

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) File No. DA 97-2539
Preempts State Court Actions Limiting the)
Construction of Cellular Facilities Based Upon)
Radio Frequency Emission Concerns)

To: Chief, Wireless Telecommunications Bureau

**COMMENT OF PLAINTIFFS IN ACTION AGAINST
360° COMMUNICATIONS COMPANY RE. 360°'s
PETITION FOR DECLARATORY RULING
OF FEDERAL PREEMPTION**

360° Communications Company (“360°”) filed a Petition for Declaratory Ruling with the Federal Communications Commission on October 27, 1997 anticipating a ruling from the District Court in Franklin County, Texas referring a question of federal preemption of common law to the Federal Communications Commission. That order was signed by the judge on November 24, 1997.¹ The FCC docketed this matter on or about December 3, 1997 with the comment period extending to January 6, 1998. These comments of plaintiffs in the state court action against 360°, respondents here, request the Commission to extend the time for comments for a minimum of thirty (30) days and to deny 360°’s petition requesting broad expansion of the limited federal preemption in the Telecommunications Act of 1996.

¹Not September 29 as noted in the FCC Public Notice DA-97-2539 of December 3, 1997.

I. INTRODUCTION

360° Communications Company (“360°”) seeks a declaratory ruling from the Federal Communications Commission that a suit at common law alleging nuisance and negligence is preempted where one of the bases for nuisance was concerns of immediately adjacent residents over undisclosed levels and frequencies of microwave radiation. It is well known that some levels of microwave radiation can damage tissue (“the cat in the microwave”) and a health concern over what level is safe is shared by many people. Indeed, at the time this suit was brought, the Commission, under direction from Congress was reviewing its standards for radio frequency radiation and subsequently adopted more stringent standards.² This concern of a large part of the public would in turn cause a loss of value of the adjacent residents’ properties.

360° asks the FCC to expand the very limited federal preemption in §704 of the Telecommunications Act of 1996 to eliminate common law claims in any way related to RF (radio frequency) radiation, even where real loss such as loss of property value can be demonstrated.

Franklin County, Texas is a rural county of gentle hills, pastures and hardwood and pine forests. The most valuable asset in Franklin County is Lake Cypress Springs, a 3,400 acre manmade lake, which is almost entirely surrounded by homes, many of which are weekend and retirement homes. The lake had been created to draw people to Franklin County, which had been losing population since the early 1900's. Just away from the lakefront are pasture land, cattle, chicken houses and the occasional farm or ranch house. The lakefront homes on Lake Cypress Springs constitute approximately 42% of the entire tax base of Franklin County.

² The adequacy of these new stricter standards are being questioned in three separate actions in United States Court of Appeals. The adequacy of the standards is not at issue in this proceeding.

Like many areas of rural America, Franklin County has no zoning and, therefore, no notice or hearing involving the public is required before beginning construction on any project in the county, whether it be construction of a barn or the disposal of radioactive waste.³

The residents of Spring Bluff (a residential community of waterfront homes) were very surprised one morning to find that a 320 foot tower to be topped by a flashing beacon was suddenly under construction immediately adjacent to their property and the shores of Lake Cypress Springs; a gross affront to the aesthetics of the lake, and the neighborhood; particularly when immediately away from the lakefront the land is almost completely undeveloped.

The Spring Bluffs residents sought a temporary restraining order which was immediately granted. After notice and extensive hearing, the trial court, the 8th Judicial District Court of Texas, issued a temporary injunction. 360° appealed and the Court of Appeals reversed on the sole grounds that the trial court had not immediately issued a trial date. The trial judge of the 8th District, who was retiring, had transferred the case to the 162nd Judicial District Court of Texas and deferred to that court for a trial date setting.

The 162nd Judicial District Court of Texas⁴ ruling on November 24, 1996 deferred the question of Federal Preemption to the Federal Communications Commission.

