DOCKET FILE COPY ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 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

REPORT AND ORDER

Adopted: November 13, 2000 **Released: November 17, 2000**

By the Commission:

Table of Contents

Paragraph Number

I. INTRODUCTION 1
II. BACKGROUND 3
III. DISCUSSION 7
A. Procedures for Filing, Serving, and Resolving Petitions 7
B. Demonstration of RF Compliance 15
C. Other Issues 19
IV. PROCEDURAL MATTERS 21
A. Regulatory Flexibility Act 21
B. Paperwork Reduction Act 24
V. CONCLUSION 27
VI. ORDERING CLAUSES 28

Appendix A – List of Comments and Replies
Appendix B – Final Rule

I. INTRODUCTION

1. In this *Report and Order*, we address the issues raised in the Commission's Notice of Proposed Rulemaking regarding the Commission's review of requests for relief from impermissible State and local regulation of personal wireless service facilities based on the environmental effects of radiofrequency (RF) emissions.[1] Specifically, we provide that such requests under Section 332(c)(7)(B)(v) of the Communications Act of 1934, as amended,[2] shall

[1] Procedures for Reviewing Requests for Relief From State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Telecommunications Act of 1934, WT Docket No. 97-192, *Second Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 12 FCC Rcd 13494, 13540-60, ¶¶ 115-54 (1997) (*RF Procedures Notice*), *aff'd Cellular Phone Taskforce v. FCC*, 205 F.3d 82 (2d Cir. 2000) (*Cellular Phone Taskforce*).

[2] 47 U.S.C. § 332(c)(7)(B)(v).

be filed as petitions for declaratory ruling, and we establish certain required and recommended procedures regarding the service of pleadings and comment periods in such proceedings. We believe that these procedures will facilitate the prompt resolution of petitions seeking relief from the Commission under Section 332(c)(7)(B)(v), while ensuring that State and local governments have an opportunity to respond to issues raised in the context of these proceedings.

2. We also conclude that the other issues raised in the *RF Procedures Notice* are best addressed through case-by-case adjudication, and we therefore terminate our consideration of these issues in the rulemaking context. In light of developments since the *RF Procedures Notice* was released, we now believe that binding rules globally resolving these issues are neither necessary nor appropriate. In particular, we note the recent release by the Commission and the Local and State Government Advisory Committee (LSGAC) of *A Local Government Official's Guide to Transmitting Antenna RF Emission Safety: Rules, Procedures, and Practical Guidance* (*Local Official's Guide*).[3] We expect that the *Local Official's Guide* will facilitate the common sense resolution of disputes regarding demonstrations of compliance with the Commission's RF emissions rules, without resort to litigation or other formal dispute resolution.

II. BACKGROUND

3. Section 704(a) of the Telecommunications Act of 1996[4] amended Section 332(c) of the Communications Act (the "Act") by adding a new Section 332(c)(7) entitled "Preservation of Local Zoning Authority."[5] Section 332(c)(7)(A) states that except as provided in Section 332(c)(7), nothing in the Communications 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."[6] Sections 332(c)(7)(B)(i)-(iii) provide that a State or local government: may not, in regulating the placement, construction and modification of personal wireless service facilities, unreasonably discriminate among providers of personal wireless services; may not regulate the placement, construction, and modification of such facilities in a manner that prohibits or has the effect of prohibiting the provision of personal wireless services; must act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time; and must render any denial of a request to place, construct, or modify personal wireless service facilities by means of a written decision supported by substantial evidence contained in a written record.[7]

---

[3] *A Local Official's Guide to Transmitting Antenna RF Emission Safety: Rules, Procedures, and Practical Guidance* (June 2, 2000), available at <http://www.fcc.gov/wtb/siting> (*Local Official's Guide*). The LSGAC is a body of elected and appointed local, State, and tribal government officials appointed by the Chairman of the Commission. It provides advice and information to the Commission on key issues that concern local and State governments and communicates State and local government policy concerns regarding proposed Commission actions.

[4] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

[5] 47 U.S.C. § 332(c)(7).

[6] *Id.* at § 332(c)(7)(A).

[7] *See id.* at § 332(c)(7)(B)(i)-(iii).

