

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

In the Matter of)	
)	
360° Communications Company)	
)	
Petition for Declaratory Ruling That Sections)	DA 97-2539
332(c)(7)(B)(iv) of the Communications Act)	
Preempt State Court Actions Limiting the)	
Construction of Cellular Facilities Based Upon)	
Radio Frequency Emission Concerns)	

**COMMENTS OF THE
PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION**

The Personal Communications Industry Association (“PCIA”),¹ hereby respectfully submits its comments in response to the *Public Notice* in the above-captioned proceeding.² As detailed below, the Commission should grant the relief sought by 360° Communications Company (“360°”).

¹ PCIA is the international trade association created to represent the interests of both the commercial and the private mobile radio service communications industries. PCIA's Federation of Councils includes: the Paging and Narrowband PCS Alliance, the Broadband PCS Alliance, the Site Owners and Managers Association, the Association of Wireless Communications Engineers and Technicians, the Private Systems Users Alliance, and the Mobile Wireless Communications Alliance. In addition, as the FCC-appointed frequency coordinator for the 450-512 MHz bands in the Business Radio Service, the 800 and 900 MHz Business Pools, the 800 MHz General Category frequencies for Business Eligibles and conventional SMR systems, and the 929 MHz paging frequencies, PCIA represents and serves the interests of tens of thousands of licensees.

² FCC Public Notice, *Public Comment Invited, Wireless Telecommunications Bureau Seeks Comment on Petition for Declaratory Ruling of 360° Communications Company*, DA 97-2539 (rel. Dec. 3, 1997) (“*Public Notice*”).

INTRODUCTION AND SUMMARY

On October 27, 1997, 360° filed a Petition for Declaratory Ruling (“*Petition*”) requesting that the Commission declare that, provided a wireless facility complies with the Commission’s rules regarding radiofrequency (“RF”) emissions, state court orders that restrict the construction of such wireless facilities are preempted by Section 332(c)(7)(B)(iv) of the Communications Act of 1934, as amended (“Communications Act”).³ 360° filed this request because its construction of a cellular transmission tower in Franklin County, Texas has been delayed for well over one year by state judicial action that is clearly preempted by Section 332(c)(7)(B)(iv).⁴ Prompt and decisive Commission action is therefore necessary to give 360° the relief to which it is entitled and to prevent such delays from re-occurring in the future.

PCIA’s support of 360° in this matter is consistent with the leadership role PCIA has assumed in attempting to ensure that wireless carriers are permitted to build out their networks unencumbered by state and local regulations of RF emissions that go beyond the jurisdictional boundaries that Congress has established. Specifically, in the past year, PCIA proposed to the Commission procedures to assist in addressing state and local requirements that purport to regulate the placement of towers and transmission facilities based on concerns about RF emissions.⁵ PCIA also filed comments and reply comments on the Notice of Proposed Rulemaking issued by the Commission in *Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of*

³ 47 U.S.C. § 332(c)(7)(B)(iv).

⁴ *Petition* at 2-3.

⁵ See Letter to Michelle C. Farquhar, Chief, and Rosalind K. Allen, Deputy Chief of the Wireless Telecommunications Bureau, from Jay Kitchen, President of PCIA (Mar. 19, 1997).

1934.⁶

In these filings, PCIA requested, *inter alia*, that the Commission: (1) clearly define the types of testing and reporting requirements states and localities are permitted to utilize in order to ensure compliance with the FCC's RF standards; (2) absent an affirmative showing that a zoning applicant has failed to comply with federal RF standards, prohibit zoning boards from denying tower siting applications on RF grounds; and (3) set forth expedited and efficient procedures to allow for the streamlined processing of petitions to preempt state and local regulations that conflict with federal RF standards. Consistent with PCIA's previous statements, the Commission should grant 360°'s requested relief and use the instant *Petition* as a vehicle for setting forth clear guidelines for when state and local regulation of tower siting based on RF concerns is inconsistent with federal law.

II. BASED ON THE FACTS ALLEGED IN THE *PETITION*, THE SPECIFIC RELIEF REQUESTED BY 360° SHOULD BE GRANTED

Because the Communications Act explicitly forbids the types of state judicial actions that have taken place in Franklin County, Texas, the Commission should grant the relief requested in the *Petition*. As a matter of law, Section 332(c)(7)(B)(iv) forbids states and localities from regulating the "placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions" provided the facilities in question comply with the Commission's regulations concerning RF emissions.⁷ The statute further specifies that "any person adversely affected by an act or failure to act by a State or local

⁶ FCC 97-3003 (rel. Aug. 25, 1997). *See* PCIA Comments, WT Dkt. No. 97-192 (filed Oct. 9, 1997); PCIA Reply Comments WT Dkt. No. 97-192 (filed Oct. 24, 1997).

