BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Petition for Declaratory	)	DA 97-2539
Ruling of 360° Communications	)	
Company	)	

COMMENTS OF THE
CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

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The Cellular Telecommunications Industry Association ("CTIA")[1] respectfully submits the following Comments to the Commission's Public Notice requesting additional comment on 360° Communications Company's ("360° Communications") Petition for Declaratory Ruling ("Petition").

I. INTRODUCTION AND SUMMARY

Nearly two years removed from amendment of the Communications Act of 1934 (the "Act"), State and local governmental activity continues to frustrate accomplishment of

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[1] CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers, including 48 of the 50 largest cellular and broadband personal communications service ("PCS") providers. CTIA represents more broadband PCS carriers and more cellular carriers than any other trade association.

Congress' long-standing goal to promote the rapid growth and development of a nationwide wireless infrastructure.[2] While Section 332(c)(7) generally contemplates State and local involvement in decisions over the placement of CMRS antennas, Congress carved out a specific exception to that authority which prohibits State and local governments from considering radio frequency ("RF") emissions in their zoning decisions. State courts were included within Section 332(c)(7)(B)(iv)'s prohibition -- and indeed, must be included -- to ensure Congress' goal of maintaining a uniform national regulatory environment for RF emissions. The Petition filed by 360° Communications provides the Commission with an opportunity to confirm what the language of Section 332(c)(7)(B)(iv) makes clear: no State or local governmental entity, including a State court, may regulate the placement, modification and construction of personal wireless service facilities based upon concerns related to RF emissions.[3]

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[2] See, e.g., H.R. Rep. No. 111, 103rd Cong., 1st Sess. 260 (1993) ("To foster the growth and development of mobile services that, by their nature, operate without regard to State lines as an integral part of the national telecommunications infrastructure, new section 332(c)(3)(A) also would preempt State rate and entry regulation of all commercial mobile services.")

[3] See infra Section II.B. The Commission has previously addressed matters similar to those raised by the 360° Petition. In each instance, the Commission either clearly stated or the record clearly supported preemption of State

II. THE ACT EXPRESSLY PROHIBITS STATE OR LOCAL ZONING AUTHORITY ON THE BASIS OF CONCERN FOR THE ENVIRONMENTAL EFFECTS OF RF EMISSIONS.

A. Section 332(c)(7)(B)(iv) Preempts States And Localities From Affecting Or Preventing The Placement, Modification And Construction Of CMRS Facilities Based Upon RF Emission Concerns.

Section 332(c)(7)(B)(iv) operates to prevent States and localities from creating a nettlesome patchwork of zoning rules and regulations based upon perceptions and concerns regarding RF emissions. The section states that:

> [n]o 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 Commission's regulations concerning such emissions.[4]

This language plainly prohibits States and localities from considering the effects of RF emissions in regulating CMRS facilities so long as the CMRS entity in question has complied

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and local zoning regulation based on RF emissions. Further delay or inquiry by the Commission serves only to hinder the development of a national wireless infrastructure. The Commission should act now and decisively resolve this matter consistent with the arguments raised herein.

[4] 47 U.S.C. § 332(c)(7)(B)(iv).

with the FCC's RF regulations.[5]

Moreover, Congress made clear that the section is not to be construed narrowly. While crafting this language, Congress explained that it intended the section to preempt both direct and indirect attempts to regulate CMRS providers based upon RF emissions.[6] As such, this section provides *absolutely no room* for States and localities to impose or permit insidious regulation in any form. For example, States and localities cannot be permitted to impose after-the-fact compliance and enforcement measures on CMRS providers, such as arbitrary or repetitious filing requirements.[7] These State and local concerns instead must be raised with, and addressed by, the Commission.

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[5] Indeed, Congress explicitly identified the Commission as the exclusive forum to resolve any disputes arising under Section 332(c)(7)(B)(iv). See 47 U.S.C. § 332(c)(7)(B)(v). As these Comments demonstrate, the Commission's authority pursuant to Section 332(c)(7)(B)(v) also preempts State court resolution of antenna siting disputes.

[6] H.R. Conf., Rep. No. 458, 104th Cong., 2d Sess. 208 (1996), reprinted in 1996 U.S. Code Cong. & Admin. News 124, 223. Congress stated its intent to:

> prevent a State or local government or its instrumentalities from basing its regulation of the placement, construction or modification of [CMRS] 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. (emphasis added)

[7] CTIA is aware of several communities seeking to require carriers to certify compliance with the Commission's RF rules.

