

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

In the Matter of)	File Nos.: EB-06-SE-344; EB-06-SE-437
)	
T-Mobile USA, Inc.)	Acct. No. 200732100001
)	
)	FRN No. 0004677209

ORDER

Adopted: January 15, 2009

Released: January 15, 2009

By the Assistant Chief, Enforcement Bureau:

1. In this Order, we adopt the attached Consent Decree entered into between the Enforcement Bureau (“Bureau”) and T-Mobile USA, Inc. (“T-Mobile”). The Consent Decree is for the purpose of terminating the Bureau’s investigation into whether T-Mobile violated section 1.1307(a)(4) of the Commission’s Rules (“Rules”)¹ with respect to the construction of a wireless communications facilities in Philadelphia, Pennsylvania, and Chimayo, New Mexico.

2. The Bureau and T-Mobile have negotiated the terms of a Consent Decree that resolves this matter. A copy of the Consent Decree is attached hereto and incorporated by reference.

3. After reviewing the terms of the Consent Decree and evaluating the facts before us, we find that the public interest would be served by adopting the Consent Decree and terminating the investigation.

4. In the absence of material new evidence relating to this matter, we conclude there are no substantial or material questions of fact as to whether T-Mobile possesses the basic qualifications, including those related to character, to hold or obtain any Commission license or authorization.

5. Accordingly, **IT IS ORDERED** that, pursuant to section 4(i) of the Act,² and sections 0.111 and 0.311 of the Rules,³ the Consent Decree attached to this Order **IS ADOPTED**.

6. **IT IS FURTHER ORDERED** that the above-captioned investigation **IS TERMINATED**.

¹ 47 U.S.C. § 302a(b).

² 47 U.S.C. § 154(i).

³ 47 C.F.R. §§ 0.111, 0.311.

7. **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 counsel for T-Mobile, David H. Solomon, Esq., Wilkinson Barker Knauer, LLP, 2300 N Street, NW, Suite 700, Washington, DC 20037.

FEDERAL COMMUNICATIONS COMMISSION

Susan McNeil
Assistant Chief
Enforcement Bureau

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T-Mobile USA, Inc.)	
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CONSENT DECREE

The Enforcement Bureau (“Bureau”) and T-Mobile USA, Inc. (“T-Mobile” or the “Company”), by their authorized representatives, hereby enter into this Consent Decree for the purpose of terminating the Bureau’s investigation into whether T-Mobile violated the historic preservation regulations set forth in section 1.1307(a)(4)¹ of the Commission’s Rules and any related rules with respect to the construction of wireless communications facilities in Philadelphia, Pennsylvania, and Chimayo, New Mexico.

I. DEFINITIONS

1. For the purposes of this Consent Decree, the following definitions shall apply:
 - (a) “Act” means the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.*
 - (b) “Adopting Order” means an Order of the Bureau adopting the terms of this Consent Decree without change, addition, deletion, or modification.
 - (c) “Bureau” means the Enforcement Bureau of the Federal Communications Commission.
 - (d) “Commission” and “FCC” mean the Federal Communications Commission and all of its bureaus and offices.
 - (e) “Compliance Plan” means the program described in this Consent Decree at paragraph nine.
 - (f) “Effective Date” means the date on which the Bureau releases the Adopting Order.
 - (g) “Investigations” means the investigations initiated by the Bureau into whether T-Mobile violated the historic preservation regulations set forth in section 1.1307(a)(4) of the Commission’s Rules and any related rules with respect to the construction of wireless communications facilities in Philadelphia, Pennsylvania (EB-06-SE-344), and Chimayo, New Mexico (EB-06-SE-437).

¹ 47 C.F.R. § 1.1307(a)(4).

- (h) “Notice of Apparent Liability” or “NAL” means the Notice of Apparent Liability for Forfeiture issued against T-Mobile Northeast, L.L.C. on October 19, 2006. *T-Mobile Northeast, L.L.C.*, 21 FCC Rcd 11799 (EB 2006).
- (i) “Parties” means T-Mobile and the Bureau.
- (j) “Rules” means the Commission’s regulations found in Title 47 of the Code of Federal Regulations.
- (k) “T-Mobile” means T-Mobile USA, Inc., and its subsidiaries, affiliates, predecessors-in-interest and successors-in-interest.

