

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

In the Matter of)

Bell Atlantic Mobile of Rochester, L.P.)

Communications Tower Constructed on Route)
488 in Hopewell, Ontario County, New York)

ULS Application No. 0001414628

MEMORANDUM OPINION AND ORDER

Adopted: May 22, 2018

Released: May 22, 2018

By the Acting Deputy Chief, Competition and Infrastructure Policy Division, Wireless
Telecommunications Bureau:

I. INTRODUCTION

1. The Competition and Infrastructure Policy Division (Division) has before it objections to a letter from the New York State Historic Preservation Officer (NYSHPO), dated June 5, 2017, which found that the communications tower referenced above does not adversely affect the Oliver Warner Farmstead (Farm), which is listed on the National Register of Historic Places (National Register).¹ These letters of objection request that the NYSHPO reconsider its finding of “no adverse effect” and issue a finding that the tower has an adverse effect on the Farm.² In addition, we have before us complaints previously filed by the NYSHPO and Joanne Cunningham regarding the above-referenced tower³ and a petition filed by Verizon Wireless seeking reconsideration of the Division’s December 2016 decision in this matter.⁴ Based on the entire record before us, the Division formally affirms the NYSHPO’s 2017 recommendation that the tower does not adversely affect the Farm, and denies the requests to overturn the NYSHPO’s recommendation. The Division further denies the complaints filed by the NYSHPO and Joanne Cunningham and dismisses the Verizon Wireless Petition for Reconsideration as moot.

¹ Letter from John A. Bonafide, Director, Division for Historic Preservation, New York State Department of Parks, Recreation and Historic Preservation, to Jacquie Payette, ERM (June 5, 2017) (NYSHPO Letter).

² Letter from Jonathan R. Tantillo, Knauf Shaw LLP, to John A. Bonafide, Director, Division for Historic Preservation, New York State Department of Parks, Recreation and Historic Preservation (June 23, 2017) (Tantillo Letter) and Letter from Mr. Roger Cunningham to John A. Bonafide, Director, Division for Historic Preservation, New York Department of Parks, Recreation and Historic Preservation (July 2, 2017) (Cunningham Letter).

³ Letters from Richard M. Lord, Historic Sites Restoration Coordinator, Division for Historic Preservation, New York State Department of Parks, Recreation and Historic Preservation, to Rose Crellin, Wireless Telecommunication Bureau (Dec. 10, 1999) and from Joanne Cunningham to Rose Crellin, Wireless Telecommunication Bureau (Mar. 28, 2000).

⁴ In the Matter of Bell Atlantic Mobile of Rochester, L.P., Ontario County, New York, Petition for Reconsideration, filed Jan. 6, 2017 (Verizon Wireless Petition for Reconsideration).

II. BACKGROUND

2. In 1987, Rochester Mobile Telephone Communications (RMTc) constructed the above-referenced tower. The tower is located diagonally across Route 488, a two-lane state highway, from the Farm, which dates to the mid-19th century and has been owned and operated as a dairy farm by the Cunningham family since 1974.⁵ RMTc changed the antennas on the tower in 1999.

3. On August 12, 2003, RMTc's successor, Verizon Wireless, submitted Universal Licensing System (ULS) Application No. 0001414628 and attached an environmental assessment (EA), seeking a finding that the 1999 antenna change did not have a significant impact on the environment.⁶ Objections to the EA were filed by the NYSHPO and by Joanne Cunningham, then owner of the Farm.⁷ Both parties objected to the EA on the grounds that the tower had never been reviewed for potential effects on historic properties as required by Section 106 of the National Historic Preservation Act (NHPA),⁸ and alleged that the tower has an adverse effect on the historic Farm. In response, Verizon Wireless argued that the tower did not require review under Section 106 and, in any event, neither the underlying tower nor the new antennas adversely affect historic properties.

