1996 prohibition on regulation of proposed cellular towers based on environmental effects of radio frequency emissions.

KENTUCKY STATUTORY PROHIBITION ON LOCAL REGULATION OF WIRELESS COMMUNICATIONS FACILITIES ON THE BASIS OF THE ENVIRONMENTAL EFFECTS OF RADIO FREQUENCY EMISSIONS

The Kentucky Legislature has effectively incorporated the federal statutory prohibition into KRS100.986(1):

> "In regulating the placement of cellular antenna towers, a planning commission shall not:
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> > (1) Regulate the placement of a cellular antenna tower on the basis of the environmental effects of radio frequency emissions to the extent that these facilities comply with the regulations of the Federal Communications Commission concerning radio frequency emissions; ...." (Emphasis added). Id. at KRS 100.986(1).

KRS 446.010(39) provides "As used in the statute laws of this state, unless the context requires otherwise: ... (39) "shall" is mandatory; ...." Thus, a planning commission has no discretion to fail to comply with KRS 100.986(1). The statutory prohibition against consideration of environmental effects of radio frequency emissions is mandatory.

CONCLUSION

In summary, the statutory prohibition of basing a wireless permitting decision on the effects of radio frequency emissions is unquestionably binding on local governments in Kentucky. 47 U.S.C. § 332(c)(7)(B)(iv) has been recognized by the U.S. Supreme Court, the federal courts in the Sixth Circuit, and the federal courts of other circuits since shortly after adoption of the Act in 1996. The Kentucky Legislature has adopted the same prohibition at KRS 100.986(1).

Applicant requests the Commission make its decision on the Application consistent with such federal and state statutes and precedent in order to avoid violation of the Applicant's clear rights in connection with the consideration of the Application pursuant to all applicable law.