

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

In the Matter of)
)
Petition for Declaratory Ruling That Section)
332(c)(7)(B)(iv) of the Communications Act) DA 97-2539
Preempts State Court Actions Limiting the)
Construction of Cellular Facilities Based Upon)
Radio Frequency Emission Concerns)

To: Chief, Wireless Telecommunications Bureau

**REPLY OF 360° COMMUNICATIONS COMPANY
TO COMMENTS ON PETITION FOR DECLARATORY RULING**

360° Communications Company (“360°”), by its attorney, hereby submits its reply to comments on its above-captioned Petition. In the Petition, 360° requests a declaratory ruling that Section 332(c)(7)(B)(iv) of the Communications Act¹ preempts the ability of state courts to regulate or enjoin the placement or construction of cellular facilities, such as the Texas transmitter proposed by 360°, based upon radio frequency emission concerns, where such facilities comply with federal emissions regulations. As detailed below, the comments overwhelmingly support the grant of 360°’s Petition. 360° accordingly urges prompt action by the Commission in this regard.

The commenters in this proceeding are virtually unanimous in asserting that the preemption language in Section 332(c)(7)(B)(iv) clearly covers the state court action 360° describes in its Petition. This statutory provision provides that

¹ 47 U.S.C. § 332(c)(7)(B)(iv).

[n]o State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service² 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.³

As emphasized by American Mobile Telecommunications Association, Inc. ("AMTA"), among others, "the language of the Act could not be plainer."⁴ On its face, Section 332(c)(7)(B)(iv) clearly and decisively preempts states and localities from considering the effects of radio frequency emissions in regulating cellular facilities, so long as the facilities comply with federal emissions regulations.⁵

The legislative history of this provision further ensures that there can be no ambiguity as to its meaning by explicitly underscoring Congress' intent to

prevent a State or local government or its instrumentalities from basing its regulation of the placement, construction or modification of [commercial mobile service] facilities directly or indirectly on the environmental effects of radio frequency emissions if those facilities comply with the Commission's regulations adopted pursuant to section 704(b) concerning such emissions.⁶

As pointed out by the Cellular Telecommunications Industry Association ("CTIA"),⁷ recent decisions and correspondence of the Commission also evidence that the agency has consistently

² As explained in 360°'s Petition, the term "personal wireless service" is defined to include commercial mobile services, such as the cellular service. 47 U.S.C. § 332(c)(7)(C)(i). The fact that 360°'s cellular service is a "personal wireless service" for purposes of the statute is not disputed in the judicial proceeding.

³ 47 U.S.C. § 332(c)(7)(B)(iv).

⁴ Comments of AMTA at 2.

⁵ In the Petition, 360° demonstrates that its proposed tower in Franklin County, Texas comports with these regulations. None of the commenters have challenged this showing.

⁶ H.R. CONF., REP. NO. 458, 104th Cong., 2d Sess. 208, *reprinted in* 1996 U.S. CODE CONG. & ADMIN. NEWS 124, 223. *See also* 141 Cong. Rec. H8274 (daily ed. Aug. 2, 1995) (colloquy between Rep. Goodlatte and Chairman Bliley affirming that states and localities may not "attempt to regulate on the basis of radio frequency emissions which is clearly a federal issue").

⁷ Comments of CTIA at 6-7.

and repeatedly interpreted Section 332(c)(7)(B)(iv) to preempt state and local regulation of transmitter construction based upon radio frequency emissions, where such facilities comply with federal emissions requirements.⁸

While the “regulation” at issue here is by a state court as opposed to a state or local legislature or administrative body, this is a distinction without a difference for purposes of the statute. The vast majority of commenters agree that a state court, such as the Texas court identified in 360°’s Petition, is clearly a “state instrumentality” within the scope of Section 332(c)(7)(B)(iv).⁹ As detailed by several of the commenters, ample precedent exists to support this proposition.¹⁰ A contrary reading would permit an “end run” around the clear directives of

⁸ See *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*, Second Memorandum and Order and Notice of Proposed Rulemaking, FCC 97-303, ¶¶ 121-122 (rel. Aug. 25, 1997) (Communications Act prohibits state or local consideration of the environmental effects of RF emissions when making zoning decisions); Letter from Michele C. Farquhar, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, to Thomas E. Wheeler, President and CEO, Cellular Telecommunications Industry Association (rel. Jan. 17, 1997) (“Section 332(c)(7)(B)(iv) prevents a State or community from basing its regulations of the placement, construction or modification of personal wireless service facilities either directly or indirectly on the environmental effects of RF emissions. . . .”); Letter from Michele C. Farquhar, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, to the Honorable Richard Hurt, Mayor of Bedford, Texas (rel. June 14, 1996) (tower siting moratorium based upon environmental effects of radiofrequency emissions violates Section 332(c)(7)(B)(iv)); Letter from Reed E. Hundt, Chairman, Federal Communications Commission, to the Honorable Susan Goldberg, Mayor of San Diego, California (Mar. 15, 1996) (same).

