

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	File No. EB-06-SE-344
T-Mobile Northeast, L.L.C.	)	NAL/Acct. No. 200732100001
	)	FRN # 0004677209

**NOTICE OF APPARENT LIABILITY FOR FORFEITURE**

**Adopted Date: October 19, 2006**

**Released Date: October 19, 2006**

By the Chief, Spectrum Enforcement Division, Enforcement Bureau:

**I. INTRODUCTION**

1. By this Notice of Apparent Liability for Forfeiture (“NAL”), we find T-Mobile Northeast, L.L.C. (“T-Mobile”), a wholly-owned subsidiary of T-Mobile USA, Inc., apparently liable for a forfeiture in the amount of eleven thousand dollars (\$11,000) for constructing a facility before completing environmental review, in apparent willful violation of Section 1.1307(a)(4) of the Commission’s Rules (“Rules”).<sup>1</sup>

**II. BACKGROUND**

2. Under the Commission’s rules implementing the National Environmental Policy Act of 1969, as amended, (“NEPA”),<sup>2</sup> licensees, permittees and applicants (collectively, “licensees”) are required to assess proposed facilities to determine whether the facilities may significantly affect the environment, as defined in Section 1.1307 of the Rules.<sup>3</sup> For actions that may have significant environmental effects, licensees must prepare and submit to the Commission an Environmental Assessment<sup>4</sup> and undergo environmental review and any mandatory consultation with expert agencies, prior to initiating construction.<sup>5</sup> This includes actions for which no pre-construction authorization is otherwise required.<sup>6</sup>

3. Section 1.1307(a)(4) of the Rules requires licensees to consider whether their proposed facilities would affect properties listed or eligible for listing (“historic properties”) in the National Register of Historic Places (“National Register”). In considering potential effects on historic properties, Section 1.1307(a)(4) requires licensees to follow the prescribed procedures established by the Programmatic Agreements for collocated antennas<sup>7</sup> and for historic preservation review.<sup>8</sup> The

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<sup>1</sup> 47 C.F.R. § 1.1307(a)(4).

<sup>2</sup> 42 U.S.C. §§ 4321-4335.

<sup>3</sup> 47 C.F.R. § 1.1307.

<sup>4</sup> See 47 C.F.R. § 1.1311.

<sup>5</sup> See 47 C.F.R. § 1.1308.

<sup>6</sup> 47 C.F.R. § 1.1312.

<sup>7</sup> See *Wireless Telecommunications Bureau Announces Execution of Programmatic Agreement with respect to* (continued...)

Collocation and Nationwide Agreements<sup>9</sup> are designed to tailor and streamline the review and consultation procedures required by the National Historic Preservation Act of 1966, as amended (“NHPA”),<sup>10</sup> and the implementing regulations issued by the Advisory Council on Historic Preservation (“Advisory Council”).<sup>11</sup>

4. Specifically, the Collocation Agreement recognizes that installing or mounting antennas on existing buildings and other structures generally is environmentally preferable to and less likely to affect historic properties than the construction of new towers, and thus exempts certain collocated antennas from the historic preservation review and consultation procedures.<sup>12</sup> The Collocation Agreement, however, does not exempt the collocation of antennas on buildings or other structures that “are over 45 years old.”<sup>13</sup> Because the collocation of antennas on such buildings or structures is not exempt, licensees must consider whether their actions may affect historic properties, in accordance with the streamlined review and consultation procedures set forth in the Nationwide Agreement, prior to initiating construction.<sup>14</sup>

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*Collocating Wireless Antennas on Existing Structures*, Public Notice, 16 FCC Rcd 5574 (WTB 2001), *recon. denied*, 20 FCC Rcd 4084 (WTB 2005) (“*Collocation Agreement*”).

<sup>8</sup> See *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, Report and Order, WT Docket No. 03-128, 20 FCC Rcd 1073 (2004), *clarified*, 20 FCC Rcd 17995 (2005), *aff’d*, *CTIA-The Wireless Ass’n. v. FCC*, No. 05-1008 (D.C. Cir. September 26, 2006) (“*Nationwide Agreement*”).

<sup>9</sup> Section 1.1307(a)(4) of the Rules incorporates by reference the Collocation Agreement and the Nationwide Agreement.