4. 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.[8]

Claims alleging a violation of Section 332(c)(7)(B)(iv) are governed by somewhat different provisions than alleged violations of other provisions of Section 332(c)(7)(B). Pursuant to Section 332(c)(7)(B)(v), any person adversely affected by a State or local government's final action or failure to act that is inconsistent with any provision of Section 332(c)(7)(B) may file an action within 30 days in a court of competent jurisdiction.[9] As an alternative, however, "[a]ny 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."[10]

5. On March 9, 1997, the Personal Communications Industry Association (PCIA) requested that the Wireless Telecommunications Bureau (WTB) initiate a proceeding to resolve several issues associated with Sections 332(c)(7)(B)(iv) and (v). Specifically, PCIA requested that the Commission develop policy guidelines that clearly describe under what circumstances State and local testing and documentation requirements related to the environmental effects of RF emissions become so onerous as to effectively constitute State and local regulation of these emissions.[11] On July 15, 1997, LSGAC submitted its Recommendation Number 5 concerning PCIA's letter.[12] LSGAC recommended that the Commission work with State and local governments and industry to develop a mutually acceptable RF testing and documentation system for adoption by State and local governments.[13]

---

[8] *Id.* at § 332(c)(7)(B)(iv).

[9] *See id.* at § 332(c)(7)(B)(v).

[10] *Id.*

[11] *See* Letter from Jay Kitchen, President, Personal Communications Industry Association, to Michele F. Farquhar, Chief, and Rosalind Allen, Deputy Chief, Wireless Telecommunications Bureau (March 19, 1997) (*PCIA Letter*). PCIA further requested that we: (1) prohibit the presentation of evidence regarding the health effects of RF emissions at zoning board hearings absent an affirmative showing that the zoning applicant has failed to comply with federal standards; (2) promulgate streamlined procedures for processing petitions that request preemption of State and local rules that attempt to regulate RF emissions in a manner inconsistent with federal standards; and (3) propose procedures for filing and reviewing requests filed pursuant to Section 332(c)(7)(B)(iv)-(v) of the Communications Act for relief from State or local regulations of the placement, construction, or modification of personal wireless service facilities based either directly or indirectly on the environmental effects of RF emissions. *See id.* at 2.

[12] *See* Local and State Government Advisory Committee Recommendation Number 5 (submitted July 15, 1997), <http://www.fcc.gov/statelocal/recommendation5.html> (*LSGAC Letter*).

[13] We have incorporated the *PCIA Letter* and the *LSGAC Letter* into the record and will treat both letters as comments in this proceeding.

6. On August 25, 1997, we issued the *RF Procedures Notice*, which requested comments on proposals developed in response to the PCIA and LSGAC Letters, as well as related matters developed independently by Commission staff.[14] In particular, the *RF Procedures Notice* sought comment on the following issues: (1) procedures for filing and serving petitions for relief under Section 332(c)(7)(B)(v) with the Commission;[15] (2) standing to file petitions and participate in Commission proceedings under Section 332(c)(7)(B)(v),[16] and standing to seek review of final Commission and delegated authority actions taken pursuant to Section 332(c)(7)(B)(v);[17] (3) for purposes of proceedings under Section 332(c)(7)(B)(v), whether to establish a rebuttable presumption that personal wireless service facilities will comply with the Commission's RF emissions rules, and procedures for State or local governments or other interested parties to rebut the presumption;[18] (4) the definition of certain terms under Sections 332(c)(7)(B)(iv) and 332(c)(7)(B)(v);[19] and (5) what demonstration a State or local government may require of a carrier to show that a facility will comply with the Commission's rules concerning RF emissions.[20] Thirty-seven parties or groups of parties filed formal comments, and 34 parties filed reply comments.[21] In addition, the Commission received numerous *ex parte* communications, which were placed in the record for this proceeding. Although we do not individually list these *ex parte* communications, we have considered them in this proceeding.

III. DISCUSSION

A. Procedures for Filing, Serving, and Resolving Petitions

7. Background. In the *RF Procedures Notice*, we proposed that parties seeking relief from the Commission under Section 332(c)(7)(B)(v) shall file a request for declaratory ruling pursuant to Section 1.2 of the Commission's rules,[22] asking that the Commission review the State or local regulation and grant appropriate relief.[23] In addition, we proposed that a copy of the request be served on the State or local authority that took action or failed to take action against which relief is sought.[24]

---

[14] *See RF Procedures Notice*, 12 FCC Rcd 13494.

[15] *See id.* at 13556-57, ¶ 149.

[16] *See id.* at 13557, ¶ 150.

[17] *See id.* at 13560, ¶ 153.

[18] *See id.* at 13557-60, ¶¶ 151-154.

[19] *See id.* at 13549-52, ¶¶ 135-141.

[20] *See id.* at 13552-56, ¶¶ 142-148.

[21] Commenters included personal wireless service providers and their representatives, State and local governments, and concerned citizens. A complete list of all of the formally commenting parties and the short forms by which they are cited is included in Appendix A. We grant the City of Fountain, Colorado's motion to consider late-filed comments, filed on November 14, 1997, and, accordingly, include the City as a party in Appendix A.

