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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
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	)	WT Docket No. 97-192

REPLY COMMENTS OF GTE SERVICE CORPORATION

GTE Service Corporation and its telephone and wireless companies

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October 24, 1997

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SUMMARY

In these reply comments, GTE addresses the joint comments filed by the National League of Cities and the National Association of Telecommunications Officers and Advisors ("NLC" and "NATOA"). The NLC and NATOA support a very narrow reading of the Commission's jurisdiction under Section 332(c)(7)(B)(v).

As an initial matter, GTE believes it is irrelevant to the FCC's rulemaking whether the FCC shares jurisdiction with the courts to review state and local government regulation of wireless facilities sites based on RF concerns. So long as the FCC has jurisdiction, which it does, it may adopt rules governing that review.

GTE opposes the NLC and NATOA proposal to define "final action" as requiring exhaustion of all state or local administrative remedies. FCC review does not depend on "final action." Rather, the FCC may review any state or local act based improperly on RF concerns. Even if "final action" is necessary, requiring exhaustion of all state or local administrative remedies would be contrary to Congress' intent to create a speedy review of state and local RF-based zoning decisions; would impose significant delays that serve to *de facto* deny many wireless siting requests by forcing applicants to abandon their requests; and would be contrary to the public interest.

GTE opposes the NLC and NATOA request that the FCC not exercise its jurisdiction to review cases in which a state or local government failed to act on a siting request presenting RF issues. Instead, GTE favors its proposal that the FCC adopt guidelines stating that failure to complete action on a siting request within 6 months may be considered a failure to act under Section 332(c)(7)(B)(v).

Contrary to the NLC and NATOA arguments, the FCC has jurisdiction to review state and local zoning decisions based in part on RF concerns. To the extent that RF concerns are a basis for any aspect of a zoning decision, the statute clearly authorizes the FCC to preempt and overturn that aspect of the decision.

The NLC and NATOA argue that the FCC lacks authority to review state or local zoning decision based nominally on other grounds but that appear to be based upon RF concerns. The Commission's proposal to review decisions apparently based on RF concerns, however, is simply a matter of lawful exercise of its authority to review state or local zoning decisions based improperly on RF concerns. This authority to act includes situations where a decision is in fact based on RF concerns, even though the written decision states another basis or is ambiguous.

The NLC and NATOA make a number of arguments supporting an FCC rule allowing state and local governments to require personal wireless carriers to demonstrate compliance with FCC RF exposure limits. None of their arguments, however, are compelling. The FCC must not allow state and local governments to require a more stringent demonstration of RF compliance than the FCC itself requires.

The NLC and NATOA comment that, in FCC review proceedings, the burden should be on the wireless service provider to demonstrate RF compliance, rather than requiring local governments to show noncompliance. GTE believes that the proposed presumption of compliance should be adopted. The presumption is consistent with the statute and with FCC practice and is entirely reasonable.

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REPLY COMMENTS OF GTE SERVICE CORPORATION

GTE Service Corporation and its telephone and wireless subsidiaries hereby file reply comments in response to the above-captioned *Notice of Proposed Rulemaking*.[1] In the *NPRM*, the Federal Communications Commission ("FCC" or "Commission") proposes procedures for filing and reviewing requests filed pursuant to Section 332(c)(7)(B)(iv)-(v) of the Communications Act ("the Act") for relief from state or local regulations on the placement, construction, or modification of personal wireless service facilities based on the environmental effects of radio frequency ("RF") emissions.[2] In these reply comments, GTE addresses the joint comments filed by the National League of Cities and the National Association of Telecommunications Officers and Advisors ("NLC" and "NATOA").

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1 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, *Notice of Proposed Rulemaking,* WT Docket No. 97-197 (released August 25, 1997) (hereinafter "*NPRM*").

2 47 U.S.C. § 332(c)(7)(B)(iv)-(v).