<sup>10</sup> 16 U.S.C. § 470 *et seq.* The NHPA requires that a federal agency consider the effects of its federal undertakings, including actions that it authorizes or approves, on historic properties prior to issuing federal licenses, permits or approvals. See 16 U.S.C. §§ 470f, 470w(7). In considering such effects, the NHPA further requires the federal agency to consider the views of expert agencies. Specifically, the NHPA requires the federal agency to consider the views of the Advisory Council on Historic Preservation, the agency tasked with the responsibility for implementing the NHPA, the appropriate State Historic Preservation Officer, and, if affected historic properties are of religious or cultural significance to Indian tribes or Native Hawaiian organizations, their representatives. See 16 U.S.C. §§ 470a(a)(3), (d)(6)(B), 470f, 470i. Consistent with the Advisory Council’s regulations, the Commission’s environmental rules delegate the task of identification and consideration of the effects that proposed facilities may have on historic properties, including the initiation of consultation, to its licensees, permittees and applicants, but the Commission remains ultimately responsible. See 47 C.F.R. § 1.1307(a)(4); see also 36 C.F.R. § 800.2(a)(3); *Nationwide Agreement*, 20 FCC Rcd at 1076-77 ¶ 5.

<sup>11</sup> See 36 C.F.R. § 800.1 *et seq.* Under the NHPA and the Advisory Council’s implementing regulations, a federal agency may, with the agreement of the Advisory Council and the relevant State Historic Preservation Officer or the National Conference of State Historic Preservation Officers, adopt Programmatic Agreements to tailor the historic preservation review and consultation procedures, as well as exempt actions, that are unlikely to affect historic properties. See 16 U.S.C. § 470v; 36 C.F.R. § 800.14(b),(c).

<sup>12</sup> See *Collocation Agreement*, 16 FCC Rcd at 5575, Appendix A.

<sup>13</sup> *Id.* at 5578-79, Appendix A, Section V. Also, under the Collocation Agreement, a collocated antenna on a non-tower structure is not exempt from historic preservation review and consultation procedures if: (i) the building or structure is a designated National Historic Landmark or is located within or near a historic district, or (ii) the collocation is subject to a substantiated complaint regarding its effect on one or more historic properties.

<sup>14</sup> See *Nationwide Agreement*, 20 FCC Rcd at 1144, Appendix B, Section I. C.

5. The Nationwide Agreement requires licensees<sup>15</sup> to: (i) determine the geographical areas of potential effects (“APE”) for both direct and visual effects;<sup>16</sup> (ii) identify historic properties within the applicable APE; and (iii) consider the effects a proposed facility may have on the identified properties. In the course of this process, licensees must, among other things, solicit the views of the State Historic Preservation Officer (“SHPO”) and, if applicable, any Indian tribe or Native Hawaiian organization (“NHO”) that may attach religious or cultural significance to potentially affected historic properties.

6. Thus, under the Nationwide Agreement, licensees must identify the historic properties located within the APE that may be directly or visually affected by their proposed facility. The APE for direct effects is the area of potential ground disturbance and any property that will be physically altered or destroyed by the undertaking; the “presumed APE” for visual effects is based on the height of the facility (i.e., the height of a mounted antenna and building, or the height of the tower).<sup>17</sup> For a facility that is 200 feet or less in overall height, the presumed APE for visual effects is a half mile.<sup>18</sup> To identify historic properties located within the APE for direct and visual effects (“nearby historic properties”), licensees must review certain records maintained by the appropriate SHPO and must gather information from interested Indian tribes and NHOs, and make additional reasonable good faith efforts at identification within the APE for direct effects.<sup>19</sup> In the course of the identification and assessment process, licensees must also gather information from the local government and the general public.<sup>20</sup> At the conclusion of this process, licensees must provide the SHPO and any interested consulting parties with Submission Packets (“Packets”) detailing their proposals and explaining the effects, if any, their proposals may have on nearby historic properties.<sup>21</sup> Licensees must provide the SHPO a 30-day period to review these Packets, during which other parties may submit comments.<sup>22</sup>

7. In cases where a licensee determines that its proposed facility will not involve historic

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<sup>15</sup> The requirements of the Nationwide Agreement apply to Commission licensees, permittees, registration holders, and applicants or prospective applicants for a wireless or broadcast license, authorization or antenna structure registration. *See Nationwide Agreement*, 20 FCC Rcd at 1145, Appendix B, Section II. A. 2.

