



FEDERAL COMMUNICATIONS COMMISSION
Public Safety and Homeland Security Bureau
Policy and Licensing Division
445 12th Street, SW
Washington, DC 20554

May 22, 2017

VIA FIRST CLASS MAIL AND EMAIL

Mr. Tim Harper
County Administrator
1305 North Main St.
P O Box 183
Marion, SC 29571

Re: VIOLATION OF FCC ENVIRONMENTAL RULES

Dear Mr. Harper:

This letter pertains to our findings that Marion County, South Carolina (Marion County), failed to comply with the Commission's regulations implementing the National Environmental Policy Act of 1969 (NEPA) and other federal environmental statutes,¹ as well as related Antenna Structure Registration (ASR) and licensing rules and the rule requiring truthful and accurate statements.² In particular, the Public Safety and Homeland Security Bureau has determined that Marion County violated Sections 1.17, 1.923(e), 1.929(a)(4), 1.947(a), 1.1307(a)(4), 1.1308(a), 1.1311(a), 17.4, 90.5, and 47 CFR Pt.1, App C of the Commission's rules by constructing and operating a public safety radio tower in Mullins, South Carolina, before completing the required environmental and historic preservation review.³ By this letter, we apprise Marion County of the implications of failing to comply with Commission regulations in the future.

¹ See 47 CFR §§ 1.1301 *et seq.*; see also 42 USC §§ 4321-4335. NEPA requires that federal agencies consider the environmental effects of their major federal actions before taking action, including issuing permits, licenses, or approvals. See also the National Historic Preservation Act, 54 USC § 300101 *et seq.*

² See 47 CFR §§ 1.17; 1.901 *et seq.*; 17.1 *et seq.*; see also 47 CFR § 90.5(b) (requiring licensees in the Private Land Mobile Radio Services to comply with the environmental requirements in Part 1 prior to construction). For facilities that require registration in the Antenna Structure Registration System, Section 1.923(e)(1) requires environmental processing pursuant to the process set forth in Section 17.4(c). Section 1.947(a) requires Commission approval for all major modifications, as defined in Section 1.929. Section 1.929(a)(4) defines a major modification as actions related to authorizations for facilities that may have a significant effect on the environment.

³ See 47 CFR §§ 1.17, 1.923, 1.929, 1.947, 1.1307, 1.1308, 1.1311, 17.4, 90.5; 47 CFR Pt.1, App C.

Regulatory Requirements

Under the Commission's rules, an applicant must consider, prior to initiating construction or deployment, whether the facility it proposes to build or use may have a significant effect on the environment. If so, the applicant must prepare an EA and submit the EA with its application in accordance with the Commission's rules.⁴ Specifically, an applicant must prepare an EA if the proposed facility meets any of several criteria specified in the Commission's rules, including construction that may affect properties listed or eligible for listing in the National Register of Historic Places,⁵ and it may not begin construction until the Commission's environmental processing is completed.⁶ The Commission's ASR rules also place a separate obligation to submit an EA with an ASR application if an EA is required under the Commission's environmental rules.⁷ Furthermore, if a facility that may have a significant environmental impact is to be constructed to provide service pursuant to a license in the wireless radio services, its construction is considered a major modification of the license. The application for this modification must be approved by the Commission prior to construction and operation.⁸

Section 1.1307(a)(4) of the rules requires applicants to consider, prior to initiating construction or deployment, whether their proposed facilities would affect properties listed or eligible for listing in the National Register of Historic Places.⁹ In considering potential effects on these properties, Section 1.1307(a)(4) requires applicants to follow the prescribed procedures set forth in the rules of the Advisory Council on Historic Preservation (Advisory Council),¹⁰ as modified by the Nationwide Programmatic Agreement for the Collocation of

⁴ 47 CFR §§ 1.1307, 1.1311(a).

⁵ See 47 CFR § 1.1307(a) (specifying eight criteria that require preparation of an EA), 1.1307(b) (EA required if human exposure to radio frequency emissions will exceed certain limits), 1.1307(d) Note (processing bureau shall require an EA for new and certain modified antenna structures over 450 feet in height). In addition, the processing bureau shall require an EA if it determines, in response to an interested person's allegation or on its own motion, that an otherwise categorically excluded facility may have a significant environmental impact. 47 CFR § 1.1307(c), (d).

⁶ 47 CFR § 1.1312(b). The contents of an EA are described in 47 CFR § 1.1311. See also 47 CFR § 1.1308 (discussing the Commission's process for reviewing EAs).

⁷ See 47 CFR §§ 17.4(c)(7) (if an EA is required under Section 1.1307, the ASR applicant shall attach the EA to its environmental submission), 17.4(c)(8) (the processing Bureau shall resolve all environmental issues in accordance with the environmental regulations before the tower owner may complete the ASR application).

⁸ See 47 CFR §§ 1.929(a)(4) (classifying applications and amendments requesting authorization for a facility that may have a significant effect on the environment as major), 1.947(a) (requiring Commission approval for major modifications). See also 47 CFR § 1.923(e) (requiring completion of environmental review prior to construction for any application in the wireless radio services proposing facilities that may have a significant environmental effect), 90.5(b) (requiring licensees in the Private Land Mobile Radio Services to comply with the environmental requirements in Part 1 prior to construction).

⁹ 47 CFR § 1.1307(a)(4).