4. On December 8, 2016, the Division issued a letter to Verizon Wireless addressing the two objections to the EA.⁹ The Division first rejected Verizon Wireless's argument that it was not required to complete Section 106 review before constructing the tower. The Division then stated that while the objections had raised significant issues regarding the tower's potential effect on the Farm, it was unable to make a finding regarding such effects because a full Section 106 review had never been conducted for the tower.¹⁰ In order to complete the record, the Division found that Verizon Wireless must complete the Section 106 review process pursuant to the Commission's current rules.¹¹ Accordingly, the Division granted the objections in part, to the extent that they requested that the Section 106 review process be completed for the tower, and otherwise dismissed the objections as moot.¹²

5. On January 6, 2017, Verizon Wireless filed a petition for reconsideration of the Division's December 8, 2016 letter ruling, arguing that the Division improperly found that Section 106 review was required for the tower.¹³ The Cunningham family, through their counsel, submitted an Opposition.¹⁴

⁵ See Supplement to Environmental Assessment, Telecommunications Facility- Hopewell Site, Prepared for Bell Atlantic Mobile of Rochester, L.P., Exhibit VI, National Register of Historic Places Inventory – Nomination Form, Section 7 at 1 and Section 8 at 7 (rec'd Nov. 13, 2003) (EA Supplement).

⁶ See Environmental Assessment, Telecommunications Facility – Hopewell Site, Prepared by Bell Atlantic Mobile of Rochester, L.P. (rec'd Aug. 12, 2003) (2003 EA).

⁷ Letter from Richard M. Lord, Historic Sites Restoration Coordinator, NYSHPO, to Daniel Abeyta, Wireless Telecommunications Bureau (Sep. 12, 2003); Landmark Farms, Environmental Assessment, Hopewell Cellular Tower Site NYS Rt. 488 (Sep. 15, 2003). Mrs. Cunningham has since passed away. Her successor in interest is Mr. Roger Cunningham, Cunningham & Sons, Landmark Farms, who has been represented in this matter by the law firm of Knauf Shaw LLP.

⁸ 54 U.S.C. § 306108.

⁹ Letter from Aaron Goldschmidt, Associate Chief, Competition and Infrastructure Policy Division to Christine Crowe, Esq., counsel for Verizon Wireless (Dec. 8, 2016) (Division Letter).

¹⁰ See *id.* at 2.

¹¹ See *id.*

¹² *Id.*

¹³ Verizon Wireless Petition for Reconsideration.

¹⁴ Opposition to Petition for Reconsideration, filed Jan. 17, 2017.

6. On March 27, 2017, Verizon Wireless submitted to the Division an FCC Form 620 and accompanying Submission Packet analyzing the tower's effects on historic properties. The Division then forwarded the Submission Packet to the NYSHPO. On June 5, 2017, the NYSHPO, after reviewing the Section 106 submission, concurred with the applicant that the constructed tower does not adversely affect the characteristics of the Farm that qualify it for inclusion in the National Register.¹⁵ The NYSHPO provided two bases for its determination: (1) that the tower was already constructed at the time the Farm was first determined eligible and subsequently listed in the National Register; and (2) that because the primary significance of the Farm property is the remarkable architectural importance of the farmhouse, the tower's intrusion on the viewshed does not diminish the ability for the house to be fully understood and interpreted as a historic resource.¹⁶

7. On June 23, 2017, Mr. Cunningham and Landmark Farms, Inc., through their counsel, sent a letter to the NYSHPO asking it to reconsider its June 5, 2017 determination of "no adverse effect" and instead to find that the tower will have and has had an adverse effect on the Farm.¹⁷ On July 2, 2017, Mr. Cunningham sent a separate letter to the NYSHPO also objecting to the NYSHPO's no adverse effect determination.¹⁸ The Division was copied on both letters. The NYSHPO has not informed us that it has revised or is revising its concurrence in response to these letters.

III. DISCUSSION

8. Section 1.1307 of the Commission's rules sets forth circumstances under which the construction of facilities, as the Commission's major federal action and federal undertaking, may require the preparation of an Environmental Assessment due to potentially significant environmental impacts, including impacts on historic properties.¹⁹ In order to determine whether a tower will adversely affect historic properties under Section 106 of the NHPA, the rules require the applicant to follow procedures set forth in the Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission (NPA).²⁰ The environmental and historic preservation review is to be completed prior to the initiation of construction.²¹

9. Collectively, Mr. Cunningham and Landmark Farms challenge four aspects of the review and the NYSHPO's decision: (1) the Division's directive to perform Section 106 review after the tower was constructed; (2) the NYSHPO's conclusion that the tower existed at the time the Farm was first determined eligible for and subsequently listed in the National Register; (3) its finding that the tower has no adverse effect on the Farm; and (4) the NYSHPO's change of position between 2003 and 2017. We address these challenges below, and then address the earlier complaints of the NYSHPO and Joanne Cunningham as well as the Petition for Reconsideration.