<sup>16</sup> “APE” refers to the geographic area within which a proposed communication facility “may directly or indirectly cause alterations in the character or use” of historic properties. *Nationwide Agreement*, 20 FCC Rcd at 1145, Appendix B, Section II. A. 3.

<sup>17</sup> *Id.* at 1156, Appendix B, Sections VI. C. 2; VI. C. 4.

<sup>18</sup> *Id.* at 1156, Appendix B, Section VI. C. 4. a.

<sup>19</sup> *Nationwide Agreement*, 20 FCC Rcd at 1156-1158, Appendix B, Section VI. D. The Nationwide Agreement requires licensees to use “reasonable and good faith efforts” to identify any Indian tribe or NHO that “may attach religious or cultural significance” to the nearby historic properties. *Id.* at 1149-50, Appendix B, Section IV B. Such efforts may include reference to the Commission’s Tower Construction Notification System through which such tribes and organizations register geographical areas that encompass significant religious or cultural historic properties of interest. *Id.* *See also generally Clarification of Procedures for Participation of Federally Recognized Indian Tribes and Native Hawaiian Organizations under the Nationwide Programmatic Agreement*, Declaratory Ruling, 20 FCC Rcd 17955 (2005) (“*Declaratory Ruling*”).

<sup>20</sup> *See Nationwide Agreement*, 20 FCC Rcd at 1153-1154, Appendix B, Section V. Notice to the public may be accomplished through local zoning or historic preservation review proceedings.

<sup>21</sup> *Id.* at 1160, Appendix B, Section VII A. 1. The Nationwide Agreement attaches standardized Packets for collocated antenna construction (FCC Form 621) and for new tower construction (FCC Form 620). *See Nationwide Agreement*, 20 FCC Rcd at 1180-1201, Appendix B, Attachments 3 and 4.

<sup>22</sup> *Id.* at 1160-61, Appendix B, Section VII. A. 2-4.

properties,<sup>23</sup> and the SHPO concurs or does not respond within 30 days of receipt of the Packet, the environmental review process is deemed complete and the licensee may begin construction.<sup>24</sup> In cases where a licensee determines that its proposed facility will have an effect on nearby historic properties, but that the effect is not adverse, and the SHPO does not respond within 30 days of receipt of the Packet, the environmental review process is deemed complete and the licensee may begin construction after it provides the Commission with a copy of the Packet and allows for the prescribed period for Commission review.<sup>25</sup> Finally, if the licensee or the SHPO determines that the proposed facility will have an adverse effect on nearby historic properties, the licensee may not begin construction until the conclusion of a prescribed process to address and, if possible, mitigate the effects.<sup>26</sup> If an Indian tribe or NHO disagrees with the licensee's determination or does not respond to contacts, the licensee must seek guidance from the Commission and cannot proceed without the Commission's concurrence.<sup>27</sup>

8. As a wireless licensee, T-Mobile is subject to the Commission's environmental rules, including the specific historic preservation review requirements. In 2005, T-Mobile proposed to collocate three cluster mounted antennas onto a mast attached to the bell tower roof of the Temple Ark of Salvation Church ("Temple Church") in Philadelphia, Pennsylvania, increasing the church's overall height from 55 feet to 67 feet. Because the church was over 45 years old, T-Mobile's proposed facility was not exempt under the Collocation Agreement.<sup>28</sup> T-Mobile thus was required to consider the effects of its proposed facility on any historic properties located within the half mile APE, as well as the APE for direct effects, and comply with the procedures outlined in the Nationwide Agreement, before it initiated construction.

9. To carry out its responsibilities under the Nationwide Agreement, T-Mobile retained environmental consultant URS Corporation ("URS"). URS researched available records, conducted on-site field investigations, and ultimately determined that T-Mobile's proposed facility would not affect historic properties. Specifically, URS determined that the Temple Church was not a historic property (i.e., was not eligible for listing on the National Register), and that the qualifying historic characteristics

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<sup>23</sup> A no effect determination signifies that there are no historic properties within the APE, or that there are such properties but the proposed facility will not alter their qualifying historic character. See *Nationwide Agreement*, 20 FCC Rcd at 1161, Appendix B, Section VII. B. 1.