The 360° petition on its face appears to address the narrow parochial concern of the siting of one tower. In fact, it is part of an industry attempt to broaden the very limited federal preemption of local zoning regulation to eliminate the “nuisance” of common law suits. 360°

³Federal and state laws regulating radioactive waste would require notice and hearing, but not local zoning laws.

⁴Not the 8th Judicial District Court as the Commission’s Public Notice of December 3, 1997 states (DA-97-2539)

puts its petition in line with another industry wide petition to expand federal exemption. “[The wireless industry] is currently exploring the need for industry relief from lengthy zoning moratoria (Petition page 2, citing Petition for Declaratory Ruling Regarding Federal Preemption of Moratoria, Imposed by State and Local Governments on Siting Telecommunications Facilities. DA-96-2140, FCC 97-2764 (December 16, 1996)”

II. THE COMMISSION SHOULD EXTEND THE TIME FOR COMMENT

The question of whether the limited federal preemption in §704 should be expanded or contracted, is currently a matter of Congressional and national concern.

Bills or hearings looking toward expansion of federal preemption have been withdrawn, while bills to limit federal preemption, e.g. by Senators Patrick Leahy and James Jeffords of Vermont (SB 1307) have been introduced and will be considered during the next session of Congress.

This is also a matter of concern to state and local governments. A bill was introduced in the Texas legislature during its last session⁵, too late in the session for consideration, which would have severely limited the kind of unregulated conduct without public notice or hearing, that 360° seeks freedom to perpetuate through this petition. It is expected that similar legislation will be introduced in the next session of the Texas Legislature. Many state and local governments have imposed moratoria to give themselves time to revise their zoning laws and ordinances to cope with the estimated 100,000 wireless towers the industry expects to put up in the next few years. Many of these same jurisdictions may want to comment on this petition to expand federal preemption.

⁵ Tex. Sen. Bill 1915

The order of the 162nd Judicial District Court of Texas was signed on November 24, 1997, just before Thanksgiving and immediately acted upon by the FCC through its public notice and for invitation for comment of December 3, 1997 with a comment period extending only to January 6, 1998, just after the New Year's weekend. As a result, almost the entire comment period lies within a time that Congress and most state legislatures are in recess and local governments have limited their dockets.

Respondent respectfully requests the Commission to extend the comment period on 360's petition and to refer the matter to its Advisory Committee on Local and State Government Issues for their advice. Chairman Kennard has observed that federal preemption "should be a last resort." It also should not be undertaken without all parties having adequate time to comment.

III. NOTHING IN THE LANGUAGE OR LEGISLATIVE HISTORY OF THE TELECOMMUNICATIONS ACT OF 1996 SUGGESTS AN INTENT BY CONGRESS TO PREEMPT SUITS AT COMMON LAW

A. PRESERVATION OF STATE AND LOCAL AUTHORITY IS THE PRIMARY OBJECTIVE OF THE AMENDMENTS ADDED IN THE TELECOMMUNICATIONS ACT OF 1996

A. The primary objective of new paragraph 7 added to the Communications Act, 47 U.S.C. §332c(7) is the preservation of local zoning authority.

Section 704 of the Telecommunications Acts of 1996 added section 7 to the Act, the first paragraph of which provides:

“(7) PRESERVATION OF LOCAL ZONING AUTHORITY-

(A) GENERAL AUTHORITY - 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.”

Petitioner, 360°, points the Commission to no authority in either the statute or legislative history that would suggest any intention by Congress to limit common law actions. It is, of course, traditional that common law actions survive broad federal regulation. For example, under the antitrust laws, the Sherman Act of 1890, and the Clayton Act of 1914, common law actions based on “restraints of trade” remained unfettered. Similarly, under the panoply of environmental laws passed in recent years, the common law remedies of nuisance and negligence have remained available to redress injury.