⁷ 47 U.S.C. § 332(c)(7)(B)(iv).

government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.”⁸ Thus, Congress has specifically empowered the Commission to preempt state and local tower siting decisions that are inconsistent with its RF regulations.⁹

The facts alleged in the *Petition* constitute a clear violation of Section 332(c)(7)(B)(iv). Specifically, a state court enjoined the construction of a personal wireless service facility (in this case, a cellular transmission tower) on the basis of, *inter alia*, the following allegations:

(1) construction of the tower will cause Plaintiffs to “incur expenses for medical attention and medicine on account of insomnia, nervousness, and aggravation of existing medical disorders;” and (2) “Plaintiffs have been substantially annoyed and inconvenienced and have suffered severe physical discomfort by the very fear of the ill health effects of Defendant’s microwave tower.”¹⁰

This is precisely the type of state action — prohibitions on tower siting based on speculative claims about the adverse health effects of RF radiation — that Congress intended to preempt.

Preliminarily, it is well settled that a state court order constitutes an act by a “State or local government or any instrumentality thereof.”¹¹ Therefore, under Sections 332(c)(7)(B)(iv) and (v), the Commission is empowered to preempt the order in question. In addition, 360° has

⁸ 47 U.S.C. § 332(c)(7)(B)(v).

⁹ See also H.R. Rep. No. 104-258 (1996) (this section is intended to “prevent a State or local government or its instrumentalities from basing the regulation, construction, or modification of [CMRS] facilities *directly or indirectly* on the environmental effects of radio frequency emissions” if the facilities comply with the Commission’s RF regulations”) (emphasis added).

¹⁰ Plaintiffs’ Verified First Amended Original Petition For Damages And Injunctive Relief, ¶¶ IV, X, *Grundman, Carter et al. v. 360° Communications Company*, Case No. 06-96-00064-CV (8th Jud. Dist. Ct. of Texas).

¹¹ See *Shelly v. Kraemer*, 334 U.S. 1, 14 (1948) (quoting *Commonwealth of Virginia*, 100 U.S. 339, 347 (1880) (“A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way”). See also *Comcast Cellular Telecom. Litig.*, 949 F. Supp. 1193, 1201 n.2 (E.D. Pa. 1996) (“judicial action constitutes a form of state regulation”).

attached a statement from a wireless engineer verifying that “the proposed 360° Communications facility will comply with FCC ... regulations as specified in Section 1.1307(b) of the FCC rules.”¹² The state court’s September 29, 1997 order does not suggest that there has been any finding or conclusive showing that the operation of the proposed tower would be inconsistent with the Commission’s RF rules. Thus, because the facility complies with the Commission’s regulations concerning RF emissions, the judicial order at issue represents a forbidden attempt at regulating the “construction ... of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions.”¹³ As such, the Commission should preempt the court order as requested by 360°.

THE COMMISSION SHOULD SET FORTH CLEAR GUIDELINES REGARDING
STATE AND LOCAL REGULATION OF TOWER SITING BASED ON RF
EMISSIONS

PCIA understands the federal-state comity concerns that underlie the Commission’s reluctance to preempt a state court decision. In classes of cases such as that described in the *Petition*, however, Congress has explicitly commanded the Commission to take action. Such a Congressional directive is based on the fact that the Commission’s rules regarding the environmental effects of RF emissions provide ample protection for all Americans. Consequently, Congress has determined that states and localities have no bona fide reason for halting the construction of the nation’s wireless telecommunications infrastructure based on these “concerns.”

¹² *Petition*, Attachment B. In particular, PCIA understands that the cellular tower that is the subject of the instant *Petition* does not raise even remote RF compliance concerns, given that the antennas will be approximately 300 feet above the ground and operate at the relatively low maximum ERP (with all channels in service) of 1,000 watts.

¹³ 47 U.S.C. § 332(c)(7)(B)(iv).

Against this background, the Commission should issue clear tower siting guidelines stating which state and local actions are permissible and which actions are impermissible. At a minimum, these guidelines should: (1) clarify that, for the purposes of Sections 332(c)(7)(B)(iv) and (v), state judicial action is equivalent to state administrative or legislative action; (2) allow licensees to file preemption petitions immediately following an adverse judicial or zoning board decision, without exhausting all appeals; (3) set a clear deadline after which a licensee can petition for the preemption of a locality’s “failure to act;” and (4) preempt state and local tower siting decisions that are based indirectly or partially on concerns about the health effects of RF emissions, provided the facility complies with the Commission’s rules. A failure by the Commission to act decisively and promptly in situations such as this will leave a regulatory vacuum that states and localities will inevitably fill with inconsistent regulations — a result that is plainly at odds with the federal regulatory framework governing the health effects of RF emissions contemplated by Section 332(c)(7)(B)(iv).

IV. CONCLUSION

For the foregoing reasons, the Commission should promptly grant the relief sought by 360° and preempt the Texas state court order at issue. The Commission should further use this proceeding to issue guidelines of general applicability in resolving wireless facilities siting disputes based on the environmental effects of RF emissions.

Respectfully submitted,

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