

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

In the Matter of )
GLOBAL TOWER, LLC ) ASR App. No. A0785797
Application for )
Antenna Structure Registration, )
Snydersville, PA )

ORDER ON RECONSIDERATION

Adopted: July 17, 2014

Released: July 17, 2014

By the Deputy Chief, Spectrum & Competition Policy Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Order on Reconsideration, we dismiss as interlocutory Global Tower LLC’s (Global) Petition for Reconsideration (Petition) of the Spectrum & Competition Policy Division’s (Division) Decision requiring Global to submit an Environmental Assessment (EA) for a proposed new antenna tower in Snydersville, Pennsylvania (Tower).

II. BACKGROUND

2. Global proposes to construct a 255-foot lattice tower for the use of Commission licensees. Because the Tower requires notification to the Federal Aviation Administration, Antenna Structure Registration (ASR) is required under the FCC’s rules.1 On September 26, 2012, Global’s ASR Application was placed on national environmental notice.2 On October 11, 2012, Mr. and Mrs. John and Joanne L. Fossett filed a request for further environmental review of the Application (Request) based on concerns about the impact of the Tower on nearby wetlands, including sources of drinking water; effects on “aquatic life”; concerns that “blasting” into the Marcellus shale that underlies the area could cause water pollution; and effects on wildlife, migratory birds, and nesting raptors.

3. Global timely submitted an Opposition to Mr. and Mrs. Fossett’s Request on November 5, 2012. While conceding that there is Marcellus shale about five to nine feet below the surface at the Tower site, Global asserted that blasting would not be used during construction, the construction would penetrate no more than a few feet into the shale, measures would be taken during construction to prevent any impact on water supplies, and Mr. and Mrs. Fossett’s allegations regarding effects on migratory birds and other species were generalized and failed to show why this particular tower posed likely harm to protected species.

4. On November 13, 2012, the Division e-mailed to the parties its Decision granting Mr. and Mrs. Fossett’s Request.3 The Division stated:

1 47 C.F.R. § 17.4(a).

2 See 47 C.F.R. § 17.4(c).

3 E-mail from Mania K. Baghdadi to William J. Sill, et al., dated November 13, 2012. The Decision had previously been posted in the ASR system on November 9, 2012.

After reviewing the submitted Request for Environmental Review and applicant's Opposition, we find that the proposed tower may have a significant environmental effect for which an Environmental Assessment should be prepared. Accordingly, pursuant to Section 1.1307(c), we require Global Tower, LLC to file an Environmental Assessment as described in Section 1.1311 of the Commission's rules, with particular attention to effects on groundwater.

5. Global timely filed its Petition to reconsider the Decision. In its Petition, Global challenges the Division's procedures for resolving Requests for Environmental Review, asserting that the Decision provided no notice of the factual basis or rationale for the Division's determination, thereby leaving unclear what Global is required to demonstrate and impairing Global's ability to respond substantively to the Division's concerns.<sup>4</sup> Further, Global argues that the Division had no factual basis upon which to determine that the Tower may have a significant effect on the environment, and therefore to require an EA, because Mr. and Mrs. Fossett's concerns about effects on groundwater are not specific and are based on incorrect facts, no fracking will be involved in the Tower construction, and measures will be taken during construction to avoid effects on groundwater by preventing surface water from contacting the shale.<sup>5</sup> Global adds that preparing an EA is an expensive and time-consuming process, and that the Division should reconsider its Decision so as to make clear that it is not lowering the evidentiary bar for environmental requesters.<sup>6</sup>

6. On December 26, 2012, Mr. and Mrs. Fossett opposed the Petition by e-mail (Opposition).<sup>7</sup> Mr. and Mrs. Fossett note that at local zoning board hearings concerning the Tower, an engineer, Mr. Doug Olmstead, testified as to his concerns about the site and recommended that further studies be conducted because of the presence of Marcellus shale. They ask the Division to uphold the Decision requiring an EA.

