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M E M O R A N D U M

To: Client

From: Technology Law Group, LLC

Date: November 9, 2017

Re: *Can a Municipality Consider Radio Frequency Interference in Considering a Permit Application for Construction of a New Telecommunications Tower?*

This Memorandum provides a summary review and analysis of federal law and regulation applicable to consideration of radio frequency interference ("RFI") as it relates to the construction of a new telecommunications tower.

Background

The matter before the City of Aurora (the "City") involves two wireless service competitors, CyrusOne LLC ("CyrusOne"), and Scientel Solutions, LLC ("Scientel"). The City granted CyrusOne's application for a special use permit for the construction of a telecommunications tower. Scientel has submitted a similar application, to which CyrusOne is opposed.

CyrusOne's cites three reasons why Scientel's application should not be granted, or at a minimum, delayed. First, it claims that Scientel's antenna would create RFI with CyrusOne's transmitter. Second, it claims Scientel's antenna would create signal congestion. And third, it claims Scientel's tower (i.e., not the antenna) would create line-of-sight interference or blockage. Scientel disputes CyrusOne's claims, both as a matter of fact and as to whether the City has the authority to reject the application on the basis of CyrusOne's claims. As set forth below, we believe that the determination of whether the Scientel tower will interfere with the CyrusOne tower is subject to the preemptive jurisdiction of the Federal Communications Commission ("Commission") and, thus, cannot be the basis of denial by the City.

Discussion

The Supremacy Clause, Article VI of the Constitution, provides Congress with the power to preempt state law. Further, the Supreme Court has found that Congress' preemption power extends to both state and local ordinances. Preemption comes in two forms; express, and field. Express preemption occurs when the language of the federal statute reveals an express congressional intent to preempt state law. The courts have not found local regulation of RFI expressly preempted. Field preemption occurs when Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the states to supplement federal law, or if an Act of Congress touches a field in which the federal interest is so dominant that the federal system is presumed to prohibit enforcement of state laws on the same issue. The courts have identified field preemption as the "most pertinent" of the various forms of federal preemption to the issue of local regulation of RFI.[1] Preemption may result not only from action taken by Congress; a federal agency acting within the scope of its Congressionally delegated authority may also preempt state regulation.[2] It is well settled that federal regulations have the same preemptive force as federal statutes.[3]

The Communications Act, 47 USC 151, *et seq*., establishes the Commission's authority to address and regulate transmissions of radio signals. The Commission is empowered to address "technical and engineering impediments" to the "effective use of radio in the public interest."[4]

In connection with this general regulatory authority, the FCC has been given specific statutory authority to regulate transmission of radio energy that creates interference. 47 U.S.C. § 301, gives the Commission authority to "maintain the control of the United States over all the channels of radio transmission. . . ." Section 302(a)

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1 *See, e.g., Freeman*, 204 F.3d at 320.

2 *Louisiana Public Service Commission,* 467 U.S. at 369. *See also Johnson County,* 199 F. 3d at 1192 (*citing Hillsborough County v. Automated Med. Lab, Inc.,* 471 U.S. 707, 713 (1985) (state laws can be preempted by federal regulations as well as by federal statutes)).

3 *Fidelity Savings and Loan Ass'n v. de las Cuesta*, 458 U.S. 141, 153-54 (1983); *Freeman*, 204 F.3d at 321.

4 *See National Broadcasting Co. v. United States,* 319 U.S. 190, 214, 63 S. Ct. 997, 1008, 87 L. Ed. 1344 (1943). *See also FCC v. Pottsville Broadcasting Co.,* 309 U.S. 134, 138, 60 S. Ct. 437, 439, 84 L. Ed. 656 (1940) (Communications Act expressed Congress's desire to maintain, through administrative control, grip on dynamic aspects of radio transmission); *Head v. New Mexico Bd. of Examiners,* 374 U.S. 424, 430, n. 6, 83 S. Ct. 1759, 1763, n. 6, 10 L. Ed. 2d 983 (1963) (the FCC's jurisdiction over technical matters associated with transmission of radio signals is clearly exclusive).