The NLC and NATOA support a very narrow reading of the Commission's jurisdiction under Section 332(c)(7)(B)(v). In particular, the NLC and NATOA contend, (1) that the courts have jurisdiction over all disputes arising under Section 332(c)(7), and that court jurisdiction is exclusive except in matters of RF compliance; (2) that the term "final action" requires all local administrative remedies to be exhausted; (3) that the courts have exclusive jurisdiction to determine whether a local government has failed to act in a reasonable period of time; (4) that the FCC may not review local government siting decisions based partially on RF concerns; (5) that the FCC may not look behind local zoning decisions to determine whether a decision based nominally on another issue was in fact based on RF concerns; (6) that the FCC should allow state and local governments to require wireless providers to demonstrate RF compliance; and (7) that the FCC should not adopt a presumption of RF compliance. GTE disagrees with the NLC and NATOA's reading of Section 332(c)(7) and the relevant legislative history. GTE believes that the narrow reading they support would create substantial delays in wireless facilities siting and make bad public policy.

I. Discussion

A. Jurisdiction over RF Matters

The NLC and NATOA take an excessively narrow view of Section 332(c)(7). The NLC and NATOA argue that jurisdiction to review state and local zoning decisions based on RF concerns is shared between the courts and the Commission. The NLC and NATOA base their view primarily on the legislative history accompanying the statute. GTE disagrees with this view and questions its relevance.

As an initial matter, whether jurisdiction over local zoning decisions based on RF concerns rests exclusively with the FCC or is shared with the courts is largely irrelevant to this proceeding. In order to make rules regarding FCC review of state and local zoning decisions based on RF concerns, the Commission must have jurisdiction over such matters. It does not matter whether the FCC's jurisdiction is exclusive. As the statute clearly indicates and the NLC and NATOA readily admit, the FCC has jurisdiction over local zoning decisions based on RF concerns. The possibility that courts may share that jurisdiction, then, does not lessen in any way the scope of the rules the FCC may adopt in this proceeding.

In support of their jurisdictional argument, the NLC and NATOA cite to language from the legislative history stating:

> It is the intent of the conferees that *other than under section 332(c)(7)(B((iv)* of the Communications Act of 1934 as amended by this Act and secton 704 of the Telecommunications Act of 1996 the courts shall have exclusive jurisdiction over all *other* disputes arising under this section.[3] (emphasis added)

Far from removing all doubt, as the NLC and NATOA claim, this passage only establishes that the courts have exclusive jurisdiction over decisions not based on RF concerns. It does not prove that the courts have concurrent jurisdiction to review state and local zoning decisions based on RF concerns. Thus, to the extent that the question has any relevance to this proceeding, GTE believes that neither the statute nor the legislative history unambiguously resolve whether jurisdiction over RF matters is shared.

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[3] NLC and NATOA Comments at 7, *citing* H.Rep. No. 104-458, 104th Cong., 2d Sess. 208 (1996) (hereinafter "Conference Report").

B. Definition of "Final Action"

The NLC and NATOA argue that the FCC improperly proposes to define the term "final action" to allow FCC review prior to exhaustion of state or local administrative remedies. The NLC and NATOA, citing again to legislative history, contend that final action requires a party to exhaust its state or local administrative appeals.[4] The Conference Report language cited states that:

> The term "final action" . . . means final administrative action at the state or local government level so that a party can commence action . . . rather than waiting for the exhaustion of any independent State court remedy otherwise required.[5]

As an initial matter, it appears as though the FCC's focus on the term "final action" may be misplaced. While the statute clearly requires "final action" as a prerequisite to court action, "final action" by a state or local government is not required for the FCC to act. Rather, the statute reads

> Any person adversely affected by *an act* or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.[6]

The use of the term "an act" by Congress in the language establishing FCC authority is significant. Clearly, Congress intended a different standard to apply to FCC jurisdiction than to court jurisdiction, otherwise it would have repeated the term "final action." GTE submits that the term "an act" does not imply that parties are required to exhaust state and local administrative remedies. Accordingly, GTE believes that the Commission has

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[4] NLC and NATOA Comments at 8.