[22] 47 C.F.R. § 1.2.

[23] *See RF Procedures Notice*, 12 FCC Rcd at 13556, ¶ 149.

[24] *See id.* at 13557, ¶ 149.

8. On November 17, 1998, the Commission issued a public notice that established procedural guidelines for filing petitions for preemption of State or local government authority pursuant to Section 253 of the Act.[25] Among other things, the public notice states that the pleading cycle for petitions under Section 253 shall be approximately 30 days for oppositions and approximately 15 days for replies, but that the specific timeframe will be established by the relevant Bureau by public notice, and may be less than the approximate timeframe listed above if the Bureau finds that good cause exists.[26] In addition, the public notice directs petitioners to serve a copy of Section 253 petitions on each State or local government entity to which the petition applies and to reference such service in the petition.[27]

9. On November 9, 1999, the Commission issued a Memorandum Opinion and Order that, among other things, amended the Commission's *ex parte* rules to make the service requirement described in the preceding paragraph applicable to all petitions requesting preemption of State or local government authority (including petitions for declaratory ruling and petitions for rulemaking), and not only preemption petitions filed under Section 253.[28] In addition, the *Ex Parte Order* expanded this service requirement to include not only "those state and localities that are the subject of the petition" but also "those whose actions are identified as warranting preemption."[29]

10. Discussion. Commenters generally favor using the Commission's declaratory ruling process to consider petitions filed pursuant to Section 332(c)(7)(B)(v).[30] We agree that the Commission's declaratory ruling process is an efficient means of handling such petitions. Thus, we conclude that parties seeking relief from the Commission under Section 332(c)(7)(B)(v) shall file a request for declaratory ruling pursuant to Section 1.2 of the Commission's rules. In addition, we conclude that such petitions shall be subject to the Commission's procedures applicable to petitions for declaratory ruling,[31] with the exception of the pleading cycle guidelines and service rules set forth in the following paragraphs.

11. Section 1.45(b) of our rules, which generally governs oppositions to petitions for declaratory ruling, provides that "[o]ppositions to any motion, petition, or request may be filed

---

[25] Suggested Guidelines for Petitions for Ruling under Section 253 of the Communications Act, *Public Notice*, 13 FCC Rcd 22970 (1998) (*Section 253 Procedures Public Notice*). Section 253 requires the Commission, subject to enumerated exceptions, to preempt the enforcement of any State or local statute, regulation, or legal requirement that prohibits or has the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service. *See* 47 U.S.C. § 253.

[26] *See Section 253 Procedures Public Notice*, 13 FCC Rcd at 22973-74.

[27] *See id.* at 22974.

[28] *See* Amendment of 47 C.F.R. §1.1200 *et seq.* Concerning Ex Parte Presentations in Commission Proceedings, *Memorandum Opinion and Order*, 14 FCC Rcd 18831, 18838-39, ¶ 29 (1999) (*Ex Parte Order*).

[29] *Id.*

[30] *See, e.g.*, Ameritech Comments at 7; CCO Comments at 30-31; NATOA Reply at 17; Vermont Environmental Board Comments at 13.

[31] *See, e.g.*, 47 C.F.R. §§ 1.45 - 1.49 (filing procedures) and 47 C.F.R. § 1.1206(a)(3) (permit-but-disclose *ex parte* status).

within 10 days after the original pleading is filed."[32] Several commenters argue that 10 days is too short a period for State and local governments to respond to petitions filed pursuant to Section 332(c)(7)(B)(v), and believe 30 days would be a more appropriate period.[33] These commenters argue that proceedings addressing petitions for relief under Section 332(c)(7)(B)(v) are inherently fact-based, and 10 days is too short a time frame for State and local governments to gather the necessary facts.[34] We agree with this position, which is not opposed. We find that the pleading cycle guidelines set forth in the *Section 253 Procedures Public Notice* are equally appropriate for petitions for declaratory ruling that seek relief under Section 332(c)(7)(B)(v).[35] Specifically, we anticipate that the pleading cycle for petitions for declaratory ruling that seek relief under Section 332(c)(7)(B)(v) will be approximately 30 days for oppositions and approximately 15 days for replies. The specific pleading cycle for each petition will be established by the Wireless Telecommunications Bureau (Bureau) by public notice, and may vary from the approximate timeframe listed above if the Bureau finds that variation is appropriate.

