

Oral Argument Not Yet Scheduled

**In the
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

In re **EGER COMMUNICATIONS,**

Petitioner

)
)
)

No. 19-1031

FCC RESPONSE TO PETITION FOR WRIT OF MANDAMUS

Petitioner Eger Communications seeks a writ of mandamus, arguing that the Federal Communications Commission has unreasonably delayed ruling on an application for review. Mandamus is not warranted.

Eger seeks to construct a communications tower to replace two existing towers in New York State. The Commission’s Wireless Telecommunications Bureau held that Eger’s tower proposal needs to be reviewed pursuant to the requirements of the National Historic Preservation Act and the Commission’s implementing rules, to determine whether the proposed tower would adversely affect a historic site in the area that is listed on the National Register of Historic Places. Eger has declined to undertake that review, asserting that its proposal comes within an exclusion from such review for replacement construction. Rather than participate in the historic review process, Eger in August 2015 sought review by the full Commission of the Bureau ruling, and contends in this Court that the Commission has unreasonably delayed acting on its application for review.

As described below, a draft order addressing Eger's application for review currently is before the FCC commissioners for a vote. There is thus no basis for the Court to intervene at this time. In all events, however, Eger has failed to satisfy the exacting standards for mandamus relief.

FACTUAL BACKGROUND

In July 2010, Eger Communications, Inc. filed an application with the Town of Livingston, New York to construct a new 190-foot self-supported communications tower in the place of two existing 190-foot guyed towers located at the same site.¹ Eger's existing towers are visible from the Olana House State Historic Site, a National Historic Landmark listed in the National Register of Historic Places, approximately two miles away. Eger's proposed new tower would replace the existing towers at the same site and would also be visible from the Olana House location.

In July 2013, after considering pleadings from parties that argued that Eger's proposed tower would have adverse impacts on the Olana House Historic Site, the Town granted Eger the municipal approvals necessary to construct the proposed tower. On judicial review of that decision, sought by opponents of the proposed

¹ A "guyed" tower is supported by wires extended from the tower and anchored into the ground. In this case, the two existing towers, which were built in 1993, are guyed towers. Eger's proposal would replace the two existing guyed towers with a single self-supporting type tower. *See Letter from Jeffrey B. Steinberg to Jacqueline Phillips Murray* at 1 (Aug. 5, 2013) (*Bureau Decision*) App. 1. (References to "App. –" are to the appendix to this pleading.)

tower, the New York State Supreme Court dismissed the challenge and found that the Town had taken the required “hard look” at the impact of the tower on the Olana House Historic Site’s viewshed and that the Town’s decision was supported by substantial evidence. *See Scenic Hudson, Inc. v. Town of Livingston Planning Board*, Decision Order, Index No. 6454-13, R.J.I. No. 10-13-0493, Sup. Ct. of the State of New York, County of Columbia (Aug. 26, 2014). *See* Pet. Exh 5 (Exh. A).

While the local approval process was under way, several parties raised concerns before the FCC about the potential effects of the proposed tower on the historic site. Under its rules implementing the National Historic Preservation Act (NHPA), the FCC requires parties that wish to construct certain communications towers to first determine whether construction may affect properties listed or eligible for listing in the National Register of Historic Places by conducting a “Section 106 review,” as mandated by Section 106 of the NHPA.² *See generally CTIA-The Wireless Ass’n v. FCC*, 466 F3d 105 (D.C. Cir. 2006). At the same time, certain types of towers, such as replacement towers, are generally excluded from

² 54 U.S.C. § 306108. The procedures for a Section 106 review are set forth in the rules of the Advisory Council on Historic Preservation, as modified by the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas and the Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process. *See* 47 C.F.R. Pt. 1, App. B and App. C.

the obligation to undergo Section 106 review because they are considered unlikely to impact historic properties.³

In April 2011, several parties filed a complaint with the FCC arguing that Eger's proposed new tower would have an adverse effect on the Olana Site and should undergo full Section 106 review. In response, Eger argued that the proposed tower is excluded from Section 106 review under Section III(B) of the Nationwide Programmatic Agreement. That provision generally excludes from Section 106 review construction of a "replacement for an existing communications tower and any associated excavation that does not substantially increase the size of the existing tower" or enlarge its location. *See* 47 C.F.R. Part 1, App. B. § I. E(1) - (3); App. C. § III (B). Eger asserted that its proposal met all of these criteria.