[5] Conference Report at 209.

[6] 47 C.F.R. § 332(c)(7)(B)(v).

authority to allow parties to seek FCC review after an initial state or local decision based on RF concerns.

Assuming, *arguendo*, that "final action" is required to trigger FCC review, GTE does not believe the legislative history cited by the NLC and NATOA supports their reading of the term. While the cited passage explains that State court appeals need not be exhausted prior to FCC review, it is silent, and therefore ambiguous, as to whether every state and local appeal procedure must be exhausted. Indeed, the only issue settled by the cited language is that Congress intended appeals to the FCC to be available sooner rather than later.

GTE submits that a definition of "final action" requiring several layers of local appeals is contrary to Congress' intent. The NLC and NATOA allow that the local appeals process may involve internal appeals, appeals to a local zoning board of appeals, or, in many jurisdictions, appeal to a city or county council.[7] Requiring aggrieved parties to exhaust all possible state or local administrative remedies, therefore, would necessarily delay FCC review and undermine Congress' intent.

Defining "final action" to require exhaustion of state or local administrative remedies would also frustrate the purpose of Section 332(c)(7)(B)(iv) and harm the public interest. Congress enacted Section 332(c)(7)(B)(iv) to ensure that entities that comply with FCC exposure limits are not denied wireless facilities citing requests based on RF concerns. As noted above, the NLC and NATOA proposal would delay FCC review substantially and thereby delay wireless site approval. These delays will force

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[7] NLC and NATOA Comments at 8.

many site applicants to abandon the request and seek another site (if another is feasible). As such, the NLC and NATOA proposal will enable state or local entities to use RF concerns to defeat many siting proposals by process rather than by reasoned and lawful decisionmaking. Delaying facilities sites also will harm the public interest by denying or delaying service into new areas or improvements into existing areas.

In keeping with congressional intent and the public interest, the Commission should adopt the proposed definition of "final action."

C. Definition of "Failure to Act"

The NLC and NATOA argue that the FCC should not attempt to define the phrase "failure to act." They contend that the FCC lacks jurisdiction to define what constitutes a reasonable period of time for acting on a siting request. They argue that because the Conference Report states that Section 332(c)(7) is not meant to confer preferential treatment on wireless facilities siting requests, the FCC, at best, may only consider the time that zoning decisions typically take in each particular locality. They state that "the preferable course" would be for the FCC to leave "failure to act" cases to the courts to resolve.[8]

GTE disagrees with the NLC and NATOA analysis. First, while the FCC clearly lacks jurisdiction to resolve disputes brought under Section 332(c)(7)(B)(ii) alleging that a state or local zoning authority has failed to act in a reasonable period of time, nothing in the Act prohibits the FCC from examining what constitutes a reasonable period of time in the context of determining whether a state or local authority has failed to act as

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[8] *Id.* at 9-10.

meant by Section 332(c)(7)(B)(v). Second, record evidence regarding how long facilities siting requests typically take to complete is relevant to determining when state or local agencies have failed to act. Third, under no circumstances should the Commission adopt the NLC and NATOA suggestion to cede jurisdiction over "failure to act" disputes to the courts. Adopting this suggestion would effectively write the "failure to act" language out of the Act and remove an important remedy available to personal wireless services providers. Indeed, ceding jurisdiction of "failure to act" disputes to the courts could preclude FCC review of any state or local zoning proceedings involving RF concerns. By simply failing to act, a state or local authority could ensure that FCC review never happened.