12. We also find that petitions for declaratory ruling seeking relief under Section 332(c)(7)(B)(v) are similar to petitions seeking Commission preemption of State or local government authority, and should be subject to the *Ex Parte Order's* expanded service rules referenced in paragraph 9 above.[36] Accordingly, we amend the expanded service requirements in the *ex parte* rules to include petitioners seeking relief under Section 332(c)(7)(B)(v).[37] Thus, petitioners seeking relief under Section 332(c)(7)(B)(v) must serve a copy of such petitions not only on those State and local governments that are the subject of the petitions, but also on those State and local governments otherwise specifically identified in the petitions whose actions petitioners argue are inconsistent with federal law.[38] In addition, we recommend that, if a petition involves a local statute, regulation, ordinance, or legal requirement, the petitioner should serve the appropriate state entity, in addition to the appropriate local entity.[39] We also recommend that, subsequent to the filing and service of the initial petition, each party, including

---

[32] 47 C.F.R. § 1.45(b).

[33] *See* NATOA Reply at 17-18; PCIA Comments at 10; US West Comments at 22; *see also* CCO Comments at 30-31 (45 days).

[34] *See* NATOA Reply at 18. Some commenters further contend that State and local governments will have to hire outside counsel in Washington, D.C. in order to effectively litigate these petitions and that State and local governments typically can only retain outside counsel with the prior approval of their legislative bodies, which typically meet infrequently and require such items to be placed on their agendas weeks in advance. *See* CCO Comments at 30-31; NATOA Reply at 17.

[35] *See Section 253 Procedures Public Notice*, 13 FCC Rcd at 22973; *see also* discussion *supra* para. 8.

[36] *See Ex Parte Order*, 14 FCC Rcd at 18838-39, ¶ 29; 47 C.F.R. § 1.1206 (Note 1 to paragraph (a)).

[37] The text of amended Note 1 to Section 1.1206(a) is set forth in Appendix B.

[38] Petitions that are not served on State or local governments in accordance with the procedures established in the *Ex Parte Order* will be dismissed without consideration as defective pleadings and treated as violating the *ex parte* rules (unless the Commission otherwise determines that the matter should be made part of the record under 47 C.F.R. § 1.1212(d) and the parties are so notified). *See Ex Parte Order*, 14 FCC Rcd at 18838-39, ¶ 29.

[39] *See Section 253 Procedures Public Notice*, 13 FCC Rcd at 22974 (recommending this procedure in the context of petitions for preemption of State or local government regulation under Section 253).

the petitioner and each respondent State or local government entity, should serve all other parties with a copy of its pleadings and any filing made pursuant to the Commission's *ex parte* rules.[40]

13. We believe that the procedural guidelines recommended in paragraph 11 above, the revision to the *Ex Parte Order's* expanded service requirements in paragraph 12, and other Commission rules generally applicable to petitions for declaratory ruling provide a fair and balanced approach to reviewing requests for relief under Section 332(c)(7)(B)(v). In particular, we believe that these procedures will facilitate the prompt resolution of petitions seeking relief from the Commission under Section 332(c)(7)(B)(v), while ensuring that State and local governments have an opportunity to respond to allegations raised against them in the context of these proceedings. We therefore decline to adopt further rules or guidelines suggested by commenters for filing, serving, and resolving petitions for relief under Section 332(c)(7)(B)(v).

14. For example, we decline to adopt the recommendation of several carriers that we impose a 30 day deadline for our own resolution of petitions filed under Section 332(c)(7)(B)(v).[41] While we understand the need to facilitate the build-out process and the need for carriers to have fast resolution of siting disputes in order to allow for faster build-out, we are not prepared to adopt a time limit for resolving petitions for relief under Section 332(c)(7)(B)(v) because we are concerned that doing so will not afford the Commission sufficient flexibility to account for the particular circumstances of each case. In addition, we decline to adopt CCO's proposal that copies of petitions filed with the Commission pursuant to Section 332(c)(7)(B)(v) should be served by hand on the affected State or local governments.[42] All documents that are required to be served on State or local governments under this order must be served in a manner that comports with our general rules governing service of process, which supplies a sufficient degree of notice to afford the affected parties an adequate opportunity to respond.[43] We decline to adopt the recommendation of some commenters that we impose default judgments against those State and local governments that fail to respond to petitions filed pursuant to Section 332(c)(7)(B)(v).[44] We do not believe that it is appropriate to limit our ability to render a decision in a Section 332(c)(7)(B)(v) proceeding on substantive grounds, even where a State or local government fails to respond to the petition. Moreover, we believe that it is unnecessary to routinely impose default judgements against State or local governments that fail to respond to Section 332(c)(7)(B)(v) petitions. Since a decision on a petition filed pursuant to Section 332(c)(7)(B)(v) will be largely factual, a State or local government's failure to respond to a Section 332(c)(7)(B)(v) petition will likely put it at a serious disadvantage, and we anticipate that unopposed petitions will be amenable to resolution relatively quickly.