II. BACKGROUND

2. 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 antennas² and for historic preservation review.³ The Collocation and Nationwide Agreements⁴ are designed to tailor and streamline the review and consultation procedures required by the National Historic Preservation Act of 1966, as amended (“NHPA”),⁵ and the implementing regulations issued by the Advisory Council on Historic Preservation (“Advisory Council”).⁶

² See *Wireless Telecommunications Bureau Announces Execution of Programmatic Agreement with respect to Collocating Wireless Antennas on Existing Structures*, Public Notice, 16 FCC Rcd 5574 (WTB 2001), *recon. denied*, 20 FCC Rcd 4084 (WTB 2005) (“*Collocation Agreement*”).

³ 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 sub nom. CTIA-The Wireless Ass’n. v. FCC*, 466 F.3d 105 (D.C. Cir. 2006) (“*Nationwide Agreement*”).

⁴ Section 1.1307(a)(4) of the Rules incorporates by reference the Collocation Agreement and the Nationwide Agreement.

⁵ 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 to its licensees, permittees and applicants, but the Commission remains ultimately responsible for enforcement of the environmental rules. 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.

⁶ 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).

3. On October 19, 2006, the Enforcement Bureau issued the Notice of Apparent Liability against T-Mobile with respect to T-Mobile's compliance with section 1.1307(a)(4) of the Commission's Rules regarding collocation of antennas onto the roof of property in Philadelphia, Pennsylvania. The NAL noted that T-Mobile voluntarily disclosed this matter to Commission staff and took prompt efforts to address historic preservation concerns by consulting with the Pennsylvania State Historic Preservation Officer ("SHPO"), which determined that T-Mobile's facility "would have no effect on historic properties."⁷

4. The Bureau also has been investigating T-Mobile's compliance with section 1.1307(a)(4) of the Commission's rules regarding construction and operation of telecommunications facilities in Chimayo, New Mexico. The Commission's Wireless Telecommunications Bureau has found that T-Mobile's tower in Chimayo has an adverse effect on historic properties.⁸ The Wireless Telecommunications Bureau also has found, in connection with the Chimayo investigation, that T-Mobile's "inadvertent errors and admissions do not establish an intentional avoidance of NHPA review or an intentional adverse effect on a historic property in contravention of Section 110(k)" of the NHPA.⁹ T-Mobile has been actively consulting with Commission staff and the New Mexico SHPO to address the effects of the Chimayo tower.

III. TERMS OF AGREEMENT

5. **Adopting Order.** The Parties agree that the provisions of this Consent Decree shall be subject to final approval by the Bureau by incorporation of such provisions by reference in the Adopting Order without change, addition, modification, or deletion.

6. **Jurisdiction.** T-Mobile agrees that the Bureau has jurisdiction over it and the matters contained in this Consent Decree and has the authority to enter into and adopt this Consent Decree.

7. **Effective Date; Violations.** The Parties agree that this Consent Decree shall become effective on the date on which the Bureau releases the Adopting Order. Upon release, the Adopting Order and this Consent Decree shall have the same force and effect as any other Order of the Bureau. Any violation of the Adopting Order or of the terms of this Consent Decree shall constitute a separate violation of a Bureau Order, entitling the Bureau to exercise any rights and remedies attendant to the enforcement of a Commission Order.

8. **Termination of Investigations.** In express reliance on the covenants and representations in this Consent Decree and to avoid further expenditure of public resources, the Bureau agrees to terminate its investigations without any findings of liability on the part of T-Mobile and to cancel the NAL. In consideration for the termination of said investigations, T-Mobile agrees to the terms, conditions, and procedures contained herein. The Bureau further agrees that, in the absence of new material evidence, the Bureau will not use the facts developed in these investigations through the Effective Date of the Consent Decree, or the existence of this Consent Decree, to institute, on its own motion (or recommend to the Commission) any new enforcement proceeding, formal or informal, or take

⁷ See Letter from Andres MacDonald, Chief, Division of Preservation Services, Pennsylvania Historical and Museum Commission to Stephen W. Tull, URS Corporation (May 10, 2006).