authorizes the Commission to promulgate "reasonable regulations (1) governing the interference potential of devices which in their operation are capable of emitting radio frequency energy by radiation, conduction, or other means in sufficient degree to cause harmful interference to radio communications." Section 303(f) of the Communications Act provides that, the FCC shall **"**[m]ake such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter." 47 U.S.C. § 303(f). The regulations associated with Section 303(f) provide further that the Commission, through its Enforcement Bureau, the authority to "[r]esolve complaints regarding radiofrequency interference and complaints regarding radiofrequency equipment and devices, including complaints of violations of sections 302 and 333 of the Communications Act." 47 C.F.R. 0.111(a)(4). Thus, there is no doubt that the Commission has jurisdiction over all channels of radio transmission, the authority to promulgate regulations governing the any interference associated with the operation of these channels as well as the right to resolve complaints regarding claims of interference.

As noted above, CyrusOne makes three interference claims. The first two—that Scientel's antenna would create radio frequency interference with CyrusOne's transmitter and that Scientel's antenna would create signal congestion—clearly fall within the Commission's jurisdiction to regulate interference caused by the radio communications themselves. As Section 153(40) of the Act, 47 USC § 153(40) defines the term "radio communication", as used in Section 302(a), to include both the radio transmissions themselves as well as "all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission[.], there is no doubt that the Commission's exclusive jurisdiction also covers the Scientel tower that is the subject of CyrusOne's third claim.

The Commission and the federal courts have consistently found that the Commission not only has authority to regulate radio transmissions as well as all related interference issues, but that the Commission's jurisdiction is exclusive and any attempt by state or local governments to regulate in the area of radio transmissions and RFI is completely preempted. For example, the Commission addressed this issue specifically in *960 Radio.*[5] In that proceeding, a local zoning board issued a conditional use permit to an FM radio facility subject to a restriction that the applicant "not operate the new facility so as to produce electronic interference to existing facilities" or to TV translators.[6] In a petition for declaratory ruling, the owner of the FM facility sought to void the

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[5] *In the Matter of 960 Radio, Inc*., *Memorandum Opinion and Declaratory Ruling*, FCC 85-578, 1985 WL 193883 (Nov. 4, 1985) ("*960 Radio*"). *See also 960 Radio, Inc., 374 U.S. 424 (1963)*

[6] *Id.* at ¶3.

requirement on the ground that "jurisdiction to control interference over the airwaves rests exclusively with the [Commission]."[7] The Commission found that sections 2, 301, and 303(c)-(f) of the Communications Act,[8] taken together, "comprehensively regulate interference, [and therefore] Congress undoubtedly intended federal regulation to completely occupy that field to the exclusion of local and state governments." The Commission further found that "any doubt about [the Commission's] jurisdiction to regulate interference was removed" with Congress' statement in the House Conference Report to the 1982 provisions of section 302 of the Act, which provides:

> The Conference Substitute is further intended to clarify the reservation of exclusive jurisdiction to the Federal Communications Commission over matters involving RFI. Such matters shall not be regulated by local or state law. . . *The Conferees intend that regulation of RFI phenomena shall be imposed only by the Commission*.[9] (emphasis added)

Recent federal court decisions are consistent with the Commission's conclusions in *960 Radio.*[10] In *Johnson County*, for example, the Tenth Circuit considered a local zoning provision that adopted an "interference regulation" prohibiting wireless telecommunications towers and antennas from operating in a manner that interfered with public safety communications.[11] The regulation also authorized the county's zoning authority to determine when interference existed and, after proper notice and opportunity for a hearing, to force the offending facility to cease operations.[12] Citing the Communications Act, Commission regulations, and Commission decisions, the Court determined that "Congress intended federal regulation of RFI issues to be so pervasive as to occupy the field."[13] The Court further noted, "this analysis is consistent with decisions of virtually all courts considering RFI preemption."[14] For these reasons, the Court concluded that the local regulation was void under the doctrine of field preemption.