7. On January 4, 2013, Global filed its Reply to Opposition to Petition for Reconsideration (Reply). Global's Reply states that there is no relevant controversy based on Mr. Olmstead's testimony, and that after Mr. Olmstead's testimony, Global did further testing at the site, made improvements to its site design, and provided expert testimony to the zoning board as to the results. Global attaches an excerpt from Mr. Olmstead's subsequent testimony stating that these measures addressed, but did not totally alleviate, his concerns.<sup>8</sup> Global adds that a federal court and local officials have all "signed off on the project."<sup>9</sup>

### III. DISCUSSION

8. The National Environmental Policy Act (NEPA)<sup>10</sup> requires all federal agencies, including the FCC, to identify and take into account environmental effects when deciding whether to authorize or undertake a major federal action. Under Council on Environmental Quality (CEQ) rules, an agency shall prepare, or require its applicant to prepare, an EA for any proposed action that may significantly affect the environment; *i.e.*, those actions which the agency neither has determined normally will have a significant effect on the environment (and therefore require an Environmental Impact Statement) nor has identified as individually or cumulatively unlikely to have a significant effect on the human environment (and are

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<sup>4</sup> Petition at 3-4.

<sup>5</sup> *Id.* at 4-8.

<sup>6</sup> *Id.* at 9-10.

<sup>7</sup> The e-mail was entered into the ASR system on December 27, 2012.

<sup>8</sup> Reply at 3.

<sup>9</sup> *Id.* at 5.

<sup>10</sup> 42 U.S.C. § 4321 *et seq.*

therefore categorically excluded).<sup>11</sup> Sections 1.1307(a) and (b) of the Commission's rules identify specific circumstances under which communications facilities may significantly affect the environment, and which, if present, always require applicants to prepare an EA for the Commission to evaluate as part of its decision-making process.<sup>12</sup> None of these circumstances are alleged to be present here.

9. Actions not within the categories for which EAs are required under Sections 1.1307(a) and (b) of the Commission's rules "are deemed individually and cumulatively to have no significant effect on the quality of the human environment and are categorically excluded from environmental processing . . . [e]xcept as provided in Sections 1.1307(c) and (d)."<sup>13</sup> Under Sections 1.1307(c) and (d), the agency shall require an EA if it determines that an otherwise categorically excluded action may have a significant environmental impact.<sup>14</sup> The purpose of the Commission's environmental notification process for ASR applications is to effectuate fully the opportunity for interested persons to allege that an EA is required under Section 1.1307(c) for ordinarily categorically excluded actions.<sup>15</sup> In its Petition, Global challenges the Division's Decision that an EA is required under Section 1.1307(c) due to the Tower's potential effects on groundwater.

10. *The Petition Must be Dismissed as Addressing an Interlocutory Action.* Section 1.106(a)(1) of the Commission's rules provides that except for a petition that relates to an adverse ruling with respect to the petitioner's participation in a proceeding, "[p]etitions for reconsideration of . . . interlocutory actions will not be entertained."<sup>16</sup> An interlocutory action by definition is one that is non-final in that it neither denies nor dismisses an application nor terminates an applicant's right to participate in the proceeding.<sup>17</sup> For an agency action to be "final," first, the action must mark the "consummation" of the agency's decision-making process, and not be merely of a tentative or interlocutory nature; and second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.<sup>18</sup>

11. Here, the Decision neither terminated the right of Global or Mr. and Mrs. Fossett to participate in the proceeding, nor finally determined whether or not Global's proposal will have a

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<sup>11</sup> See 40 C.F.R. §§ 1501.4(a)-(b) (a federal agency shall determine whether a proposal is of a type that normally requires an environmental impact statement (EIS) or normally is categorically excluded and, if neither is applicable, the agency shall prepare an EA), 1507.3(b)(2) (agency shall specify criteria for identifying typical classes of action that normally require an EIS, normally do not require either an EIS or an EA, and normally require an EA but not necessarily an EIS).

<sup>12</sup> 47 C.F.R. §§ 1.1307(a), (b); see also 47 C.F.R. § 1.1307(d) Note (interim criteria for preparing an EA to address potential significant effects to migratory birds, pending final rules).

<sup>13</sup> 47 C.F.R. § 1.1306(a).

<sup>14</sup> See 47 C.F.R. §§ 1.1307(c), (d); Public Employees for Environmental Responsibility, *Order*, 16 FCC Rcd 21439, 21441 ¶ 3 (2001). These provisions satisfy Section 1508.4 of the Council on Environmental Quality's rules, 40 C.F.R. § 1508.4, requiring that "[a]ny [categorical exclusion] procedures shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect."