---

[40] *See id.* at 22974 (recommending this procedure in the context of petitions for preemption of State or local government regulation under Section 253).

[41] *See* PCIA Comments at 12; US West Reply at 22-23; PrimeCo Comments at 15-16; Southwestern Bell Reply at 4-5. *But see* NATOA Reply at 22-23 (asserting that proceedings addressing petitions for relief under Section 332(c)(7)(B)(v) will be inherently fact-based and, in some cases, may require more than 30 days for thorough consideration).

[42] *See* CCO Comments at 29-30.

[43] *See* 47 C.F.R. § 1.47.

[44] *See* US West Comments at 1; PrimeCo Comments at 17.

B. Demonstration of RF Compliance

15. Background. In the *RF Procedures Notice*, we sought comment on the extent to which localities are permitted to request personal wireless service providers to demonstrate compliance with the Commission's RF exposure guidelines.[45] Under Section 332(c)(7)(B)(iv), State and local regulation of personal wireless service facilities siting based on the environmental effects of RF emissions is preempted "to the extent that such facilities comply with the Commission's regulations concerning such emissions." This leaves unresolved the issue of what State and local governments can require as proof of compliance with the Commission's regulations.

16. The Commission and the LSGAC produced the *Local Official's Guide* in response to misunderstandings between industry and local governments regarding this issue. The *Local Official's Guide* provides information and voluntary guidance to local governments to facilitate their ability to devise reasonable and effective procedures for assuring that antenna facilities located within their boundaries comply with Commission limits for human exposure to RF emissions. It provides a summary of the Commission's RF exposure guidelines and the Commission's procedures for ensuring compliance and enforcing its rules. It also provides guidance to local governments attempting to determine if a radio transmission facility may raise compliance concerns by helping local governments to recognize sites that do not raise compliance concerns. In addition, it provides information for initiating a Commission inquiry in instances where a facilities operator is unable to dispel a local government's concerns about compliance.

17. Discussion. Pursuant to Section 332(c)(7), and consistent with the Commission's general authority to regulate the operation of radio facilities,[46] State and local governments are broadly preempted from regulating the operation of personal wireless service facilities based on RF emission considerations. Thus, for example, a local government may not require a facility to comply with RF emissions or exposure limits that are stricter than those set forth in the Commission's rules, and it may not restrict how a facility authorized by the Commission may operate based on RF emissions or any other cause. We note that the Commission's plenary authority in this area has recently been upheld by the courts.[47] Thus, State or local authority with respect to personal wireless service facilities is limited to regulation of the placement, construction, and modification of such facilities. The sole question in this area posed by the *RF Procedures Notice* was the extent of a State or local government's authority, in the context of such regulation, to require a demonstration of compliance with our RF exposure guidelines.

18. We recognize that State and local governments have a legitimate interest in ascertaining that facilities will comply with the RF exposure limits set forth in our rules. We also recognize that certain requirements related to demonstrating compliance can be unnecessarily burdensome on carriers. Although the *Local Official's Guide* is not legally binding, we expect it will help produce a framework for local and State governments and

[45] *See RF Procedures Notice*, 12 FCC Rcd at 13552, ¶ 142.

[46] *See* 47 U.S.C. § 301.

[47] *See Cellular Phone Taskforce*, 205 F.3d at 95-96.

wireless service providers to work cooperatively on this issue. As a result of the *Local Official's Guide*, we expect that many disputes pertaining to demonstrations of compliance will be resolved by the parties in a manner that will allow personal wireless services to be deployed and delivered to consumers as rapidly as possible, while preserving the authority of State and local jurisdictions in land use matters and protecting the public health. Moreover, where there is a genuine question regarding a site's compliance with the RF exposure limits, Commission staff will promptly take all appropriate actions to ensure compliance.[48] In particular, if a local government were to make a Commission inquiry regarding a site's compliance with RF exposure limits in a case where compliance cannot be readily demonstrated by applying the principles set forth in the *Local Official's Guide*, we would require the operator of the facility to provide sufficient information to demonstrate compliance.[49] Therefore, we do not believe any binding rule governing demonstrations of compliance is necessary. To the extent that any party may argue in a properly filed case that a particular requirement to demonstrate compliance violates Section 332(c)(7), we will consider the issue in that context.