In a letter decision addressing the complaint, the Commission's Wireless Telecommunications Bureau, acting pursuant to delegated authority, found that the specific circumstances of this case made Section 106 review necessary under the NHPA, regardless of whether the proposed tower otherwise qualified for the replacement-tower exclusion. *Bureau Decision* (App. 1). The *Bureau Decision* noted that Section XI of the Nationwide Programmatic Agreement provides the Commission with discretion to address unique circumstances and avoid results that are inconsistent with the intent of the Nationwide Programmatic Agreement and

³ Nationwide Programmatic Agreement § III (B), 47 C.F.R. Pt. 1, App. C § III (B); 36 C.F.R. § 800.14(b).

the NHPA. The *Bureau Decision* found it appropriate to exercise such discretion and stated that the proposed new tower might present a significantly greater visual intrusion than the existing guyed towers, thus requiring Section 106 review.

Eger sought reconsideration of the *Bureau Decision*, again arguing that the proposed tower was a replacement tower excluded from Section 106 review. Eger also contended that it would serve the public interest to grant reconsideration because the new tower would support additional antennas needed to upgrade public safety communications systems in the region.

The Bureau dismissed Eger's Petition for Reconsideration as a procedurally improper appeal of an interlocutory action under Section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, which generally prohibits reconsideration of interlocutory actions. *Eger Communications, Inc.*, 30 FCC Rcd 8149 (WTB 2015) (*Reconsideration Order*) App. 5. The *Reconsideration Order* concluded that because the *Bureau Decision* did not terminate Eger's participation in the Section 106 review process or make a final determination of whether the proposed tower would have an adverse effect on the Olana Site, the *Decision* was interlocutory.

Eger filed an Application for Review with the full Commission, arguing that the *Reconsideration Order* erred in concluding that the *Division Letter Decision* was interlocutory. In the alternative, Eger urged the Commission to exercise its discretion to reach the merits of the dispute regardless of whether the *Bureau Decision* was final and to find that the proposed tower is a replacement excluded

from Section 106 review pursuant to Section III of the Nationwide Programmatic Agreement.

Eger's application for review is under active consideration by the Commission. On Friday, May 3, 2019, a draft order resolving it was circulated to the Commissioners for a vote. *See* App. 11.

ARGUMENT

Because the matter is under active consideration by the Commission, there is no warrant for the Court to take the extreme step of issuing a mandamus order. But even if a draft order were not before the Commission for a vote, Eger's petition provides no basis for the Court to grant mandamus in these circumstances.

"[M]andamus is 'drastic;' it is available only in 'extraordinary situations;' it is hardly ever granted; those invoking the court's mandamus jurisdiction must have a 'clear and indisputable' right to relief; and even if the plaintiff overcomes all these hurdles, whether mandamus relief should issue is discretionary." *In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005) (*en banc*). This Court will order mandamus only where the petition demonstrates that the agency delay is "egregious." *American Hosp. Ass'n v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016). In such cases, the Court is guided by the "*TRAC* factors," which are as follows:

- "the time agencies take to make decisions must be governed by a rule of reason";
- any statutory "timetable or other indication of the speed with which [Congress] expects the agency to proceed";

- “delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake”;
- “the effect of expediting delayed action on agency activities of a higher or competing priority”;
- “the nature and extent of the interest prejudiced by delay”;
- “the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.”

Telecommunications Research & Action Ctr. v. FCC, 750 F.2d 70, 76 (D.C. Cir.

1984) (*TRAC*). “The party seeking mandamus has the burden of showing that its

right to issuance of the writ is clear and indisputable.” *Power v. Barnhart*, 292 F.3d

781, 784 (D.C. Cir. 2002) (internal quotation marks omitted).

Eger’s petition does not address these legal standards and does not come close to meeting the rigorous requirements justifying the extraordinary remedy of mandamus.

The petition focuses primarily on the fact that the Commission has not yet acted on

Eger’s August 2015 application for review of the Bureau *Reconsideration Order*.

See Pet. ¶¶22, 24, 26. As this Court has emphasized, however, the Commission is

“entitled to considerable deference in establishing a timetable for completing its

proceedings.” *Cutler v. Hayes*, 818 F.2d 879, 896 (D.C. Cir. 1987). And three and

one-half years, while longer than perhaps is desirable, is not the sort of “egregious”

delay, *American Hospital Association*, 812 F.3d at 189, that might justify the

Court’s intrusion into the Commission’s allocation of its own resources.