GTE believes that the approach recommended in its comments makes much more sense. GTE recommended that the Commission adopt guidelines stating that state and local authorities considering facilities siting requests raising RF issues should complete the approval or rejection process entirely within 6 months or risk FCC intervention and preemption. Failure by a state or local authority either to approve or reject a facilities site within the time guidelines would be evidence that the authority has failed to act.[9] GTE's believes its proposal is reasonable and addresses the concerns raised by NLC and NATOA. GTE's proposal (1) preserves FCC jurisdiction to review state and local site authorization proceedings where the state or local authority has failed to act; (2) encourages state and local authorities to process wireless facilities siting requests quickly; and (3) responds to the NLC and NATOA concerns by enabling

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[9] GTE Comments at 3-4.

the FCC to consider whether a period of time longer than six months is typical in a particular area.

D. Decisions Based Partially on RF Concerns

The NLC and NATOA argue that the Commission's proposal to review state and local zoning decisions based in part on RF compliance issues exceeds its statutory authority and makes no sense. They argue that the FCC may not rely upon the definition of the term "indirectly" as means of establishing jurisdiction over decisions based in part on RF concerns, because that term appears only in legislative history and cannot be used to increase jurisdiction under the Act.[10]

This argument misses the point. The FCC's jurisdiction over decisions based partially on RF concerns need not rely at all on the presence of the term "indirectly" in the legislative history. Rather, the statute clearly establishes that the FCC has jurisdiction to preempt state and local zoning decisions based on RF concerns where the facilities in question comply with FCC RF exposure limits. Thus, to the extent that RF concerns are a basis for any aspect of a zoning decision, the statute clearly authorizes the FCC to preempt and overturn that aspect of the decision.

The NLC and NATOA also argue that FCC review of decisions based in part on RF concerns makes no sense, since the other bases for the decision would have to be reviewed in the courts.[11] Whether or not pursuing separate appeals of a contrary zoning decision makes sense, however, is irrelevant. The statute clearly establishes

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[10] NLC and NATOA Comments at 11-15.

[11] The NLC and NATOA argument again assumes that the courts have concurrent jurisdiction over RF matters, an issue which has not been decided.

that the FCC may review RF aspects of state and local zoning decisions. An aggrieved party has the right to choose to pursue the RF aspects of a decision separate from other aspects of the decision. The possibility that pursuing separate review might cause delay and additional expense to the wireless service provider is a factor to be considered by the provider, not a basis for eliminating FCC review.

E. Decisions Based Nominally on Other Grounds

The NLC and NATOA argue that the FCC lacks authority to review state or local zoning decisions that are ambiguous or based nominally on other grounds, but that appear to be based upon RF concerns. They contend that the FCC's proposal to review such decisions constitutes an improper re-drawing of jurisdictional boundaries, raises first amendment concerns regarding the rights of citizens to raise RF issues in state and local proceedings, and is better left to be resolved by court action brought under Section 332(c)(7)(B)(iii).[12]

Again, the NLC and NATOA appear to be over-analyzing the issue. The NLC and NATOA's arguments complicate a simple jurisdictional analysis with first amendment arguments. These constitutional concerns, however, are unfounded and irrelevant. In no way will the specter of FCC review of state and local zoning decisions involving evidence of RF concerns stop concerned citizens from submitting evidence of RF exposure. Evidence of a violation of FCC RF exposure limits is relevant both in state and local zoning proceedings and in FCC complaint proceedings, and nothing the FCC proposes to adopt in this proceeding will affect citizens' ability to gather and

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[12] NLC and NATOA comments at 15-20.

present such evidence. Moreover, it is likely that most citizens submitting evidence in zoning proceedings neither know nor care whether the FCC may ultimately review the government's action in those proceedings.

The Commission's proposal to review decisions apparently based on RF concerns is simply a matter of lawful exercise of the jurisdiction conferred by Section 332(c)(7)(B)(v). The statute, in authorizing the FCC to review decisions based improperly on RF concerns, does not limit the FCC to reviewing only decisions based nominally on RF concerns. Rather, the statute bases FCC jurisdiction on whether the state or local decision was in fact made on RF grounds. In order to make that determination, the FCC may, from time to time, need to review decisions based nominally on other grounds or that are ambiguous, where the underlying record is dominated by RF concerns. Whether FCC review of such decisions might be difficult or risky is beside the point.