Indeed, by the clear language of §7A emphasizing the preservation of local authority, Congress shows its intention to preserve both federal and state authority. Federal preemption is only found where there is express language or where comprehensive federal regulation leaves no room for state action that is not in conflict with federal law or regulation. See *Exxon Corporation v. Governor of Maryland*, 98 Supreme Ct. 2207 (1978).

The common law at issue here, addresses real concerns that shape people’s attitudes and directly affect their conduct. When many people are unwilling to purchase a piece of property right next to a 320 foot tall antennae tower, whether for reasons of fear or aesthetics, in economic terms, demand is reduced and the price and value of the land is directly affected. The issue most often arises in condemnation proceedings where the 5th Amendment to the Constitution requires just compensation for takings of private property authorized by government.

“The overwhelming majority rule today is that a decline in the value of remaining property resulting from the public’s fear of power lines is compensable without regard to the reasonableness of that fear because the reasonableness of the fear is irrelevant to the loss suffered by the property owner.” See 23 MLW 1220; *Criscuola v. Power Authority of the State of New*

York, 81 NY 2nd 649 (1993); *Florida Power and Light Company v. Jennings*, 518 So. 2nd 895 (Florida 1987); for an analysis of fear in an area of scientific uncertainty, see *Kaufman* (“Efficient Compensation for Lost Market Value Due to Fear of Electric Transmission Lines,”) 12 *George Mason UL Rev.* 711 (1990).

III. B. ONLY ZONING REGULATION OF RF EMISSIONS BY STATE AND LOCAL AUTHORITY ARE PREEMPTED

Only zoning regulation by state and local authority involving RF emissions is preempted by §704 of The Telecommunications Act of 1996. Petitioner, 360°, tries to equate common law nuisance and negligence actions with regulation. It is not regulation, even though it may effect conduct, including the placement of a tower or require compensation for diminished value of adjacent property. The suit at issue does not seek to regulate RF emissions.

360° Communications calls the Commission’s attention to the fact that wireless telecommunications service providers are having “difficulty obtaining access to sites for their transmission towers” and reminds the Commission of the “delays and difficulties inherent in the state and local zoning process. We, in turn, would ask the Commission to be cognizant of the fact that there is no state and local zoning process involved in this matter, only common law issues of nuisance and negligence in which we allege 360° was at fault in not using due diligence in siting the tower and at fault in attempting to erect a nuisance with a number of damaging effects, only some of which are engendered by concerns over exposure to long-term, low-level, microwave radiation.

The difficulties 360° is experiencing are of its own making. Respondents’ position from the beginning is that 360°, which had qualified three separate locations close to each other, chose

the wrong one, (two in pasture land and the offending one on the lakefront next to a residential housing development and a public park). We have urged 360° to relocate the tower a very short distance to the other sites which remain available. Respondents have offered to assist in the process. 360°, instead, has chosen to use this petition as an attempt, on behalf of itself and the wireless communications industry, to persuade the Commission to expand the limited preemption in §704 of the Telecommunications Act of 1996 and thus avoid the consequences of its ill considered siting decision.

Nothing in the Telecommunications Act of 1996, nor its legislative history suggests that common law actions of nuisance and negligence in a state court are to be considered preempted by federal law.

C. THE LAW OF UNINTENDED CONSEQUENCES

Were the Commission to attempt to expand the limited federal preemption contained in §704, some very troubling questions would be raised. If the Commission expands federal preemption to cover common law suits, and should studies in the future show potential harm from long term exposure to low-level microwave radiation, resulting in even more restrictive Commission RF emission regulations, what happens to a legal remedy for those who may have been injured and can demonstrate that injury? Unquestionably, the wireless communications industry, including 360° would assert that federal preemption of common law actions gives it immunity from suit on the basis of compliance with federal regulation. The tobacco companies won many cases on the grounds they complied with federal regulation requiring the printing of the Surgeon General's warning label on cigarette packages and that provided adequate warning to the public of the hazards of smoking.