C. Other Issues

19. Background. In addition to the issues discussed in Sections III.A and III.B above, the *RF Procedures Notice* sought comment on: (1) who has standing to file petitions and participate in Commission proceedings under Section 332(c)(7)(B)(v),[50] and who has standing to seek review of final Commission and delegated authority actions taken pursuant to Section 332(c)(7)(B)(v);[51] (2) for purposes of proceedings under Section 332(c)(7)(B)(v), whether to establish a rebuttable presumption that personal wireless service facilities will comply with the Commission's RF emissions rules, and procedures for State or local governments or other interested parties to rebut the presumption;[52] and (3) the definition of certain terms under Sections 332(c)(7)(B)(iv) and 332(c)(7)(B)(v).[53] We received a number of comments on these issues from the personal wireless service industry, State and local governments, and concerned citizens.

20. Discussion. We conclude that it is not necessary to reach a global resolution of the remaining issues at this time. When we issued the *RF Procedures Notice*, we believed that advance resolution of many of the procedural and definitional issues would be helpful to parties,

---

[48] *See Local Official's Guide* at 10.

[49] The provision of such information is consistent with the operator's affirmative obligation to confirm compliance for all facilities that are not categorically excluded. *See* 47 C.F.R. § 1.1307(b). In addition, we note that an operator must evaluate and determine compliance for a facility that is otherwise categorically excluded if specifically requested to do so by the Commission. *See* 47 C.F.R. §§ 1.1307(c), 1.1307(d); *Local Official's Guide* at 7.

[50] *See RF Procedures Notice*, 12 FCC Rcd at 13557, ¶ 150.

[51] *See id.* at 13560, ¶ 153.

[52] *See id.* at 13557-60, ¶¶ 151-154.

[53] *See id.* at 13549-52, ¶¶ 135-141. We also note that the *RF Procedures Notice* referenced certain other issues, including the evidence that can be presented before local zoning boards, that were raised in the PCIA Letter. *See id.* at 13540, ¶ 115. To the extent such issues may be considered within the scope of the *RF Procedures Notice*, they are encompassed within the discussion below.

as well as to courts.[54] Subsequent developments, however, do not suggest the need for further guidance on these issues. Indeed, we have received only one petition for relief under section 332(c)(7)(B)(v), and that petition was withdrawn after the parties settled the underlying controversy.[55] Furthermore, although there have been numerous reported court decisions under Section 332(c)(7), only a small proportion of these decisions have involved RF emissions issues. There do not appear to be serious differences among courts in addressing these issues.[56] Under these circumstances, and given the complexity of these issues, we conclude that these issues are best addressed through case-by-case adjudication.

IV. PROCEDURAL MATTERS

A. Regulatory Flexibility Act

21. Final Regulatory Flexibility Certification. The *RF Procedures Notice* incorporated an Initial Regulatory Flexibility Analysis (IRFA) of the proposed rules pursuant to 5 U.S.C. § 605.[57] No comments were filed on the IRFA. Section 604 of the Regulatory Flexibility Act, as amended, requires a final regulatory flexibility analysis in a notice and comment rulemaking proceeding unless the Commission certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."[58] The RFA generally defines "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[59] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small

[54] *See id.* at 13542, ¶ 118.

[55] *See* Petition of 360° Communications Company 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 Emission Concerns, *Order*, 14 FCC Rcd 9172 (Com. Wir. Div. 1999) (*360° Communications Order*).

[56] *See, e.g.*, *Goforth v. Smith*, 991 S.W.2d 579, 582-85 (Ark. 1999) (concluding that the Telecommunications Act precluded private common law actions, as well as state action, on the basis of RF emissions); *Smart SMR v. Borough of Fair Lawn*, 704 A.2d 127 (N.J. 1998) (finding that the zoning board was wrong in denying a tower application on the basis of community residents' belief that the Commission's RF emissions standard would not protect their health); *AWACS v. Newtown Township*, 702 A.2d 604 (Pa. Commw. Ct. 1997) (deciding that the Telecommunications Act preempts a local zoning board from considering the environmental effects of RF emissions); *Kapton v. Bell Atlantic NYNEX Mobile*, 700 A.2d 581 (Pa. Commw. Ct. 1997) (stating that a landowner suing over a 270 foot tower for multiple reasons, including electromagnetic field concerns, conceded that the Telecommunications Act preempts the field); *Westinghouse Electric Corp. v. Council of Township of Hampton*, 686 A.2d 905, 908 (Pa. Commw. Ct. 1996) (confirming the trial court's decision that RF concerns did not defeat the construction of a 150 foot tower by a wireless provider). *Cf. In re Freeman*, 975 F. Supp. 570, 574 (D. Vt. 1997), *aff'd sub nom in Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311 (2d Cir. 2000) (acknowledging, in a case concerning RF interference, that the Telecommunications Act preempts consideration of RF emissions when considering the construction or modification of wireless facilities). *But see Sprint Spectrum, L.P. v. Township of Warren Planning Board*, 737 A.2d 715 (N.J. Superior Ct. App. Div. 1999) (holding that the board of health could inquire about RF emissions and require an explanation of the methodology of the RF study to ensure that the Commission's emissions standards are followed).