⁸ See E-mail from Jeffrey S. Steinberg, Deputy Chief, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau, to Katherine Slick, New Mexico State Historic Preservation Officer, *et al.* (Nov. 5, 2008).

⁹ See Letter from Jeffrey S. Steinberg, Deputy Chief, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau, to Charlene Dwin Vaughn, AICP, Assistant Director, Office of Federal Programs, Federal Permitting, Licensing, and Assistance, Advisory Council on Historic Preservation (Oct. 3, 2008).

any action on its own motion against T-Mobile concerning the matters that were the subject of the investigations. The Bureau also agrees that it will not use the facts developed in the investigations through the Effective Date of this Consent Decree, or the existence of this Consent Decree, to institute on its own motion (or recommend to the Commission) any proceeding, formal or informal, or take any action on its own motion (or recommend to the Commission any action) against T-Mobile with respect to T-Mobile's basic qualifications, including its character qualifications, to be a Commission licensee or authorized common carrier or hold Commission authorizations.

9. **Compliance Plan.** For purposes of settling the matters set forth herein, T-Mobile agrees to create within 30 days of the Effective Date of this Consent Decree and maintain a Compliance Plan related to future compliance with the historic preservation requirements of the Act, the Commission's Rules, and the Commission's Orders. The Plan will include, at a minimum, the following components:

- (a) **Compliance Team.** T-Mobile shall appoint a two-person team that will be responsible for implementation of this Compliance Plan. This team shall be thoroughly familiar with the FCC's environmental requirements, including the Collocation Agreement and the historic preservation review process under the Nationwide Agreement. T-Mobile shall provide those persons' identities and contact information to the FCC and ensure that this information is kept current.
- (b) **Compliance Procedures.** T-Mobile will periodically review, at least once during the first twelve months after the Effective Date and once during the second twelve months after the Effective Date, the Company's written policies and procedures governing its compliance with the Commission's historic preservation requirements, and will make any changes to such policies and procedures, as appropriate, to assist in compliance with the Act, the Commission's Rules and the Commission's Orders. These policies and procedures shall spell out in detail the historic preservation compliance responsibilities of T-Mobile's outside consultants dealing with wireless facilities construction and of those employees within T-Mobile who supervise those consultants, as well as the methods by which historic preservation compliance will be assured at each stage of the pre-construction and construction process. As part of these procedures, to better ensure the completeness and accuracy of its submissions, for those states where the SHPO is participating, T-Mobile will encourage its consultants to use the FCC's Electronic Section 106 Filing System ("E-Section 106 System") for submitting materials to the State Historic Preservation Officers. T-Mobile shall provide an executive summary of its written policies and procedures to the Bureau and the Wireless Telecommunications Bureau within 30 days of the Effective Date of this Consent Decree.
- (c) **Compliance Training.** T-Mobile will periodically conduct, at least once during the first twelve months after the Effective Date and once during the second twelve months after the Effective Date, training for key T-Mobile personnel and consultants who have responsibility for and involvement in communications tower and antenna siting with regard to T-Mobile's policies and procedures governing compliance with the FCC's historic preservation rules and those rules themselves. Relevant new employees and consultants will also be trained within 90 days of their employment. The training program shall include detailed information concerning the Section 106 process, including the FCC Form 620 and Form 621 Submission Packets and the Tower Construction Notification System.
- (d) **FCC Monitoring.** T-Mobile will monitor FCC developments and decisions and modify its historic preservation compliance policies as appropriate. T-Mobile will continue reasonably to cooperate with the FCC regarding the accuracy of T-Mobile's submittals for tower construction and collocation.

- (e) **Good Faith Consultation Efforts.** T-Mobile will continue to consult in good faith with the Wireless Telecommunications Bureau and the New Mexico SHPO regarding the Chimayo, New Mexico site referenced in paragraph four above.
- (f) **Compliance Reports.** T-Mobile will file compliance reports with the Commission ninety days, twelve months, and twenty four months after the Effective Date of the Order adopting this Consent Decree. Each compliance report shall include a compliance certificate from an official (Vice President or higher), as an agent of T-Mobile, stating that the official has personal knowledge that T-Mobile has complied with the terms of the Compliance Plan set forth in this paragraph, together with an accompanying statement explaining the basis for the official's compliance certification. All compliance reports shall be submitted to the Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554. All reports shall also be submitted electronically to Jacqueline Ellington, Esq. at Jackie.Ellington@fcc.gov and to JoAnn Lucanik, Esq. at JoAnn.Lucanik@fcc.gov.
- (g) **Termination Date.** Unless stated otherwise, the requirements of this paragraph will expire twenty four months from the Effective Date.