Commission RF regulations carry the imprimatur of the federal government that they adequately protect human health from hazards. They probably do from known, well-documented hazards, but what of hazards not yet known and those that presently raise disturbing questions of biohazard, but have not been repeatedly validated and peer reviewed as of this date?

The Commission has no charter to assume liability and no authority to waive the sovereign immunity of the federal government from suit. The remedy would lie in the common law.

The common law is an ancient institution designed to provide broad remedies where warranted. Today our common law incorporates all of the principles of law and equity and is an institution that singularly is provided its own due process protections in the Bill of Rights, Amendment VII to the United States Constitution.

D. 360° COMPLIANCE WITH COMMISSION REGULATIONS NOT AT ISSUE

It is not the intention of respondents to contest the adequacy of the Commission's RF emissions regulations to protect human health and safety. That is being done in three separate actions in appellate courts, including one brought by the Communications Workers of America.

Respondents do believe that their concerns are legitimate. They were in part engendered by 360°'s own actions. When respondents requested information on the power level and frequency of 360°'s proposed antennae, they were at first refused. When information was provided, respondents later learned that the power output was understated by a factor of 10.

Respondents share concerns that tests recommended by the Federal Environmental Protection Agency in 1993 to determine biological effects of cellular and PCS RF emissions have

not been conducted either by the industry or by any federal agency charged with protecting public health and the environment.

The FCC, the agency in charge of regulating radio frequency regulation, does not have expertise in health and safety and has to rely on the expertise of others.

The industry vehicle for conducting research into the health and safety effects of Wireless Technology Research (L.L.C) has itself become a center of controversy.

“WTR to skip rat exposure studies. WASHINGTON--In a surprisingly candid admission, the head of the cellular industry’s cancer research project said he will leave the six-year, \$28 million program in mid-1999 without conducting either short-term or long-term animal exposure studies...The omission of short- and long-term radio-frequency radiation animal studies from WTR research is bound to cause embarrassment to the cellular industry, and could trigger further congressional investigation into the matter.” Vol. 16, No. 41 RCR, page 1, “The Weekly Newspaper for the Wireless Industry” October 20, 1997.

CONCLUSION

As the Commission is most aware, the issue of expansion of federal preemption under the Communications Act and the Telecommunications Act of 1996 amendments is quite controversial and, in addressing other issues, the Commission has not fared well in attempting to extend federal preemption. We urge the Commission to extend the comment period on this matter so that a wide variety of interested parties including state and local political entities, as well as the U. S. Congress, have an opportunity to comment.

With respect to expanding federal preemption to cover common law suits, there is no need. Common law provides a remedy only for demonstrated injury and only when warranted.

360°, in its petition and in its conclusion, asserts that “the plain language and legislative history of §332(c)(7)(B)(iv) unambiguously preempts state court actions.” Where RF emissions are part of the concern, 360° refers to legislative history, but cites none. The plain language of §704 of the Telecommunications Act of 1996 shows the intention of Congress to protect local zoning authority and is totally silent about suits at common law.

Congress had and will have the opportunity to add federal preemption of common law suits where RF emissions are any factor, if it chooses.

No one wants to impede the buildout of the cellular and personal communications industries. It should be done in an orderly fashion, with forethought. The laws in place are adequate to accomplish this without the need to expand federal preemption to cover common law suits, but the right to bring an action at common law should be preserved to provide a remedy where there is unthinking or ill-considered action and injury can be demonstrated.

Suits at common law are rarely preempted by federal regulation, do not appear to be preempted here. We urge the Commission to defer to Congress, if the issue needs resolution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Comment of Plaintiffs in Action Against 360° Communication Company Re. 360° s Petition for Declaratory Ruling of Federal Preemption, was forwarded to the Office of Secretary, Federal Communications Commission, by placing the same with the U.S. Postal Service, Express Mail, on January 5, 1998 and that true and correct copies were also forwarded to each remaining party on the attached Service List by placing the same with the U.S. Postal Service, First Class Mail, on January 5, 1998.

V. Rock Grundman

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