[57] *See RF Procedures Notice*, 12 FCC Rcd at 13586-91, Appendix D.

[58] 5 U.S.C. § 605(b).

[59] *Id.* at § 601(6).

Business Act.[60] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[61] The Commission believes, as discussed below, that the rule adopted in this proceeding will not have a significant economic impact on a substantial number of small entities.

22. As discussed above in paragraph 12 , the Commission is making one rule change in this *Report and Order*. Specifically, the Commission amends Note 1 to Section 1.1206(a) of the Commission's rules so that the expanded service requirements set forth in that note apply to petitions filed pursuant to Section 332(c)(7)(B)(v) (*i.e.*, petitions for relief from impermissible State and local regulation of personal wireless service facilities on the basis of RF emissions). Thus, petitioners seeking relief under Section 332(c)(7)(B)(v) must serve a copy of such petitions on those State and local governments that are the subject of the petitions as well as on those State and local governments otherwise specifically identified in the petitions whose actions petitioners argue are inconsistent with federal law. Given that the Commission has received only one petition for relief under section 332(c)(7)(B)(v),[62] we do not anticipate that numerous State and local governments will be the subject of such petitions or identified in such petitions. Thus, we do not expect that the service requirement adopted in this *Report and Order* will impose a significant burden of cost and time on petitioners, including petitioners that are small entities. We believe that this service requirement will facilitate the efficient resolution of petitions seeking relief under Section 332(c)(7)(B)(v). Moreover, we believe that this requirement will ensure that State and local governments, including those governments that are small entities, have an opportunity to participate in proceedings under Section 332(c)(7)(B)(v).

23. Accordingly, the Commission certifies, pursuant to Section 605(b) of the Regulatory Flexibility Act,[63] as amended by the Contract with America Advancement Act of 1996,[64] that the rule adopted in this *Report and Order* will not have a significant economic impact on a substantial number of small entities. The Commission will send a copy of the *Report and Order*, including a copy of this final certification, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996.[65] In addition, the *Report and Order* and this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration, and a summary will be published in the Federal Register.[66]

---

[60] *Id.* at § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. S § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[61] Small Business Act, 15 U.S.C. § 632.

[62] That petition was withdrawn after the parties settled the underlying controversy. *See 360° Communications Order*, 14 FCC Rcd 9172; note 55 *supra*.

[63] *See* 5 U.S.C. § 605(b).

[64] Public Law No. 104-121, 110 Stat. 847 (1996).

[65] *See* 5 U.S.C. § 801(a)(1)(A).

[66] *See id.* at § 605(b).

B. Paperwork Reduction Act

24. This *Report and Order* contains a new information collection. Specifically, the *Report and Order* amends Note 1 to Section 1.1206(a) of the Commission's rules so that the expanded service requirements set forth in that note apply to petitions filed pursuant to Section 332(c)(7)(B)(v) (*i.e.*, petitions for relief from impermissible State and local regulation of personal wireless service facilities on the basis of RF emissions). Thus, petitioners seeking relief under Section 332(c)(7)(B)(v) must serve a copy of such petitions on those State and local governments that are the subject of the petitions as well as on those State and local governments otherwise specifically identified in the petitions whose actions petitioners argue are inconsistent with federal law.

25. As part of our continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collection contained in this Order, as required by the Paperwork Reduction Act of 1995.[67] Public and agency comments are due 60 days from publication of the summary of this *Report and Order* in the Federal Register, and OMB comments are due 60 days from that date. Comments should address: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (2) the accuracy of the Commission's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

26. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 1-C804, 445 Twelfth Street, S.W., Washington, D.C. 20554, or via the Internet to jboley@fcc.gov, and to Edward C. Springer, OMB Desk Officer, Room 10236 New Executive Office Building, 725 Seventeenth Street, N. W., Washington, D.C. 20503, or via the Internet to edward.springer@omb.eop.gov.

V. CONCLUSION

27. As discussed above, we provide that requests filed under Section 332(c)(7)(B)(v) shall be filed as petitions for declaratory ruling, and we establish certain recommended procedures regarding the comment periods and the service of pleadings in such proceedings. We also amend Note 1 to Section 1.1206(a) of the Commission's rules so that the expanded service requirements set forth in that note apply to these proceedings. We believe that these procedures will ensure that petitions seeking relief under Section 332(c)(7)(B)(v) will be resolved efficiently, with an opportunity for all interested parties to participate. With respect to all other issues raised in the *RF Procedures Notice*, we terminate the present proceeding.