¹⁵ NYSHPO Letter at 1.

¹⁶ *See id.* at 2.

¹⁷ Tantillo Letter at 1.

¹⁸ Cunningham Letter at 2.

¹⁹ 47 CFR § 1.1307. *See generally* 47 CFR §§ 1.1301 *et seq.* (procedures implementing the Commission's compliance with federal environmental statutes, including the National Environmental Policy Act, 42 U.S.C. §§ 4321-4335, and the National Historic Preservation Act, 54 U.S.C. § 300101 *et seq.*).

²⁰ 47 CFR § 1.1307(a)(4) (2017) (specifying use of the NPA in performing historic preservation review); 47 CFR Pt. 1, App. C (NPA). This portion of Section 1.1307(a)(4) has subsequently been recodified in Section 1.1320. *See Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Deployment*, Report and Order, 32 FCC Rcd 9760 (2017).

²¹ *See* 47 CFR § 1.1312(b).

A. Post-Construction Review of the Tower

10. The Division Letter directed Verizon Wireless to complete the Section 106 process for the existing tower.²² Pursuant to the Commission's rules, however, an applicant's environmental and historic preservation review is to be completed prior to the initiation of construction.²³ In his letter, Mr. Cunningham questions how, given that the tower was constructed without going through the Section 106 process, a Section 106 review can now be conducted.²⁴

11. We note that although the NHPA and the Commission's rules require evaluation before construction, the Commission has in fact accepted post-construction review when an applicant failed to evaluate the undertaking before it was built.²⁵ In so doing, the Commission inherently recognizes that, while post-construction review is inferior to review prior to construction given that some effects may no longer be observable or able to be mitigated, post-construction review can identify some effects that may be addressable, such that it is a better alternative than no review whatsoever.

12. In any event, we find that Mr. Cunningham had an opportunity when the Division Letter was issued to dispute the requirement that Verizon Wireless complete the Section 106 process after construction, but he failed to do so.²⁶ Accordingly, this argument is dismissed as being outside of the scope of this proceeding.

B. Date of Tower Construction versus Date of National Register Listing

13. In its letter, the NYSHPO states that it determined the Farm to be eligible for listing in the National Register on October 28, 1987, and that the FCC informed it that construction of the tower was completed in January 1987. The NYSHPO states that "[g]iven the existence of the tower at the time the Farm was first determined eligible and subsequently listed in the National Register, the tower was part of the setting and could not have had an adverse effect on the farm."²⁷

14. In his letter, Mr. Cunningham disputes the October 28, 1987 date that the NYSHPO indicated that the Farm was determined eligible for listing in the National Register. In this regard, he cites to a January 23, 1987 letter that characterizes the Farm as eligible for listing in the National Registry as of that date.²⁸ Mr. Cunningham also disputes the January 1987 date that the NYSHPO indicated that the tower was constructed. In support, he refers to a letter from the attorney for RMTC to the FCC indicating that RMTC filed its application to construct and operate from the tower on June 9, 1987.²⁹

15. We have reviewed the record associated with the ULS application, and find conflicting information about when the tower was constructed, and whether it was constructed prior to the

²² Division Letter at 2.

²³ See 47 C.F.R. § 1.1312(a). See also 47 C.F.R. § 1.1312(a) (1986).

²⁴ Cunningham Letter at 1-2.

²⁵ See, e.g., *General Communication, Inc.*, indirect parent company of *The Alaska Wireless Network, LLC*, File Nos.: EB-SED-15-00018810, Order, 30 FCC Rcd 11492, 11499-500 (EB 2015); *Plateau Telecommunications, Inc.*, Letter, 29 FCC Rcd 2972 (WTB/SCPD 2012).

²⁶ See 47 C.F.R. § 1.106(f) (requiring petitions for reconsiderations to be filed within 30 days from the date of public notice of the final Commission action).