To do otherwise and allow such "back-door" RF emission regulation would be to permit States and localities to indirectly infringe upon a field which the Commission completely occupies and regulates pursuant to express Congressional authority, and would unwind entirely the preemptive effect of Section 332(c)(7)(B)(iv).

Importantly, in crafting the Section 332(c)(7)(B)(iv) exception, Congress borrowed language verbatim from Section 332(c)(7)(A). Specifically, Section 332(c)(7)(A) and Section 332(c)(7)(B)(iv) confer and eliminate, respectively, the authority of any "State or local government or instrumentalit[ies] thereof . . . ." These sections, therefore, are co-extensive. To the extent that State and local governments and instrumentalities, including State courts, are granted authority under Section 332(c)(7)(A), these same entities are clearly denied jurisdiction under Section 332(c)(7)(B)(iv).

A plain reading of Section 332(c)(7)(B)(iv) is not only consistent with good interpretive practice, it is also consistent with the goals underpinning its passage. Congress plainly expressed an interest in resolving RF matters at the Federal level to ensure a uniform examination of those issues, as well as

uniform application of the resulting determinations.[8] In selecting the Commission as the locus for RF emission studies and standards, Congress obtained a close fit between the expert agency and the subject matter under its consideration.[9] This Congressional designation should not be disturbed.

B. The Commission Has Consistently Interpreted Section

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[8] Failure to expeditiously and conclusively resolve this Petition will only encourage additional frivolous claims such as those raised in the 360° Communications case. See Rock Grundman, Margaret and Syd Carter, Mary and Larry Lange, Carol and Jim Reid and Marilyn H. Mallory, v. 360 Degree Communications Company, No. 8640 at 2-3 (D. Tex. filed June 28, 1996) ("The expected consequences of erecting the 300 foot high microwave tower, at the site selected and described above, would proximately cause a person of ordinary sensibilities discomfort and substantial annoyance to those residing in the vicinity of the 300 foot high microwave tower. . . . In addition, Plaintiffs fear they will incur expenses for medical attention and medicines on account of insomnia, nervousness and aggravation of existing medical disorders.") (emphasis added) Congress foresaw the possibility that these types of actions would hinder the development of a nationwide wireless infrastructure and thus rested with the Commission complete authority over RF matters.

[9] See Seattle SMSA Limited, Partnership, et al. v. San Juan County, No. C96-1521Z, slip op. at 6-7 (W.D. Wa. Aug. 11, 1997) (stating that "Congress has determined that facilities that comply with applicable Federal Communications Commission regulations do not pose a health risk and cannot be a basis for denying a permit.") (emphasis added); see, e.g. In the Matter of Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, ET Docket No. 93-62, *Second Memorandum Opinion and Order* at ¶ 13 (rel. Aug. 25, 1997) (stating that Congress required the Commission to evaluate the effects of its actions on the quality of the human environment, including the RF effects of its regulation of communications transmitters and facilities).

332(c)(7)(B)(iv) To Preempt State And Local Regulation Based Upon RF Decisions.

In March 1996, Chairman Hundt, in a letter to the Mayor of San Diego, emphasized the Act's preemption of local government siting decisions based on consideration of environmental effects of RF emissions.[10] Shortly thereafter, the Chief of the Wireless Telecommunications Bureau ("WTB") informed the Mayor of Bedford, Texas that a tower siting moratorium based upon the environmental effects of RF emissions violated Section 332(c)(7)(B)(iv).[11] In January 1997, the WTB Chief explained to CTIA in a letter that:

> Section 332(c)(7)(B)(iv) prevents a State or community from basing its regulation of the placement, construction or modification of personal wireless service facilities either directly or indirectly on the environmental effects of RF emissions. . . .[12]

Recently, the Commission reiterated the Act's preemption of State and local consideration of the environmental effects of RF emissions when making zoning decisions.[13] The Commission noted

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10 See Letter from Reed E. Hundt, Chairman, Federal Communications Commission, to the Honorable Susan Golding, Mayor of San Diego, California (Mar. 15, 1996).

11 See 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).

12 Letter from Michele C. Farquhar, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, to Mr. Thomas E. Wheeler, President and CEO, Cellular Telecommunications Industry Association (rel. Jan. 17, 1997).

13 See Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of

that it:

> will continue to consider requests for relief of state and local government actions that prescribe or restrict the operation of personal wireless facilities pursuant to the authority granted to the Commission by Congress in Section 332(c)(7).[14]

Not only is the Act clear, but so too is the Commission's view of the preemptive effect of Section 332(c)(7)(B)(iv). The Commission should take action in this proceeding to resolve completely any pending questions regarding this matter.