¹⁰ 36 CFR Part 800.

Wireless Antennas (Collocation Agreement)¹¹ and the Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process (NPA).¹² These agreements tailor and streamline the review and consultation procedures routinely required by the National Historic Preservation Act of 1966 (NHPA)¹³ and the implementing regulations issued by the Advisory Council.

Marion County's Conduct

Marion County has failed to comply with the Commission's environmental, ASR, and licensing regulations.¹⁴ On May 15, 2015, Marion County submitted an ASR application on FCC Form 854 for a proposed site in Mullins, South Carolina,¹⁵ wherein it certified that the project would not have a significant environmental impact. However, this certification occurred before Marion County completed the required process for engaging federally recognized Tribal Nations¹⁶ and before it submitted a complete Memorandum of Agreement to mitigate the tower's adverse effects on historic properties on March 8, 2016.¹⁷

¹¹ 47 CFR Pt. 1, App. B; 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).

¹² 47 CFR Pt. 1, App. C; see *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, Report and Order, 20 FCC Rcd 1073 (2004), *clarified*, 20 FCC Rcd 17995 (2005), *aff'd*, *CTIA-The Wireless Ass'n. v. FCC*, 466 F.3d 105 (D.C. Cir. 2006) (*NPA Report and Order*). Under the NHPA and the Advisory Council's implementing regulations, the Advisory Council may approve program alternatives that tailor a federal agency's historic preservation review and consultation procedures to the particular circumstances of the agency's program or that exempt from historic preservation review actions that are unlikely to affect historic properties. See 54 USC § 304108 *et seq.*; 36 CFR § 800.14(b), (c).

¹³ 54 USC § 300101 *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 54 USC §§ 306108, 300320. This review is commonly referred to as "Section 106 Review" because the provision requiring the review was originally enacted as Section 106 of the NHPA. 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, which is the federal agency responsible for implementing the NHPA; the appropriate State Historic Preservation Officer; and, if historic properties of religious or cultural significance to federally recognized Tribal Nations or Native Hawaiian Organizations may be affected, their representatives. See 54 USC §§ 302104, 302706, 306108, 304101. As authorized by the Advisory Council, the Commission's environmental rules delegate to its licensees, permittees, and applicants initial responsibility for identifying historic properties and evaluating the effects that their proposed facilities may have on such properties, but the Commission remains ultimately responsible for ensuring that the Section 106 process occurs in accordance with applicable statutory and regulatory provisions, as well as for government-to-government consultation with federally recognized Tribal Nations. See 47 CFR § 1.1307(a)(4); see also 36 CFR § 800.2(a)(3); *NPA Report and Order*, 20 FCC Rcd at 1076-77 ¶ 5.

¹⁴ See 47 CFR §§ 1.1301 *et seq.*; 1.901 *et seq.*; 17.1 *et seq.*; 90.5; 47 CFR Pt.1, App C.

¹⁵ FCC File No. A0939905. ASR 1295866. Registration was granted on May 15, 2015.

¹⁶ See 47 CFR Pt. 1, App. C, § IV. As contemplated under the NPA, Marion County subsequently completed this process using the Tower Construction Notification System. See TCNS No. 127736, submitted 6/8/2015.

¹⁷ See FCC File No. A1042191, submitted July 15, 2016.

Furthermore, although it needed to file an EA and get a Finding of No Significant Impact (FONSI) pre-construction due to the adverse effect on historic properties, Marion County continued construction of the 300-foot tower until its completion in early June 2016, and began operating before it submitted an EA and before it received a FONSI.¹⁸

As a result, Marion County incorrectly certified, in violation of the Commission's rules, that it had completed an environmental review, that the tower did not require an EA under Section 1.1307, and that the project would not have a significant environmental impact.¹⁹ In addition, Marion County certified on the ASR application that the tower would have no significant environmental impact before completing the processes that would support such a conclusion, thereby constituting a material misstatement of fact without a reasonable basis for believing that the statement was correct and not misleading.²⁰

Based on the self-reported information we have received, we find that Marion County violated the Commission's environmental and ASR regulations, as well as the regulation requiring truthful and accurate statements. Future violations may result in additional action, including the imposition of monetary penalties, pursuant to the Public Safety and Homeland Security Bureau's authority under 47 CFR § 0.111(a)(11) or via referral to the Commission's Enforcement Bureau. Furthermore, Marion County's conduct at issue in this letter may provide grounds for an upward adjustment in the amount of a penalty.

Please direct any questions regarding this letter to John Adams (john.adams@fcc.gov, (202) 418-0394).

Sincerely,



Michael Wilhelm
Acting Chief, Policy and Licensing Division
Public Safety and Homeland Security Bureau

cc: Jennifer Hernandez, Myrtle Beach Communications
1330 Enterprise Ave
Myrtle Beach, SC 295

¹⁸ 47 CFR § 1.923(e), 1.929(a)(4), 1.947(a), 1.1308(a), 90.5. *See* ASR 1295866. A FONSI was issued on August 31, 2016.

¹⁹ 47 CFR §§ 1.1307(a)(4), 1.1311(a), 17.4(c)(8). *See also* Wireless Telecommunications Bureau Reminds Antenna Structure Owners of Registration Obligations, *Public Notice*, DA 15-704 (June 17, 2015).

²⁰ 47 CFR § 1.17(a)(2).