<sup>24</sup> *Id.* at 1161, Appendix B, Section VII. B. 1 and 2.

<sup>25</sup> *Id.* at 1162, Appendix B, Section VII. C. 2. In cases where the SHPO affirmatively concurs with a licensee's determination of no adverse effect, the process is complete and the licensee may proceed without any submission to the Commission. *Id.* at 1161-62, Appendix B, Section VII C.1.

<sup>26</sup> *Id.* at 1162-63, Appendix B, Section VII. C. 3-6 and D. The NHPA establishes a procedural scheme whereby effects on historic properties must be considered prior to federal licensing; it does not preclude federally licensed actions that alter or impair historic properties. See 16 U.S.C. § 470f; see also *National Mining Ass'n v. Fowler*, 324 F.3d 752, 755 (D.C. Cir. 2003) (noting that the NHPA does not impose substantive standards on federal agencies; it only requires federal agencies to solicit the Advisory Council's views and take into account the effects of its licensed actions on historic properties); *Davis v. Latscher*, 202 F.3d 359, 368-69 (D.C. Cir. 2000); *City of Alexandria v. Slater*, 198 F. 3d 862, 871 (D.C. Cir. 1999), *cert. denied sub nom.*, 531 U.S. 820 (2000) (finding that the NHPA is a procedural not a substantive statute and thus does not bar federally authorized projects that significantly or adversely affect historic properties, it only requires that federal agencies consider such effects in their decision making); *Amendment of Environmental Rules in Response to New Regulations Issued by the Council on Environmental Quality, Order*, 60 RR 2d 13, 16 ¶¶ 7-8, n. 12 (1986) (noting that the Commission may authorize actions that adversely affect the environment, where it concludes that "the public benefits outweigh the environmental consequences").

<sup>27</sup> *Nationwide Agreement*, 20 FCC Rcd at 1152, Appendix B, Section IV. G.

<sup>28</sup> The church, formerly the 6th German Evangelical Church, was built in 1898.

of two eligible railroad properties located within the half mile APE would not be altered by T-Mobile's proposed facility. On October 13, 2005, URS solicited the views of the local planning and the local historical agencies.<sup>29</sup> In addition, on October 14, 2005, URS sought to identify interested Indian tribes and solicit their views by submitting the proposed church site to the Commission's Tower Construction Notification System ("TCNS"). The TCNS notification was sent to 17 federally-recognized Indian tribes that had identified the Philadelphia area as within their area of geographic preference and was also sent to 19 additional Indian tribes that had not yet specified their areas of geographic preference. URS did not, however, prepare and submit the required Packet (FCC Form 621) to the Pennsylvania SHPO at this time.

10. On October 20, 2005, before any of the 17 federally-recognized Indian tribes that had identified the Philadelphia area as within their area of geographic preference had responded, and before URS submitted the Packet to the Pennsylvania SHPO, T-Mobile commenced construction at the church site. T-Mobile completed construction on November 9, 2005.

11. T-Mobile later realized that its construction was premature, and through URS, advised the Pennsylvania SHPO on December 16, 2005, and the Commission staff on January 9, 2006. In February and March of 2006, conferences calls were held between representatives of T-Mobile, URS, the Pennsylvania SHPO and the Commission staff to address historic preservation concerns. On March 23, 2006, URS submitted to the Pennsylvania SHPO a Packet (FCC Form 621) and a Historical Resources Survey Form ("HRSF"). The documentation determined that T-Mobile's facility did not directly affect historic properties because the Temple Church was not eligible for listing in the National Register,<sup>30</sup> and did not indirectly (visually) affect the eligible railroad properties located within the APE because it did not alter their qualifying characteristics for inclusion in the National Register. On May 10, 2006, the Pennsylvania SHPO concurred, finding that T-Mobile's facility "would have no effect on historic properties."<sup>31</sup>

12. Regarding the tribal notifications, on October 21, 2005, URS received automatic, computer-generated responses via TCNS from five Indian tribes indicating that there was no need for consultation on the Temple Church site.<sup>32</sup> On December 16, 2005, after two unsuccessful attempts by URS to contact the Tuscarora Nation, URS referred the site to the Commission staff for follow-up contact.<sup>33</sup> Accordingly, on December 21, 2005, the Commission staff sent a letter to the Tuscarora Nation

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<sup>29</sup> See Letter from Zana C. Wolf, Architectural Historian, URS Corporation, to Philadelphia City Planning Commission (October 13, 2005); Letter from Zana C. Wolf, Architectural Historian, URS Corporation, to Philadelphia Historical Commission (October 13, 2005). In September of 2005, prior to the issuance of these requests, T-Mobile applied for and was granted zoning and building permits from the City of Philadelphia Department of Licenses. See *supra* n. 20 and accompanying text (regarding local involvement).

