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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

FCC LOCAL AND STATE GOVERNMENT
ADVISORY COMMITTEE

October 9, 1997

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: 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. 97-197)

97-197

Dear Mr. Caton:

Please find enclosed an original and nine copies of the LSGAC's Advisory Recommendation No. 7 for filing in the above-referenced proceeding.

Thank you for your attention to this matter. Please feel free to contact me at (303) 320-6100 if you have any questions regarding this filing.

Very truly yours,

Kenneth S. Fellman

Kenneth S. Fellman
Chairman, LSGAC

cc: Commissioners (w/encl.)
William E. Kennard, Esq. (w/encl.)
Susan Fox, Esq. (w/encl.)
Sheryl Wilkerson, Esq. (w/encl.)
LSGAC Committee Members (w/encl.)
National Association Staff (w/encl.)

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FCC Local and State Government Advisory Committee
Advisory Recommendation Number 7 Regarding:
Petition for Rulemaking of the CTIA Concerning Amendment to the Commission's
Rules to Preempt State and Local Regulation of CMRS Transmitting Facilities
(FCC 97-303; WT Docket No. 97-197)

1. The Commission has requested comment on two proposals that would limit the type of information that local and state governments may require to demonstrate that personal wireless facilities comply with the Commission's standards for human exposure to radiofrequency emissions ("RF Standards"). NPRM ¶¶ 142 et.seq. The LSGAC appreciates the Commission's recognition that local officials should be able to provide constituents with meaningful assurance that facilities within the community comply with the RF Standards. The LSGAC disagrees with the Commission's proposed limits on local compliance monitoring for three fundamental reasons.
2. First, the LSGAC questions the Commission's authority to limit local and state efforts to ensure that facilities comply with the RF Standards. With respect to concerns about RF emissions, the Telecommunications Act preempts local decisions regulating the placement of personal wireless facilities only to the extent that the facilities comply with the RF Standards. The LSGAC is not interested in promoting or defending unreasonable or unnecessary compliance monitoring; however, the LSGAC does not believe the Telecommunications Act grants the Commission authority to limit or preempt local compliance monitoring.
3. Second, even if it is within the Commission's jurisdiction to impose such limits, the LSGAC disagrees with the Commission's conclusion that such limits are necessary or appropriate. The LSGAC questions why the Commission is interested in restricting, rather than guiding, state and local efforts to protect the public health and safety. The NPRM expresses concern that providers are experiencing construction delays while state and local officials search for methods to assess compliance. Instead of limiting local and state authority to monitor compliance with the RF Standards, the Commission should work with local and state governments to develop informational materials like the Fact Sheet #1 and Fact Sheet #2 that were issued by the Wireless Bureau. These materials were extremely helpful to local governments and expedited local processing of wireless facility permit applications. Similar materials focusing on monitoring compliance with the RF Standards would be equally valuable; they would minimize construction delays without dictating that state and local officials do less than they may reasonably believe is necessary to protect the public health and safety, and without generating expensive and unproductive litigation over the respective roles of federal, state and local authorities.
4. Third, the Commission's alternative proposals both disregard four fundamental realities. The following facts were acknowledged by the Commission staff from the Mass Media Bureau, the Wireless Bureau, and the Office of Engineering and Technology who met with staff from the cities in the ten major broadcast market areas on September 25 and with the LSGAC on September 26:

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- A. The Commission's regulatory scheme relies on providers of personal wireless services to self-certify that their facilities will comply with the RF exposure standards. (The Commission proposes to *extend* its policy of self-certification by adopting a presumption that facilities comply with the RF Standards. NPRM ¶147.)
- B. Whether or not a particular facility complies with the Commission's RF exposure standards depends on the specific circumstances of its installation – those circumstances that affect the ability of individuals to approach the facility and the area around the facility in which RF emissions exceed the Commission's standards.
- C. With respect to personal wireless facilities, the Commission does not collect any site-specific information about the circumstances of any particular installation. As a result, information provided to the Commission cannot establish whether a particular facility in a particular location risks exposing individuals to emissions that exceed the RF Standards.
- D. The Commission does not have resources to conduct any field assessments or monitoring of the circumstances under which licensees install facilities in particular locations.

The Commission's first proposed alternative would limit local and state governments to receiving: 1) self-certification statements comparable to those received by the Commission, and 2) documents related to RF emissions submitted as part of the Commission's licensing process. NPRM ¶143. Because compliance with the Commission's standards depends on site-specific factors, and because the Commission does not collect any site-specific information as part of its licensing process, this proposal completely fails to address the legitimate interests of local and state officials in providing meaningful assurance to the public that facilities comply with the RF Standards.

5. The Commission's second proposed alternative would allow local and state governments to require a *demonstration* of compliance only with respect to facilities that are categorically excluded from environmental assessment by the Commission because of their height above ground level or their low operating power. The LSGAC questions why the Commission proposes to provide *greater* latitude to local and state governments in evaluating RF Standard compliance for those facilities that the Commission has determined pose the *most remote* potential for generating emissions that exceed the RF exposure standards. State and local governments must be allowed to require a demonstration of compliance for facilities that create the greatest risk to public health and safety – those that are *not* categorically excluded from environmental assessment by the Commission's rules. The Commission's non-binding policy statement elaborating on what a demonstration of compliance might consist of offers a useful starting point. NPRM ¶ 146. However, this cannot serve as a limitation on state and local authorities. For example, state and local authorities cannot be restricted from conducting site visits to evaluate whether proposed restrictions on access to a facility have actually been

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constructed or installed as promised. The Commission's second proposal therefore fails to adequately recognize the responsibility of local and state officials.

6. The LSGAC is not prepared at this time to submit a proposal for recommended procedures to conduct meaningful monitoring of compliance with the Commission's RF Standards. The LSGAC would welcome the opportunity to work with Commission staff to develop such a proposal. The LSGAC therefore proposes to continue the dialogue with Commission staff that was initiated on September 25 and 26. The LSGAC would like to consider, at its November 21 meeting, a proposal developed jointly by local, state and federal staff for *recommended* monitoring procedures. The LSGAC believes that widespread distribution of recommended monitoring procedures would obviate any perceived need for preemption of state and local authority. The LSGAC would also welcome the opportunity to discuss recommended monitoring procedures with all interested industry associations at the LSGAC's November 21 meeting.

RECOMMENDATION: For the reasons discussed above, the LSGAC recommends and requests:

- A. That the Commission make appropriate Commission staff available to meet with staff who work for LSGAC members and for national organizations representing state and local government interests sometime in late October or early November to review and discuss proposals for recommended monitoring procedures.
- B. That members of the Commission and the Commission General Counsel participate in a discussion of any proposal arising from the meeting of local, state and federal staff at the next LSGAC meeting on November 21.
- C. That the Commission join the LSGAC in inviting interested industry associations to discuss any proposal arising from the meeting of local, state and federal staff at the November 21 meeting of the LSGAC.

Adopted by the LSGAC on September 26, 1997


Kenneth S. Fellman
Chairman