⁹ Comments of AT&T Wireless Services, Inc. at 2; Comments of BellSouth Corporation at 2; Comments of CTIA at 8-10; Comments of GTE Service Corporation at 4; Comments of Personal Communications Industry Association at 5; Comments of PrimeCo Personal Communications, L.P. at 4-5.

¹⁰ See, e.g., *Shelly v. Kraemer*, 334 U.S. 1, 14 (1948) (quoting *Ex Parte Virginia*, 100 U.S. 339, 347 (1880)) (“A State acts by its legislative, its executive, or its judicial authorities.”); *Van Camp v. AT&T Information Systems*, 963 F.2d 119, 122 (6th Cir. 1992) (“ERISA is ‘intended to apply . . . to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law.’ Therefore, state-law claims, and state-court decisions resolving those claims . . . are preempted by ERISA.”) (citations omitted); *Comcast Cellular Telecom. Litigation*, 949 F. Supp. 1193, 1201 n.2 (E.D.Pa 1996) (“It is undisputed that like legislative or

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Section 332(c)(7)(B)(iv) and thwart Congress' clearly articulated goal of a uniform federal approach to resolving radio frequency issues.

Only one commenter does not strongly support the grant of 360's Petition -- the plaintiffs in the state court suit that is the basis for the instant declaratory ruling request ("the Plaintiffs"). However, the arguments they present are wholly inconsistent with the plain language of the statute and explicit pronouncements of Congressional intent. Although the Plaintiffs suggest that Section 332(c)(7)(A)'s preservation of general state and local authority over tower siting precludes federal preemption,¹¹ such an argument wholly ignores the specific and clear exception to this authority set forth in Section 332(c)(7)(B)(iv) and the limiting language contained in Section 332(c)(7)(A) itself.¹² Similarly, Plaintiffs' assertion that Congress has not expressed any intent to limit common law actions¹³ is simply wrong. Unlike the other statutes the Plaintiffs identify that provide for broad federal regulation while still permitting common law remedies, Section 332(c)(7)(B)(iv) specifically mandates *exclusive* federal jurisdiction over this issue and expressly proscribes *all* state or local regulation, including state court common law actions."¹⁴

As discussed above, the record in this proceeding is virtually unanimous that Section 332(c)(7)(B)(iv) preempts the ability of state courts to regulate or enjoin the placement or

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administrative action, judicial action constitutes a form of state regulation. Thus, like state legislative action, state court adjudications threaten the uniformity of regulation envisioned by a congressional scheme.").

¹¹ Comments of Plaintiffs at 5-6.

¹² The general authority contained in Section 332(c)(7)(A) is prefaced by the phrase, "[e]xcept as provided in this paragraph." The provision for federal preemption of state or local regulation of radio frequency emissions appears later in paragraph 7 at Section 332(c)(7)(B)(iv).

¹³ Comments of Plaintiffs at 6.

¹⁴ The Plaintiffs' additional arguments concerning unintended consequences and the sufficiency of federal radio frequency emission regulations are irrelevant to action on 360's Petition. They are also wholly without basis in law or in fact.

construction of cellular facilities, such as the Texas transmitter proposed by 360°, based upon radio frequency emission concerns, where such facilities comply with federal emissions regulations. Accordingly, 360° urges the Commission to move expeditiously in granting its Petition.¹⁵ Prompt agency action is essential not only finally to permit the provision of improved cellular service to consumers in Franklin County, Texas, but also to preclude similar, impermissible roadblocks to the implementation of ubiquitous, competitive wireless service for all U.S. consumers.

Respectfully submitted,

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¹⁵ 360° strongly opposes the Plaintiffs' request for further extension of the comment period. Comments of Plaintiffs at 4-5. The Commission has thus far provided ample opportunity for public comment on the Petition, as evidenced by the numerous comments filed. Clearly, the time period was sufficient to permit the Plaintiffs to assemble and file their own pleading. The record provides absolutely no basis for further delaying a decision in this case.

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of January, 1998, I caused copies of the foregoing
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