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the Communications Act of 1934, WT Docket No. 97-197, *Second Memorandum Opinion and Order and Notice of Proposed Rulemaking*, FCC 97-303 at ¶¶ 121-122 (rel. Aug. 25, 1997).

[14] Id. at ¶ 89. Rather than narrowly interpreting its basis of authority, the Commission noted its willingness to consider the extension of Section 332(c)(7)(B)(iv)'s prohibition on State and local consideration of the environmental effects of RF emissions to services other than personal wireless services, subject to a party offering the appropriate evidence and legal basis for so doing. See id. at ¶ 79.

III. THE PHRASE 'STATE OR LOCAL GOVERNMENT OR INSTRUMENTALITY THEREOF' CONTEMPLATES STATE COURTS FOR PURPOSES OF SECTION 332(c)(7)(B)(iv), AND THUS STATE COURTS HAVE NO MORE AUTHORITY THAN ANY OTHER STATE OR LOCAL GOVERNMENTAL ENTITY.

The limitation of authority in Section 332(c)(7)(B)(iv) applies to every "State or local government or instrumentality thereof." Thus, Congress contemplated that all State actors, including State courts, should be prevented from regulating antenna siting based upon RF emissions. This point is central to proper resolution of the instant Petition.

A. State Judicial Action Poses The Same Threat To A Federal Regulatory Scheme As Does State Legislative Or Administrative Action.

State judicial decisions regarding CMRS tower sites based upon RF emissions concerns would thwart the plain meaning of the Act, and would undermine Congress' intended scheme of resolving RF emissions matters on a uniform basis before the appropriate Federal regulatory body, the Commission.

The 8th Judicial District Court of Texas recognized the inherent tension between the prohibition contained in Section 332(c)(7)(B)(iv) and its hearing the instant case concerning 360° Communications. The court appropriately permitted the parties to petition the Commission for resolution. As other courts have reasoned:

> like legislative or 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.[15]

Congress could not have intended that a plaintiff could bring against a CMRS provider a State law claim whose merits, in whole or in part, were predicated on the State court making an RF emission determination. Otherwise, in so ruling, the court would establish precedent concerning RF emissions which would function no differently than a legislative rule or administrative regulation in its ability to interfere with Congress' uniform RF approach.

B. State Courts Are Contemplated By The Phrase "State or local government or instrumentality thereof."

Court decisions in similar contexts provide support for the conclusion that State courts should not be permitted to adjudicate disputes where other State or local governmental entities lack jurisdiction. In determining whether State court enforcement of a private, racially-discriminatory contract constituted governmental action for purposes of the 14th

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[15] Comcast Cellular Telecomm. Litig., 949 F. Supp. 1193, 1201 n.2 (E.D. Pa. 1996) (citing Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 326); see id. ("A system under which each State could, through its courts, impose on railroad carriers its own version of reasonable service requirements could hardly be more at odds with the uniformity contemplated by Congress . . . ."). The Supreme Court has also recognized the rulemaking and regulatory power of adjudications in SEC v. Chenery Corp., 332 U.S. 194 (permitting federal administrative agency rulemaking via adjudication pursuant to the agency's informed discretion).

Amendment, the Supreme Court stated that "[a] State acts by its legislative, its executive, or its judicial authorities. It can act in no other way."[16]

The Sixth Circuit, relying on language virtually identical to that contained in Section 332(c)(7)(B)(iv), determined that State court decisions were preempted by the Employee Retirement Income Security Act ("ERISA").[17] The court held that:

> ERISA is intended to apply in its broadest sense 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.[18]

These cases merely confirm what the Act clearly states and what Congress intended -- Section 332(c)(7)(B)(iv) preempts State courts from regulating the placement, modification and construction of CMRS facilities based upon RF emissions.

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16 Shelley v. Kraemer, 334 U.S. 1, 13 (1948) (quoting Ex parte Virginia, 100 U.S. 339, 347 (1880) (emphasis added)). The case goes on to cite additional cases decided by the Supreme Court supporting this proposition.

17 29 U.S.C. § 1001 et seq. ("It is hereby declared to be the policy of this Act to protect . . . the interests of participants in employee benefit plans and their beneficiaries . . . .")

18 See Nordic Village, Inc., et al. v. Nordic Village, Inc., 963 F.2d 118, 122 (6th Cir. 1992) (citation omitted).

IV. CONCLUSION

For the foregoing reasons, CTIA urges the Commission to grant the Petition for Declaratory Ruling of 360° Communications Company and state conclusively that Section 332(c)(7)(B)(iv) prohibits State courts from reaching decisions concerning the placement, modification and construction of personal wireless service facilities based upon RF emission concerns.

Respectfully submitted,

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