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[7] *Id.*

[8] *See 960 Radio* at ¶5.

[9] H.R. Conf. Rep. No. 97-765, at 33 (1982), reprinted in 1982 U.S.C.C.A.N. 2261, 2277.

[10] *See Johnson County*, 199 F.3d 1185.

[11] 199 F.3d at 1188.

[12] *Id.*

[13] 199 F.3d at 1193.

[14] *See Johnson County,* 199 F. 3d at 1192 (citing numerous federal and state court decisions holding that RFI falls within the Commission's exclusive jurisdiction).

The Commission, and courts have been consistent in the application of preemption on RFI, even when the state or local authority purportedly attempts to ensure a party's compliance with FCC regulations. For example, in *Johnson County*, the Court held "we disagree with the County's argument that the provisions are not a direct regulation of RFI, but rather a "perfectly lawful effort to assure itself that a carrier is complying with FCC standards." On this basis, the Court rejected the County's effort to address RFI issues through its zoning regulations.[15]

In its Memorandum the Troutman Sanders ("TS") law firm, representing CyrusOne, argues that the precedent supporting preemption offered by Scientel is non-binding and distinguishable. That argument is wrong on both counts. In support, TS references Section 332(c)(7)(A) which provides that, "Except as provided in this paragraph, nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332(c)(7)(A). However, Section 332(c)(7)(A), by its terms, only applies to "personal wireless services", which are defined, in Section 332(c)(7)(C), as the reference specifically states that it is limited to "personal wireless services", as "commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services"; it does not apply to the point-to-point facilities at issue here. The limited effect of Section 332(c)(7)(A) to commercial mobile services was placed beyond doubt in Section 601 of the Act, which, provides that "[t]his Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State or local law unless expressly so provided in such Act or amendments." 47 U.S.C. § 152 (note) (Supp.1997)." As the Act does not expressly except the point-to-point services at issue from exclusive jurisdiction of the Commission, they are subject to the Commission's exclusive jurisdiction notwithstanding Section 332(c)(7)(A)'s limited application to commercial mobile services.

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[15] *See also Southwestern Bell Wireless, Inc. v. Board of County Commissioners*, 199 F.3d 1185, 1193 (10 th Cir. 1999) ("Southwestern Bell") ("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*, 199 F.3d 1185, 1192 ("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"); *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))("[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.'")

Moreover, even if the matter at issue did involve placement, construction or modification of wireless facilities, § 332(c) (7) does not authorize state or local regulation of radio frequency interference. Under this subsection, state and local regulation of personal wireless service facilities with respect to the environmental effects of radio frequency emissions is preempted. 47 U.S.C. § 332(c) (7) (B) (iv). The statute is silent as to the ability of state or local authorities to regulate with respect to the radio frequency interference at issue here. TS' reference to the New *York SMSA* case also arises in the context of the environmental effects of a tower to be used for commercial mobile wireless services and thus that case is plainly not applicable to the point-to-point services at issue here.

Finally, TS argues that the existence of language in the City ordinances that considers interference issues requires that those issues be considered here. The fact that certain City ordinances may address interference issues cannot form the legal basis of jurisdiction over the interference issues in the instant matter where such jurisdiction is expressly and directly reserved to the Commission.[16]

Conclusion

Taken together, the Commission and court decisions clearly establish that the Commission has sole jurisdiction to regulate RFI, to the exclusion of provisions in permitting, local zoning or other regulations.

The absence of City jurisdiction over these issues does not mean that CyrusOne lacks a remedy. Indeed, a party opposed to the construction of a tower on the basis of the possibility, or actual, RFI may take its complaint to the FCC Enforcement Bureau's Spectrum Enforcement Division which, in conjunction with the applicable FCC regional and field offices, is responsible for responding to interference complaints involving FCC licensees.

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[16] We do not address TS'arguments relating to the cases cited by Scientel as we do not rely on those cases. We do note, however, that TS' arguments are both untenable and dubious, and do not counter the ultimate finding that the Comission has exclusive jurisdiction over the interference issues being considered here.