F. Demonstration of Compliance

The NLC and NATOA make a number of arguments supporting an FCC rule allowing state and local governments to require personal wireless carriers to demonstrate compliance with FCC RF exposure limits. They argue, for example, that a demonstration of RF compliance is required under Sections 704(b) of the Telecommunications Act of 1996 and Section 151 of the Communications Act.[13] Contrary to the NLC and NATOA's general assertions, however, there is no statutory basis for an RF demonstration requirement of any sort. The statute merely requires

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[13] *Id.* at 22.

that if an applicant complies, state and local governments cannot regulate the placement of facilities on RF grounds.

The NLC and NATOA also argue that a compliance demonstration requirement is necessary because under blanket licensing regimes, state and local authorities will not know where categorically excluded wireless facilities will be located.[14] GTE disagrees. First, the reason these facilities are categorically excluded is because the FCC, after an exhaustive process, found that they present little risk of harmful RF exposure. It makes absolutely no sense, therefore, to require heightened compliance demonstration standards for categorically excluded facilities. Second, the NLC and NATOA's argument fails to consider that RF concerns will only come to state and local authority attention in conjunction with a wireless *siting* application or proposed action on an existing site. As such, the agency will know exactly where the facility is located.

The NLC and NATOA also argue that members of the public cannot be expected to trust companies to comply with FCC RF exposure limits or the FCC to adequately enforce its requirements.[15] As GTE stated in its comments, however, the harsh penalties that would apply to FCC licensees that do not comply with RF exposure limits virtually assure compliance. Moreover, FCC practice has been to assume compliance

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[14] *Id.* at 24-25.

[15] *Id.* at 22-23, 24-26.

with FCC rules – even in matters of public safety.[16] There is no compelling reason to allow state and local agencies to require a greater demonstration of RF compliance than the FCC itself requires.

Finally, the NLC and NATOA argue that a demonstration of RF compliance is necessary to protect public health and safety. They argue that health and safety issues take precedence over minimizing administrative burdens on providers. Accordingly, the NLC and NATOA favor an even more stringent requirement than the Commission's "more detailed showing" approach. They suggest that, should state and local governments be presented with evidence questioning a carrier's RF compliance, the government entity should be allowed to seek additional information from the carrier.[17]

GTE shares the NLC and NATOA concerns with respect to public health and safety.[18] GTE does not believe, however, that a demonstration of compliance requirement will diminish state and local governments' ability to protect their constituents. In the unlikely event that FCC rules, enforcement audits, and penalties fail to ensure complete compliance with RF exposure limits, state and local government agencies retain the power to regulate wireless facilities sites that are not in compliance.

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[16] For example, the FCC requires facilities site applicants to perform and submit an environmental assessment ("EA") for facilities that would significantly affect the human environment. 47 C.F.R. § 1.1307(a). The FCC does not, however, require an applicant to submit proof that an EA is not necessary before processing the application. Rather, the Commission presumes that if the site presented a threat to the human environment, an EA would have been prepared and submitted.

[17] NLC and NATOA Comments at 25-26.

[18] GTE notes that in the event one of its facilities did not comply with RF emissions standards, GTE employees and shareholders would be among the most likely to be affected.

Contrary to the NLC and NATOA's assertions, state and local agencies have the means to check for compliance independent of any steps taken by the federal government. In particular, any individual or any state and local authority concerned about the RF emissions from any wireless facility can measure the RF emissions from the site. Should the site be found not to comply, the state or local government can take appropriate zoning action and any affected party can file an FCC complaint alleging noncompliance.