[67] Public Law No. 104-13.

VI. ORDERING CLAUSES

28. Pursuant to the authority contained in Sections 4(i), 303(r), and 332(c)(7) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 332(c)(7), IT IS ORDERED that this Report and Order is hereby ADOPTED.

29. IT IS FURTHER ORDERED that the rule amendment made by this Report and Order, and specified in Appendix B, SHALL BECOME EFFECTIVE 120 days after publication of a summary of the Report and Order in the Federal Register, pending OMB approval.

30. IT IS FURTHER ORDERED that the motion of the City of Fountain, Colorado, to consider late-filed comments is GRANTED.

31. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this Report and Order, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary

Appendix A

Comments

Ad-Hoc Association of Parties Concerned About the Federal Communications Commission's Radiofrequency Health and Safety Rules (Ad-Hoc Association)
Ameritech Mobile Communications, Inc.
AT&T Wireless Services, Inc.
BellSouth Corporation
Bozeman City-County Planning Council
Cellular Phone Taskforce
Cellular Telecommunications Industry Association, Inc.
Concerned Communities and Organizations (CCO)
Cunningham, Scott R.
GTE Service Corporation
Haavind, Diane
Horowitz, Jean
Hutchins, Mark F.
Jefferson Parish, Louisiana
Local and State Government Advisory Committee (LSGAC)
Maddux, Dealy-Doe-Eyes
Mobile Services
National League of Cities and the National Association of Telecommunications Officers and Advisers (NATOA)
New York City Department of Information Technology and Telecommunications and New York City Department of Health
Occhiuto, David
Orange County, Florida
Ormond Beach, Florida
Palm Beach County, Florida
Personal Communications Industry Association (PCIA)
PrimeCo Personal Communications, L.P. (PrimeCo)
Rayner, Lucia
Romano, JoAnn and family
San Francisco, City and County of
San Juan County, Washington, Laura Arnold, Planning Director
San Juan County, Washington, Rhea Miller, Commissioner, District 3
San Juan County, Washington, Darcie L. Nielsen, Commissioner, District 1
Seattle City Council
Southwestern Bell Mobile Systems, Inc., Southwestern Bell Wireless, Inc., and Pacific Bell
Sprint Spectrum L.P. d/b/a Sprint PCS
US West, Inc.
Vermont Environmental Board
Vermont House of Representatives
Worsham, Michael

Replies to Comments

Ad Hoc Association
Airtouch Communications, Inc.
Ameritech Mobile Communications, Inc.
AT&T Wireless Services, Inc.
BellSouth Corporation
Bennett, Myrna
Bird, Stephen
Cape Cod Commission
Cellular Telecommunications Industry Association, Inc.
Concerned Communities and Organizations
Connecticut Siting Council and Richard Blumenthal, Attorney General of Connecticut
Emermen, Annie and Sidney
Ergotec Association, Inc.
Fountain, Colorado, City of
Fusion UV Systems
GTE Service Corporation
Hardwick (Vermont) Action Committee
Hurdiburg, Peter
Institute of Natural Therapies
Mobile Services
NATOA
Nextel Communications, Inc
Palm Beach County, Florida
PCIA
Powertel PCS, Inc.
PrimeCo
Southwestern Bell Mobile Systems, Inc., Southwestern Bell Wireless, Inc., and Pacific Bell
Sprint Spectrum L.P. d/b/a Sprint PCS
Tschudy, Richard L.
U.S. Congress Representative Bernard Sanders
U.S. Congress Senator Patrick Leahy
US West, Inc.
Vermont House of Representatives Majority Leader Paul A.Cillo
Vermont Representative David Deen
Whitehall, Ohio, City of

Appendix B

Final Rule

Part 1 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 1 – PRACTICE AND PROCEDURE

1. The authority citation for Part 1 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 154, 303, and 309(j) unless otherwise noted.

2. Section 1.1206 is revised to read as follows:

§ 1.1206 Permit-but-disclose proceedings.

(a) ***

Note 1 to paragraph (a): In the case of petitions for declaratory ruling that seek Commission preemption of state or local regulatory authority and petitions for relief under 47 U.S.C. § 332(c)(7)(B)(v), the petitioner must serve the original petition on any state or local government, the actions of which are specifically cited as a basis for requesting preemption. Service should be made on those bodies within the state or local governments that are legally authorized to accept service of legal documents in a civil context. Such pleadings that are not served will be dismissed without consideration as a defective pleading and treated as a violation of the ex parte rules unless the Commission determines that the matter should be entertained by making it part of the record under §1.1212(d) and the parties are so informed.

*****