10. **Section 208 Complaints; Subsequent Investigations.** Nothing in this Consent Decree shall prevent the Commission or its delegated authority from adjudicating complaints filed pursuant to section 208 of the Act against T-Mobile or its affiliates for alleged violations of the Act, or for any other type of alleged misconduct, regardless of when such misconduct took place. The Commission's adjudication of any such complaint will be based solely on the record developed in that proceeding. Except as expressly provided in this Consent Decree, this Consent Decree shall not prevent the Commission from investigating new evidence of noncompliance by T-Mobile with the Act, the rules, or Commission Orders.

10. **Voluntary Contribution.** T-Mobile agrees that it will make a voluntary contribution to the United States Treasury in the amount of twenty-five thousand dollars (\$25,000.00). The payment will be made within 30 days after the Effective Date of the Adopting Order. The payment must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the Account Number and FRN Number referenced in the caption to the Adopting Order. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code). T-Mobile shall also send electronic notification on the date said payment is made to Jacqueline Ellington, Esq. at Jackie.Ellington@fcc.gov and JoAnn Lucanik, Esq. at JoAnn.Lucanik@fcc.gov.

11. **Waivers.** T-Mobile waives any and all rights it may have to seek administrative or judicial reconsideration, review, appeal or stay, or to otherwise challenge or contest the validity of this Consent Decree and the Adopting Order, provided the Bureau issues an Adopting Order adopting the Consent Decree without change, addition, modification, or deletion. T-Mobile shall retain the right to challenge Commission interpretation of the Consent Decree or any terms contained herein. If either Party (or the United States on behalf of the Commission) brings a judicial action to enforce the terms of the Adopting Order, neither T-Mobile nor the Commission shall contest the validity of the Consent Decree or the Adopting Order, and T-Mobile shall waive any statutory right to a trial *de novo*. T-Mobile hereby

agrees to waive any claims it may otherwise have under the Equal Access to Justice Act, 5 U.S.C. § 504 and 47 C.F.R. § 1.1501 *et seq.*, relating to the matters addressed in this Consent Decree.

12. **Invalidity.** In the event that this Consent Decree is rendered invalid by any court of competent jurisdiction, it shall become null and void and may not be used in any manner in any legal proceeding.

13. **Subsequent Rule or Order.** The Parties agree that if any provision of the Consent Decree conflicts with any subsequent rule or Order adopted by the Commission (except an Order specifically intended to revise the terms of this Consent Decree to which T-Mobile does not expressly consent) that provision will be superseded by such Commission rule or Order.

14. **Successors and Assigns.** T-Mobile agrees that the provisions of this Consent Decree shall be binding on its successors, assigns, and transferees.

15. **Final Settlement.** The Parties agree and acknowledge that this Consent Decree shall constitute a final settlement between the Parties. The Parties further agree that this Consent Decree does not constitute either an adjudication on the merits or a factual or legal finding or determination regarding any compliance or noncompliance with the requirements of the Act or the Commission's Rules and Orders.

16. **Modifications.** This Consent Decree cannot be modified without the advance written consent of both Parties.

17. **Paragraph Headings.** The headings of the Paragraphs in this Consent Decree are inserted for convenience only and are not intended to affect the meaning or interpretation of this Consent Decree.

18. **Authorized Representative.** Each party represents and warrants to the other that it has full power and authority to enter into this Consent Decree.

19. **Counterparts.** This Consent Decree may be signed in any number of counterparts (including by facsimile), each of which, when executed and delivered, shall be an original, and all of which counterparts together shall constitute one and the same fully executed instrument.

Susan McNeil
Assistant Chief
Enforcement Bureau

Date

Kathleen O'Brien Ham
Vice President, Federal Regulatory
T-Mobile USA, Inc.

Date