<sup>30</sup> Specifically, the HRSF found that the church was not eligible because its gothic revival architecture was common, its integrity was compromised by modern additions, and it lacked association with significant historic persons or events.

<sup>31</sup> See Letter from Andres MacDonald, Chief, Division of Preservation Services, Pennsylvania Historical and Museum Commission to Stephen W. Tull, URS Corporation (May 10, 2006).

<sup>32</sup> On October 27, 2005, one of these five tribes, the Shawnee Tribe, replied to URS stating, in contradiction of the earlier automatic message, that it did wish to be consulted on this site. There is nothing in the record to indicate that URS or T-Mobile initiated any further contact with the Shawnee Tribe as a result of this request for consultation.

<sup>33</sup> In the *Declaratory Ruling*, the Commission clarified that once an applicant has made two good faith efforts over 40 days to obtain a response from an Indian tribe or NHO as specified in the Nationwide Agreement, the Commission upon notice will send a letter or email to the Indian tribe or NHO seeking an indication of the Indian tribe's or NHO's interest in participating in review of the proposed construction. If the Indian tribe or NHO does not respond within 20 days, it will be deemed to have no interest in pre-construction review, and the applicant's obligations with respect to that Indian tribe or NHO under the Nationwide Agreement are complete. *Declaratory* (continued...)

giving it a final 20-day period to indicate an interest in the site. This 20-day period expired without any response from the Tuscarora Nation.

13. On August 4, 2006, the Wireless Telecommunications Bureau (“WTB”) sent T-Mobile a Letter of Inquiry (“LOI”).<sup>34</sup> In its response to the LOI,<sup>35</sup> T-Mobile acknowledges that it erred in constructing the facility at the church site before completing the historic preservation review requirements.<sup>36</sup> According to T-Mobile, the error occurred with its “Philadelphia and Central Pennsylvania markets internal record keeping procedures,” when one of its employees “inadvertently issued directions to start construction” before the historic preservation review process was completed.<sup>37</sup> T-Mobile states that, after the company realized its error, it contacted appropriate state and federal agencies, completed the required documentation, and provided further environmental training for its staff.<sup>38</sup> After receiving T-Mobile’s LOI response, the WTB referred the matter to the Enforcement Bureau for possible enforcement action.

### III. DISCUSSION

14. Under Section 503(b)(1)(B) of the Communications Act of 1934 as amended (“Act”), and Section 1.80(a)(1) of the Rules, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.<sup>39</sup> To impose such a forfeiture penalty, the Commission must issue a notice of apparent liability, and the person against whom such notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.<sup>40</sup> The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has violated the Act or a Commission rule.<sup>41</sup>

15. The record establishes that T-Mobile commenced and completed construction at the Temple Church site prior to submission of the required Packet to the Pennsylvania SHPO and receiving the recommendation of the Pennsylvania SHPO. The record also establishes that T-Mobile commenced and completed construction at the Temple Church site prior to receiving responses from interested Indian tribes or obtaining Commission guidance. Thus, we find that T-Mobile commenced and completed

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*Ruling*, 20 FCC Rcd at 16092.

<sup>34</sup> See Letter from Dan Abeyta, Assistant Chief, NEPA Adjudications, Spectrum Competition and Policy Division, Wireless Telecommunications Bureau, Federal Communications Commission, to Shannon Reilly Kraus, Corporate Counsel, T-Mobile USA, Inc. (August 4, 2006). The LOI was sent to T-Mobile’s parent company, T-Mobile USA, Inc., and its parent company responded. See *infra* n. 35.

<sup>35</sup> See Letter from Shannon Reilly Kraus, Corporate Counsel, T-Mobile USA, Inc., to Dan Abeyta, Assistant Chief, NEPA Adjudications, Spectrum Competition and Policy Division, Wireless Telecommunications Bureau, Federal Communications Commission (August 31, 2006) (“Response”).