<sup>15</sup> National Environmental Policy Act Compliance for Proposed Tower Registrations, Effects of Communications Towers on Migratory Birds, WT Docket Nos. 08-61, 03-187, *Order on Remand*, 26 FCC Rcd. 16700, 16719 ¶ 50 (2011).

<sup>16</sup> 47 C.F.R. § 1.106(a)(1).

<sup>17</sup> In the Matter of Jet Fuel Broadcasting Application for a New AM Broadcast Station at Orchard Homes, Montana and Bott Communications, Inc., Application for a New AM Broadcast Station at Black Hawk, South Dakota, *Memorandum Opinion and Order*, 29 FCC Rcd 2471, 2471-72 ¶ 2 (2014) (*Jet Fuel Broadcasting*) (affirming Bureau's finding that grant of a comparative preference to a broadcast license applicant was interlocutory, and that a Petition for Reconsideration of the grant was therefore subject to dismissal, where petitioner would have further opportunity to challenge the competing application before any authorization could be awarded).

<sup>18</sup> *Id.* at 2471-72 ¶ 2, citing *Bennett v. Spear*, 520 U.S. 154, 177-78, 117 S.Ct. 1154, 1168 (1997).

significant impact on the quality of the human environment. Instead, it sought additional information, in the form of an EA submitted pursuant to Sections 1.1307, 1.1308, and 1.1311 of the Commission's rules,<sup>19</sup> to inform the determination that the agency must make, under NEPA and the implementing regulations of the CEQ and the FCC, as to whether to issue a finding of no significant impact (FONSI) or to notify Global pursuant to Section 1.1308 of the Commission's rules that its proposal requires further environmental processing.<sup>20</sup> Accordingly, the Decision requesting further information necessary to assess the environmental consequences of the ASR Application was interlocutory, just as any request for additional information necessary to process a pending application would be interlocutory. The Petition for Reconsideration must therefore be dismissed.<sup>21</sup>

#### IV. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED that pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, the Petition for Reconsideration filed by Global Towers, LLC IS DISMISSED.

13. IT IS FURTHER ORDERED, pursuant to Section 1.1307(c) of the Commission's rules, 47 C.F.R. § 1.1307(c), that Global Towers, LLC prepare and submit an Environmental Assessment with respect to the above-referenced Antenna Structure Registration application.

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<sup>19</sup> 47 C.F.R §§ 1.1307 (identifying actions that may have a significant environmental effect, for which an EA is routinely required to determine whether further environmental processing is needed, and providing that the processing bureau will require an EA if it determines that an otherwise categorically excluded action may have a significant environmental effect), 1.1308(b) (an EA shall explain the environmental consequences of the proposal and shall set forth sufficient analysis for the agency to reach a determination that the proposal will or will not have a significant environmental effect), 1.1311(b) (stating that the EA shall deal specifically with any feature of the site that has special environmental significance and enumerating issues to be discussed in the EA).

<sup>20</sup> 42 U.S.C. § 4322(2)(C) (all federal agencies shall prepare a detailed statement for proposed major federal actions significantly affecting the quality of the human environment); 40 C.F.R. §§ 1501.4(c) (the agency shall determine whether to prepare an EIS based on the EA), 1508.9(a)(1) (an EA is a document with sufficient evidence and analysis for the agency to determine whether to prepare an EIS or issue a FONSI); 47 C.F.R §§ 1.1308(c) (if the FCC determines, based on an independent review of the EA and any mandatory consultation, that the proposal will have a significant impact on the quality of the human environment, it will publish a notice of intent to prepare an EIS unless the applicant amends its application to reduce, minimize, or eliminate environmental problems), 1.1308(d) (if the FCC determines, based on an independent review of the EA and any mandatory consultation, that the proposal will not have a significant environmental impact, it will make a finding of no significant impact).

<sup>21</sup> *Jet Fuel Broadcasting*, 29 FCC Rcd at 2471-72 ¶¶ 2-3 (affirming that the Bureau's Letter Decision was interlocutory where the Bureau's legal analysis of the competing application would not impair petitioner's ability to challenge the applicant's Section 307(b) preference because consummation of the application process would occur only upon dismissal or grant of the application); George M. Arroyo, Dennis J. Kelly, Esq., *Letter*, 24 FCC Rcd 11010, 11012 (Audio Div., Media Bur. 2009); Alden Communications Corp., *Memorandum Opinion and Order*, 103 FCC 2d 1 (Rev. Bd. 1986).

14. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

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