

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

COMMENTS OF GTE SERVICE CORPORATION

GTE Service Corporation and its telephone and wireless companies (“GTE”) hereby submits its comments in support of the above-referenced Petition.¹ In the Petition, 360° asks the Federal Communications Commission (“FCC” or “Commission”) to declare that Section 332(c)(7)(B)(iv) of the Communications Act² applies to state court action regulating the placement, construction, and modification of cellular facilities based on radio frequency emission (“RF”) concerns, where such facilities comply with federal RF regulations.

GTE supports the 360° Petition. GTE believes that Section 332(c)(7)(B)(iv) applies to all instrumentalities of a state government, including state courts. Accordingly, GTE urges the Commission to declare that no state court may regulate the

¹ Petition for Declaratory Ruling that Section 332(c)(7)(B)(iv) of the Communications Act Preempts State Court Actions Limiting the Construction of Cellular Facilities Based Upon Radio Frequency Emissions Concerns, filed October 27, 1997, by 360° Communications (“360°”), (hereinafter “Petition”).

² 47 U.S.C. § 332(c)(7)(B)(iv).

placement, construction, or modification of personal wireless service facilities, where such facilities comply with federal RF emissions regulations.

I. Discussion

Although the 360° Petition is raised in the context of a Texas state court proceeding considering whether 360° may construct a particular cellular facility, 360° does not ask the Commission to address the merits of that proceeding. Rather, the Petition asks the Commission to decide one question: whether state court judgments and injunctions restricting the placement and construction of cellular transmission towers based upon RF emission concerns are preempted by Section 332(c)(7)(B)(iv) of the Communications Act, where the facilities comply with federal RF emissions regulations.

Section 332(c)(7)(B)(iv) provides that

No 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.¹

¹ *Id.*

Based on this language, then, determining whether state court action is preempted involves a four-step inquiry. The Commission must determine: (1) whether a state court is a state government or instrumentality thereof; (2) whether the state court action constitutes regulation of the placement, construction, or modification of a personal wireless facility; (3) whether any such regulation was based on the environmental effects of RF emissions; and (4) whether the facilities comply with federal RF regulations.

Of these steps, the last three all involve a factual determination that must be made on a case-by-case. While an examination of whether the facts alleged by 360° satisfy these steps may be beyond the scope of 360°'s petition, it appears as though each of these steps has been met. Thus, in examining step two of the inquiry, it appears that the state court is considering action that would block or halt construction of a personal wireless facility.¹ While some may argue that the Texas court has authority to act pursuant to Section 332(c)(7)(B)(v), GTE does not agree. That subsection, which authorizes "courts of competent jurisdiction" to review certain actions taken by state government entities regulating the placement, construction, and modification of

¹ Petition at 2-3.

personal wireless facilities,¹ is not invoked here. In this case, the court is not reviewing an action taken by a state or local zoning commission. Rather, given that the location chosen for the wireless facility is apparently not subject to any zoning restrictions, the court itself seeks to regulate the placement, construction, or modification of a personal wireless facility. As such, Section 332(c)(7)(B)(iv) is applicable.

Turning to step three of the inquiry, 360° alleges that the action being considered by the court was brought by group of area residents complaining of unspecified harmful environmental effects of radiofrequency emissions.² Finally, considering step four of the inquiry 360° alleges (and submits a supporting affidavit to confirm) that the facility under construction complies with federal RF emissions guidelines.³

The only legal question for the Commission to determine in this proceeding, therefore, is whether Section 332(c)(7)(B)(iv) applies to state court action. Fortunately, however, this question has been previously answered. It is a well-settled principle that state judicial action is equivalent to state legislative or administrative action. Thus, the

¹ See 47 U.S.C. § 332(c)(7)(B)(v).

² Petition at 2.

³ *Id.* at 5-6, and Attachment B.

United States Supreme Court has ruled that “[a] state acts by its legislative, its executive, or its judicial authorities. It can act no other way.”¹ Moreover, at least one federal district court has found that “[i]t is undisputed that 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.”² These decisions leave no doubt that state court action constitutes action by a state government or its instrumentalities. Accordingly, GTE agrees with 360° that state court regulation of the placement, construction, and modification of personal wireless facilities based on RF concerns falls within the ambit of the prohibitions set forth in Section 332(c)(7)(B)(iv).

¹ *Shelly v. Kraemer*, 334 U.S. 1, 14 (1948) (quoting *Commonwealth of Virginia*, 100 U.S. 339, 347 (1880)).

² *Comcast Cellular Telecom. Litig.*, 949 F. Supp. 1193, 1201 n.2 (E.D.Pa. 1996).

II. Conclusion

GTE supports the 360° Petition. GTE believes that Section 332(c)(7)(B)(iv) applies to all instrumentalities of a state government, including state courts. GTE urges the Commission to declare that no state court may regulate the placement of personal wireless service facilities, where such facilities comply with federal RF emissions regulations.

Respectfully submitted,

GTE Service Corporation and its telephone
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