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Memorandum

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to: Scientel Solutions, LLC

from: Dennis P. Corbett
E. Ashton Johnston

subject: Exclusive Federal Regulation of Radio Frequency Interference Matters

The question of whether issues concerning radio frequency interference ("RFI") may be considered by a local or state authority in connection with an application for a permit to construct communications facilities arises from time to time, and has long been well settled. The answer is no, because the field is preempted by federal law. Consequently, it is not appropriate for a local or state authority to consider potential RFI issues related to any Scientel Solutions, LLC application for permit relating to the construction of towers or the installation of transmit/receive facilities/equipment.

The issue has been addressed by numerous state and federal courts throughout the country. The Eight Circuit Court of Appeals, in a decision that thoroughly considered federal legislation, regulations promulgated by the Federal Communications Commission ("FCC"), and FCC adjudications in order to determine whether and to what extent federal law preempts local regulation of RFI issues, held that "based on statutes and agency regulations and adjudications, Congress intended federal regulation of RFI issues to be so pervasive as to occupy the field." *Southwestern Bell Wireless, Inc. v. Board of County Commissioners*, 199 F.3d 1185, 1193 (10th Cir. 1999). The Court in *Southwestern Bell* found its analysis "consistent with decisions of virtually all courts considering RFI preemption." *Id.* The Second Circuit Court of Appeals likewise held that "[a]llowing local zoning authorities to condition construction and use permits on any requirement to eliminate or remedy RF interference 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311, 325 (2d Cir. 2000) (quoting *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152 (1983)). As the Second Circuit noted in *Freeman*, numerous other courts "have reached the same conclusion when faced with the question whether federal law preempts state common law nuisance actions purporting to regulate RF interference." *Id.* (citing, *inter alia*, *Broyde v. Gotham Tower, Inc.*, 13 F.3d 994, 998 (6th Cir. 1994).

With respect to federal legislation, the Communications Act of 1934, as amended (the "Act"), applies to "all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States," with the purpose of "maintain[ing] the control of the United States over all the channels of radio transmission." 47 U.S.C. §§ 152(a), 301. The Act created the FCC and "empowers it to regulate radio communications including 'technical and engineering aspects.'" *Southwestern Bell*, 199 F.3d at 1190 (quoting *National Broad. Co. v. United States*, 319 U.S. 190, 215 (1943). Indeed, the FCC's jurisdiction over "technical matters" associated with the transmission of radio signals "is clearly exclusive." *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 430 n.6 (1963).

When Congress amended the Act in 1982 to give the FCC explicit authority to regulate home electronic equipment with the potential to cause RFI (*see* 47 U.S.C. § 302a(a)), the House Conference Report accompanying the amendments clarified that "exclusive jurisdiction over RFI incidents (including pre-emption of state and local regulation of such phenomena) lies with the FCC." H.R. Conf. Rep. No. 97-765, at 23 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2261, 2267. The Report stated that:

> [s]uch 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. The Conferees believe that radio transmitter operators should not be subject to fines, forfeitures or other liability imposed by any local or state authority as a result of interference appearing in home electronic equipment or systems. Rather, the Conferees intend that regulation of RFI phenomena shall be imposed only by the Commission.

Id. at 33, 1982 U.S.C.C.A.N. at 2277. This history "evidences Congress's intent that the FCC have exclusive jurisdiction over RFI complaints." *Southwestern Bell*, 199 F.3d at 1191.

FCC regulations also preempt state and local regulation of RFI issues. *See Hillsborough County v. Automated Med. Lab., Inc.*, 471 U.S. 707, 713 (1985) (state laws can be pre-empted by federal regulations to the same extent as federal statutes). The FCC has sole authority to promulgate regulations "as it may deem necessary to prevent interference between stations." 47 U.S.C. § 303(f). As the Eight Circuit found in *Southwestern Bell*, the "FCC's regulations show its broad authority over RFI issues," 199 F.3d at 1192 (citing 47 C.F.R. §§ 0.111(e) [now 47 C.F.R. 0.111(a)(4)] and 0.131(h) (granting FCC Enforcement Bureau power to "resolve complaints regarding radiofrequency interference and complaints regarding radiofrequency equipment and devices," with input from the FCC Wireless Telecommunications Bureau), 47 C.F.R. §§ 22.353, 24.237, 27.58, 90.173(b), 90.403(e) (rules regarding resolution of interference disputes), and 47 C.F.R. §§ 1.80(a)(1), (b)(4) (FCC can assess a fine for failure to comply with FCC permit or license). *Southwestern Bell*, 199 F.3d at 1192. The frequencies licensed by the FCC for use by Scientel Solutions are subject to comparable technical regulations. *See* 47 C.F.R. §§ 101.101-151.

Finally, reviewing courts have affirmed the FCC's authority to preempt local regulation of RFI issues:

> If the agency's choice to pre-empt "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."

City of New York v. FCC, 486 U.S. 57, 64 (1988) (upholding FCC's choice to preempt state technical standards over cable television signals) (citation omitted). Of relevance here is that, "[i]n challenges to local zoning ordinances or permit conditions that would regulate RFI, the FCC has ruled that it has exclusive jurisdiction over RFI." *Southwestern Bell*, 199 F.3d at 1192 (citing, *inter alia*, *In re Mobilecomm of New York, Inc.*, 2 FCC Rcd 5519 (1987) (invalidating local zoning ordinance regulating RFI, finding "Congress undoubtedly intended federal regulation to completely occupy [the RFI] field to the exclusion of local and state governments")). Furthermore, very practical considerations undergird all of the fundamental principles articulated above: "RFI is a federal interest and requires a national approach to regulate the field." *Southwestern Bell*, 199 F.3d at 1192 (citing *Fetterman v. Green*, 455 Pa.Super. 639, 689 (1997) (holding RFI "involves the resolution of technical matters ceded to the FCC due to the need for national uniformity and consensus")).

Accordingly, the forum for resolving disputes related to potential RFI matters is the FCC, where an aggrieved party may file a complaint or seek redress against the FCC license held by the other party. Moreover, a prospective plaintiff or complainant would have an opportunity to pursue federal court review of its claims, as the Act allows aggrieved parties to seek review of FCC decisions and orders in the United States Court of Appeals for the District of Columbia Circuit, 47 U.S.C. § 402(b). *See Broyde*, 13 F.3d at 998.