State and local governments complain that requiring such entities to audit companies in this manner to determine compliance is costly, and that it would be better policy to require the companies to bear the expense of demonstrating compliance. GTE disagrees. The telecommunications industry, aided by new legislation and FCC rules favoring competition and deregulation, has transformed from a highly regulated, concentrated structure to a highly competitive, lightly regulated structure. The CMRS market, in particular, is intensely competitive.[19] In this new world, both Congress and the FCC have stated a preference for fewer regulations and fewer compliance rules, with harsh penalties for noncompliance. The highly regulatory compliance demonstration standards favored by the NLC and NATOA represent a step backward in regulatory approach, inappropriate in a competitive market and contrary to the deregulatory intent of Congress.

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[19] Indeed, competition itself helps insure compliance. Should any entity be found to have violated RF exposure limits, competitors will certainly bring that violation to the public's attention in the marketplace.

Finally, the NLC and NATOA proposal for compliance demonstration would be contrary to the public interest. Allowing state and local governments to require compliance demonstration beyond that required by the FCC would unnecessarily increase company costs and further slow the site acquisition process. The result to the public would likely be more expensive service and slower delivery of new services and improvements to existing services.

G. Presumption of Compliance

The NLC and NATOA comment that, in FCC review proceedings, the burden should be on the wireless service provider to demonstrate RF compliance rather than requiring local governments to show noncompliance. They base this view primarily on their reading of the statutory language. In particular, they claim that the FCC has no jurisdiction to act under Section 332(c)(7)(B)(v) unless it first establishes RF compliance and that compliance may not be established through a presumption.[20]

The NLC and NATOA again are misreading the statute. The NLC and NATOA turn around statutory language to limit federal jurisdiction when it is state and local jurisdiction that is actually limited. Section 332(c)(7)(B)(iv) eliminates state and local authority to regulate the placement of personal wireless facilities based on RF concerns. The only way a state or local government may properly regulate facilities based on RF is when the facilities in question do not comply. Thus, it is the state and local agencies that must establish RF noncompliance in order to have jurisdiction to act.

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[20] NLC and NATOA Comments at 26-27. They also re-argue many of their reasons for favoring a demonstration of compliance. GTE responded to these arguments in the previous section.

A closer examination of Section 332(c)(7)(B)(v) further contradicts NLC and NATOA arguments that the FCC must establish RF compliance in order to have jurisdiction to act. First, the "act" contemplated under Section 332(c)(7)(B)(v) is review of state and local action and relief from improper action. Section 332(c)(7)(B)(v) of the statute confers jurisdiction on the FCC to review claims that a state or local agency violated 332(c)(7)(B)(iv). A necessary part of that review is a determination whether the wireless provider actually complied with RF exposure limits. Thus, rather than a prerequisite to FCC review, RF compliance is a part of that review. Second, the NLC and NATOA are correct that the FCC may not preempt state and local action (or "failure to act") if the personal wireless service provider is found to have failed to comply with RF guidelines. The statute, however, does not prohibit the FCC from using a presumption to establish compliance, especially when, as here, presumed compliance with Commission rules is reasonable and a long-standing FCC policy.

II. Conclusion

GTE disagrees with the NLC and NATOA's reading of Sections 332(c)(7)(B)(iv) and (v) and the relevant legislative history. GTE believes that these section clearly establish the FCC's ability to review any state or local zoning authority regulations based in whole or in part on RF emissions concerns. GTE opposes the NLC and NATOA's proposal to allow state and local governments to require wireless providers to prove compliance with FCC RF exposure limits, and to place the burden of proving compliance in review proceedings on the wireless provider.

Respectfully submitted,

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Certificate of Service

I, Judy R. Quinlan, hereby certify that copies of the foregoing "Reply Comments of GTE Service Corporation" have been mailed by first class United States mail, postage prepaid, on October 24, 1997 to all parties of record.

Judy R. Quinlan

Judy R. Quinlan