²⁷ NYSHPO Letter at 2.

²⁸ See Cunningham Letter at 1, citing Letter from Julia S. Stokes, Deputy Comm'r for Historic Preservation, NYSHPO, to Geoff Astles, Manager, Division of Planning and Research for Ontario County (Jan. 23, 1987) (see 2003 EA at Exh. XI, App'x 11-A) (Stokes Letter).

²⁹ Cunningham Letter at 1.

NYSHPO's determination of the Farm's eligibility for the National Register.³⁰ Given that we required applicant to conduct the Section 106 review out of concern that it may have an adverse effect on the historic farmstead,³¹ and given that the NYSHPO has conducted the necessary substantive review, we need not reach a finding on the timing issue. We therefore do not rely on the NYSHPO's first basis for its determination of no adverse effect, and instead consider its finding that the tower does not diminish the integrity of characteristics that qualify the Farm for listing in the National Register.

C. Effect of the Tower on the Farm

16. The "Section 106 Cultural Resources Report" that Verizon Wireless included in its Form 620 Submission Packet concluded that the tower has no adverse effect on historic properties in the Area of Potential Effects (APE) for visual effects because the Oliver Warner Farmstead is not adversely affected and no other historic properties were identified in the APE. In reviewing this submission, the NYSHPO Letter states, the question that the NYSHPO specifically considered was whether "the industrial communication tower directly or indirectly impact[s] the salient elements of the Farm that made it eligible for inclusion in the National Register."³² The NYSHPO states that the nomination of the Farm indicated that its primary significance was the "highly intact cobblestone farmhouse."³³ In this regard, the NYSHPO cites its 1987 letter to the Cunninghams stating that the Oliver Warner House was "architecturally significant as a distinctive example of early nineteenth century cobblestone residential architecture."³⁴ The NYSHPO also observes that while the National Register nomination for the farmstead provides an overview of the property which mentions that the entire 203 acres are included in the nomination, there is no other mention of the farm acreage or setting in the "description section" of the nomination form.³⁵ For these reasons, the NYSHPO found that "the ability for the house to be fully understood and interpreted as a historic resource is not diminished by the presence of the structure several hundred feet away and on the opposite side of the road,"³⁶ and therefore found no adverse effect on the Farm.

17. Mr. Cunningham and Landmark Farms argue that the NYSHPO used a standard for adverse effects that is significantly higher than what is required under Section 106 of the NHPA.³⁷ In this regard, they assert that the NYSHPO's standard of review was "whether the undertaking would have an effect so adverse as to render the historic asset ineligible for inclusion in the National Register."³⁸ In

³⁰ See 2003 EA. The weight of the evidence in the 2003 EA suggests that the tower was indeed constructed in January 1987. See, e.g., Exh. XII at 5 ("The SHPO issued its advisory opinion on January 23, 1987, a day after construction of the tower was completed"); Exh. XI, App'x 11-E at 3 (Stokes Letter) (New York Supreme Court decision stating that Article 78 proceeding resulted in a consent order on March 4, 1987, but that tower construction "was substantially completed before petitioners commenced the first Article 78 proceeding"). Nonetheless, even assuming this date is accurate, there remains conflicting evidence about when the Farm was determined eligible for the National Register.

³¹ See Division Letter at 2.

³² NYSHPO Letter at 2.

³³ *Id.* at 1.

³⁴ *Id.*

³⁵ *Id.* at 2.

³⁶ *Id.* at 2.

³⁷ See Tantillo Letter at 1.

³⁸ *Id.* at 2.

addition, they disagree with the NYSHPO's determination that the tower does not have an adverse effect on the characteristics of the Farm that qualify it for inclusion in the National Register.³⁹

18. Upon review, we find that the NYSHPO's assessment of the visual effects of the tower on the farmstead was consistent with the standard under the NPA, which defines how Section 106 is to be applied in the context of communications towers regulated by the FCC.⁴⁰ Section VI.E.3. of the NPA provides that "[a]n undertaking will have a visual adverse effect on a Historic Property if the visual effect from the Facility will noticeably diminish the integrity of one or more of the characteristics qualifying the property for inclusion in or eligibility for the National Register. Construction of a facility will not cause a visual adverse effect except where visual setting or visual elements are character-defining features of eligibility of a Historic Property located within the APE."⁴¹ Consistent with this provision, the NYSHPO recommended that because the character-defining features of eligibility for the Farm are architectural rather than visual, the tower does not cause a visual adverse effect. We therefore reject the argument that the NYSHPO used an effect standard that was higher than contemplated under Section 106 of the NHPA.