<sup>36</sup> *Id.* at 5.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 5, and Exhibits 6-7.

<sup>39</sup> 47 U.S.C. § 503(b)(1)(B) and 47 C.F.R. § 1.80(a)(1).

<sup>40</sup> See 47 U.S.C. § 503(b)(4); 47 C.F.R. § 1.80(f).

<sup>41</sup> See, e.g., *SBC Communications, Inc.*, 17 FCC Rcd 7589, 7591, ¶ 4 (2002).

construction at the church site prior to concluding the historic preservation review process in apparent willful violation of Section 1.1307(a)(4) of the Rules.<sup>42</sup> Based on our finding, and consistent with Section 503(b)(1)(B) of the Act and Section 1.80(a)(1) of the Rules, we find it appropriate to propose a forfeiture penalty against T-Mobile.

16. Section 503(b)(2)(B) of the Act authorizes the Commission to assess forfeitures against common carriers of up to \$130,000 for each violation, or each day of a continuing violation, up to a maximum of \$1.325 million for a single act or failure to act.<sup>43</sup> In determining the appropriate forfeiture amount, Section 503(b)(2)(D) of the Act<sup>44</sup> directs the Commission to consider “the nature, circumstances, extent and gravity of the violation, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”

17. The Commission has established base forfeiture amounts for certain violations,<sup>45</sup> but has not specified a base forfeiture amount for constructing a facility prior to completing historic preservation or other environmental reviews required under Section 1.1307(a) of the Rules. Nevertheless, the Commission has stated that “any omission of a specific rule violation from the list ... [establishing base forfeiture amounts] should not signal that the Commission considers any unlisted violation as nonexistent or unimportant. The Commission expects, and it is each licensee’s obligation to know and comply with all Commission’s rules.”<sup>46</sup> Thus, the Commission retains its discretion to issue forfeitures on a case-by-case basis.<sup>47</sup> Having considered the statutory factors and as explained below, we propose a base forfeiture amount of \$7,000.

18. In determining the appropriate base forfeiture amount, we consider the nature of the T-Mobile’s violations. The Commission has long required licensees to submit environmental assessments,

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<sup>42</sup> Section 312(f)(1) of the Act defines “willful” as “the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law. 47 U.S.C. § 312(f)(1). The legislative history of Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act, H.R. Rep. No. 97-765, 97<sup>th</sup> Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the term in the Section 503(b) context. See, e.g., *Southern California Broadcasting Co.*, 6 FCC Rcd 4387, 4388 (1991) (“*Southern California*”). Because T-Mobile consciously and deliberately constructed its facility at the church site, its failure to comply with the environmental review requirements was willful. Its claim of inadvertent mistake is not a mitigating factor and does not negate a finding of willfulness. See *Emery Telephone*, 13 FCC Rcd 23854, 23859 ¶¶ 11-12 (1998), *recon. dismissed in part and den’d in part*, 15 FCC Rcd 7181 (1999); *PJB Communications of Virginia, Inc.*, 7 FCC Rcd 2088 ¶ 5 (1992); *Bureau D’Electronique Appliquee, Inc.*, 20 FCC Rcd 17893, 17896 ¶¶ 9-12 (Enf. Bur. 2005); *Eure Family Ltd. Partnership*, 17 FCC Rcd 7042, 7043 ¶¶ 5-7 (Enf. Bur. 2002).

<sup>43</sup> 47 U.S.C. § 503(b)(2)(B). The Commission twice amended Section 1.80(b)(3) of the Rules, 47 C.F.R. § 1.80(b)(3), to increase the maxima forfeiture amounts, in accordance with the inflation adjustment requirements contained in the Debt Collection Improvement Act of 1996, 28 U.S.C. § 2461. See *Amendment of Section 1.80 of the Commission’s Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, 15 FCC Rcd 18221 (2000) (adjusting the maximum statutory amounts from \$100,000/\$1,000,000 to \$120,000/\$1,200,000); *Amendment of Section 1.80 of the Commission’s Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, 19 FCC Rcd 10945 (2004) (adjusting the maximum statutory amounts from \$120,000/\$1,200,000 to \$130,000/\$1,325,000); see also 47 C.F.R. § 1.80(c).

<sup>44</sup> 47 U.S.C. § 503(b)(2)(D).

<sup>45</sup> See *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087, 17113-15 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) (“*Forfeiture Policy Statement*”); see also 47 C.F.R. § 1.80.

<sup>46</sup> *Forfeiture Policy Statement*, 12 FCC Rcd at 17099 ¶ 22.

<sup>47</sup> *Id.*

perform environmental review and obtain Commission approval before they construct facilities that *may* have a significant effect on the environment, including historic properties.<sup>48</sup> The Commission has explained that any construction delay resulting from requiring pre-construction environmental review “is more than offset by the public interest benefits of ensuring, in compliance with Federal environmental statutes, that no potentially irreversible harms to the environment occurs.”<sup>49</sup> We also note that the Commission has determined that \$10,000 is the appropriate base forfeiture amount for violations of other environmental rules, specifically, the radio frequency radiation exposure limits set forth in Section 1.1307(b), notwithstanding the absence of an established base forfeiture amount in the rules.<sup>50</sup> While we think that failure to comply with Section 1.1307(a)(4) is a serious violation and may have a significant effect on historic properties, such violations do not potentially jeopardize public health and safety, as do violations of the radio frequency radiation exposure limits. We thus find that a lower base forfeiture amount of \$7,000 is appropriate for violations of the historic preservation review requirements of Section 1.1307(a)(4) of the Rules.

19. This \$7,000 base forfeiture amount is subject to adjustment, however. In this regard, we consider T-Mobile’s size and ability to pay a forfeiture.<sup>51</sup> To ensure that forfeiture liability is a deterrent, and not simply a cost of doing business, the Commission has determined that large or highly profitable companies, such as T-Mobile, could expect the assessment of higher forfeitures for violations.<sup>52</sup> Given T-Mobile’s size and ability to pay a forfeiture, we conclude that an upward adjustment of the base forfeiture amount to \$14,000 is appropriate. We do not believe that T-Mobile is entitled to any mitigation of the proposed forfeiture amount because its employee mistakenly authorized construction before the historic preservation review was concluded.<sup>53</sup> It is well established that licensees are responsible, and subject to forfeiture liability, for violations caused by their employees’ actions.<sup>54</sup> We find, however, that T-Mobile

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<sup>48</sup> See *Amendment of Environmental Rules*, First Report and Order, Gen. Docket No. 88-387, 5 FCC Rcd 2942, 2294 Appendix 3. (1990) (amending Section 1.1312 of the environmental rules to require that facilities, which are subject to geographic blanket licenses and which may affect the environment, be evaluated and approved “prior to the initiation of construction of the facility”) (“*First Report*”), *modified*, Second Report and Order, 6 FCC Rcd 1716 (1991) (further amending the rules to require the facilities of non-dominant common carriers be subject to the same pre-construction environmental review as wireless carriers that operate under geographic blanket licenses).

<sup>49</sup> *First Report*, 5 FCC Rcd at 2943 ¶ 11.

<sup>50</sup> See *A-O Broadcasting Corporation*, 17 FCC Rcd 24184, 24190 ¶ 22 (2002), *forfeiture ordered*, 31 Communications Reg. (P&F) 411 (2003), *recon. denied*, 20 FCC Rcd 756 (2005) (determining that the \$10,000 base forfeiture amount established for antenna lighting and other safety violations should apply to violations of Section 1.1307(b) violation, given the serious and “public safety nature” of the radio frequency radiation maximum exposure limits); see also *Americom Las Vegas Limited Partnership*, 17 FCC Rcd 23689, 23694 ¶ 19 (Enf. Bur. 2002), *forfeiture ordered*, 19 FCC Rcd 9643 (Enf. Bur. 2003), *review pending*.

<sup>51</sup> T-Mobile’s parent company, T-Mobile USA, Inc., recently reported that in 2005, it passed the 20 million customer mark and had total revenues of approximately \$14.8 billion. See Press Release, *T-Mobile USA Reports Record Fourth Quarter and Full Year 2005 Results* (March 2, 2006).