D. NYSHPO Oct. 16, 2003 Letter

19. Mr. Cunningham and Landmark Farms further observe that, in a letter dated October 16, 2003, the NYSHPO previously determined that the Hopewell tower has an adverse effect on the Farm.⁴² Accordingly, they request that the NYSHPO reconsider the no adverse effect determination made in its letter.⁴³

20. We reject the argument that the NYSHPO's June 5, 2017 letter contradicts the NYSHPO's October 16, 2003 letter. At the time that the October 16, 2003 letter was written, the Section 106 record was incomplete. Applicant had never reviewed the tower for potential effects on historic properties, much less submitted its evaluation to the SHPO, as required by Section 106 of the NHPA. Accordingly, the NYSHPO's determination of effect was premature, because it lacked sufficient information to fully apply the criteria of adverse effect on historic properties within the APE.

E. 1999 NYSHPO Complaint and 2000 Cunningham Complaint

21. Finally, the complaints filed by the NYSHPO and Joanne Cunningham contend that the existing tower, including the installation of any additional antennas, is not in compliance with Section 106.⁴⁴ In light of the NYSHPO's subsequent no adverse effect determination, together with our denial of the challenges to this determination for the reasons discussed above, we reject these arguments.

F. Verizon Wireless's Petition for Reconsideration

22. Because Verizon Wireless has complied with the requirements set forth in the Division Letter and this Order resolves the underlying dispute in its favor, we dismiss Verizon Wireless's Petition for Reconsideration as moot.

IV. CONCLUSION

23. Based on the information before us, we concur with the NYSHPO's determination that Verizon Wireless's tower does not diminish the integrity of the characteristics of the Farm that qualify it for inclusion in the National Register. In light of the Section 106 review conducted for the tower as well

³⁹ See *id.*, Cunningham Letter at 1-2.

⁴⁰ See 36 CFR § 800.14(b).

⁴¹ NPA, § VI.E.3.

⁴² See Tantillo Letter at 2, Exh. A (Letter from Richard M. Lord, Historic Sites Restoration Coordinator, NYSHPO, to Daniel Abeyta, Wireless Telecommunications Bureau (Oct. 16, 2003)).

⁴³ *Id.*

⁴⁴ NYSHPO 1999 Letter at 1 and Cunningham 2000 Letter at 6.

as the NYSHPO's concurrence that the tower does not have an adverse effect on historic properties, we find that Verizon Wireless has complied generally and substantively with the Commission's Section 106 process for assessing impacts pursuant to its rules implementing the NHPA.

V. ORDERING CLAUSES

24. 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 Verizon Wireless and any related pleadings are DISMISSED as MOOT.

25. IT IS FURTHER ORDERED that pursuant to Section 106 of the National Historic Preservation Act, 54 U.S.C. § 306108, and Section 1.1307 of the Commission's rules, 47 C.F.R. § 1.1307, the objections submitted by Mr. Roger Cunningham and Landmark Farms, Inc., are DISMISSED IN PART and DENIED IN PART.

26. IT IS FURTHER ORDERED that pursuant to Section 106 of the National Historic Preservation Act, 54 U.S.C. § 306108, the complaint filed by the New York State Historic Preservation Officer in 1999 and the complaint filed by Mrs. Joanne Cunningham in 2000 ARE DENIED.

27. IT IS FURTHER ORDERED that the application (ULS Application No. 0001414628) with an Environmental Assessment filed by Verizon Wireless on August 12, 2003, IS DISMISSED as MOOT.

28. This action is taken pursuant to delegated authority under Section 0.331 of the Commission's rules, 47 C.F.R. § 0.331.

Federal Communications Commission

Aaron Goldschmidt
Acting Deputy Chief
Competition and Infrastructure Policy Division
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