<sup>52</sup> See *Forfeiture Policy Statement*, 12 FCC Rcd at 17099-100; see also *SBC Communications, Inc.*, 16 FCC Rcd 19370, 19372 ¶¶ 9-12 (Enf. Bur. 2001), *forfeiture ordered*, 17 FCC Rcd 7589, 7599 ¶ 23 (2002) (increasing the \$3,000 base forfeiture amount to \$100,000, based on a finding that the carrier had the ability to pay and that its failure to file required information was egregious and intentional). We find that T-Mobile’s violation was willful, but not egregious or intentional. See *supra* n. 42. Nevertheless, because T-Mobile’s revenues, like SBC’s, are substantial, the forfeiture amount must be higher to serve a deterrent effect.

<sup>53</sup> See *supra* n. 42 (noting that inadvertent mistakes are not mitigating circumstances and do not negate findings of willfulness).

<sup>54</sup> See *Bay Television, Inc.*, 10 FCC Rcd 11509, 11510-11 ¶ 9 (1995); *Sonderling Broadcasting Corp.*, 69 FCC Rcd (continued...)



is entitled to a downward adjustment of the proposed forfeiture based on its voluntary disclosures to Commission staff, and prompt efforts to address historic preservation concerns by consulting with the Pennsylvania SHPO and Commission staff, *prior* to the Commission's initiation of an investigation. Accordingly, consistent with precedent,<sup>55</sup> we reduce the proposed forfeiture amount from \$14,000 to \$11,000.

#### IV. CONCLUSION

20. We propose a forfeiture of \$11,000 against T-Mobile for its failure to comply with the historic preservation review requirements prior to constructing its facility in apparent willful violation of Section 1.1307(a)(4) of the Rules.

#### V. ORDERING CLAUSES

21. **ACCORDINGLY, IT IS ORDERED** that, pursuant to Section 503(b) of the Act, and Section 1.80 of the Rules, T-Mobile Northeast, L.L.C., **IS** hereby **NOTIFIED** of its **APPARENT LIABILITY FOR A FORFEITURE** in the amount of \$11,000 for its apparent willful violation of Section 1.1307(a)(4) of the Rules.

22. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Rules, within thirty days of the release date of this Notice of Apparent Liability for Forfeiture, T-Mobile Northeast, L.L.C., **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

23. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within 30 days of the release of this Order. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.<sup>56</sup> Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 358340, Pittsburgh, PA 15251-8340. Payment by overnight mail may be sent to Mellon Bank/LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, PA 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106. Requests for payment of the full amount of the NAL under an installment plan should be sent to: Associate Managing Director – Financial Operations, 445 12<sup>th</sup> Street, S.W., Room 1-A625, Washington, D.C. 20554.<sup>57</sup>

24. The response, if any, must be mailed to the Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554, ATTN: Enforcement Bureau – Spectrum Enforcement Division, and must include the NAL/Acct. No. referenced in the caption.

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289, 290-291 ¶ 6 (1977); *Wagenvoord Broadcasting Co.*, 35 FCC 2d 361, 361-62 ¶ 3 (1972); *Eure Family Lmted. Partnership*, 17 FCC Rcd 21861, 21863-64 ¶¶ 6-7 (Enf. Bur. 2002); *American Paging, Inc.*, 12 FCC 10417, 10419-20 ¶ 11 (WTB 1997).

<sup>55</sup> See *Local Phone Services, Inc.*, 21 FCC Rcd 9974 ¶ 117 (2006) *Emery Telephone*, 13 FCC Rcd at 23858 ¶¶ 5, 10; *Victoria Cellular Corp.*, 7 FCC Rcd 7853, 7854 ¶¶ 10-11 (1992); *American Family Ass'n*, 17 FCC Rcd 18135, 18137 ¶ 10 (Enf. Bur. 2002), *recon. denied*, 18 FCC Rcd 2413 (Enf. Bur. 2003).

<sup>56</sup> 47 U.S.C. § 504(a).

<sup>57</sup> See 47 C.F.R. § 1.1914.

25. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting principles; or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.<sup>58</sup>

26. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture shall be sent by first class mail and certified mail return receipt requested to Shannon Reilly Kraus, Esq., T-Mobile USA, Inc., 129290 SE 38<sup>th</sup> Street, Bellevue, Washington 98006.

FEDERAL COMMUNICATIONS COMMISSION

Kathryn S. Berthot  
Chief, Spectrum Enforcement Division  
Enforcement Bureau

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<sup>58</sup> *Id.*