Furthermore, in the case of mandamus petitions predicated upon allegations of unreasonable administrative delay, “a finding that delay is unreasonable does not, alone, justify judicial intervention.” *In re Barr Labs*, 930 F.2d 72, 75 (D.C. Cir.), *cert. denied*, 502 U.S. 906 (1991); *accord Cobell v. Norton*, 240 F.3d 1081, 1096 (D.C. Cir. 2001); *In re United Mine Workers*, 190 F.3d 545, 551 9 (D.C. Cir. 1999). This Court has, for example, refused to issue writs of mandamus even when the complained-of delay was much longer than the period at issue here. *See Her Majesty the Queen of Right of Ontario v. EPA*, 912 F.2d 1525, 1534 (D.C. Cir. 1990) (nine-year delay not unreasonable in light of the “complexity of the factors facing the agency”); *Harvey Radio Labs, Inc. v. United States*, 289 F.2d 458 (D.C. Cir. 1961) (10-year delay in acting on radio station application held not so egregious to require mandamus); *cf In re United Steelworkers of America v. Rubber Manufacturers Ass’n*, 783 F.2d 1117, 1120 (D.C. Cir. 1986) (declining to conclude that a possible seven-year delay in completing rulemaking was unreasonable notwithstanding the “seriousness of the health risks” created by the absence of regulation).

The petition does not demonstrate that any of the other *TRAC* considerations, cited above, call for grant of Eger’s petition. There is, for example, no specific statutory time schedule applicable to FCC action in a situation such as this. *See, e.g.*, 47 U.S.C. §§ 155(c)(4)-(7) (discussing procedures relating to FCC disposition of applications for review of staff action). And Eger does not explain

why its application for review should be a high priority for the agency given competing priorities. Accordingly, no writ would be appropriate even were there not a draft item before the Commissioners.

CONCLUSION

Because a draft order addressing Eger's application for review currently is before the Commission for a vote, mandamus relief is not appropriate. In all events, Eger has failed to satisfy the standards for such relief and the Court should deny the petition for a writ of mandamus.

Respectfully submitted,

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/s/ C. Grey Pash, Jr.

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May 8, 2019

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s/ C. Grey Pash, Jr.

C. Grey Pash, Jr.
Counsel
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CERTIFICATE OF FILING AND SERVICE

I, C. Grey Pash, Jr., hereby certify that on May 8, 2019, I filed the foregoing FCC Response to Petition for Writ of Mandamus with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the electronic CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

s/ C. Grey Pash, Jr.

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APPENDIX



**FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

August 5, 2013

VIA ELECTRONIC MAIL AND U.S. MAIL

Jacqueline Phillips Murray, Esq.
10 Maxwell Drive, Suite 100
Clifton Park, New York 12065

Re: Proposed communications tower
Eger Communications, Inc., Columbia County, New York

Dear Ms. Murray:

The Spectrum and Competition Policy Division (Division) of the Wireless Telecommunications Bureau, Federal Communications Commission (FCC or Commission), has before it a pending complaint regarding the above-referenced tower, which Eger Communications, Inc. (Eger) proposes to construct in Columbia County, New York. Specifically, the Olana Partnership and Scenic Hudson, Inc. (Olana/Hudson) have filed a Letter/Informal complaint (Informal Complaint)¹ regarding the review process for the proposed tower under Section 106 of the National Historic Preservation Act (NHPA).² Eger opposed the Informal Complaint,³ and Olana/Hudson submitted a reply.⁴ For the reasons discussed below, we grant the Informal Complaint in part and direct Eger to complete the Section 106 process pursuant to the procedures specified in the Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission (Nationwide Agreement).⁵

Eger currently owns two 199-foot guyed towers located near the Olana House State Historic Site (Olana) in Columbia County (County).⁶ The two guyed towers were built in 1993. Several County and local public safety entities have existing FCC-licensed facilities on the two

¹ See Letter from John Caffry, Esq., counsel for Olana Partnership and Scenic Hudson, Inc. to Dan Abeyta, Assistant Chief, Spectrum and Competition Policy Division, dated April 5, 2011 (Informal Complaint).

² 16 U.S.C. § 470f.

³ See Letter from Robert Gagen, Esq., counsel for Eger Communications, Inc., to Dan Abeyta, Assistant Chief, Spectrum and Competition Policy Division, dated August 29, 2011 (Eger Response); see also Letter from Robert Gagen, Esq., counsel for Eger Communications, Inc., to Dan Abeyta, Assistant Chief, Spectrum and Competition Policy Division, dated October 24, 2011.

⁴ See Letter from John Caffry, Esq., counsel for Olana Partnership and Scenic Hudson, Inc., to Dan Abeyta, Assistant Chief, Spectrum and Competition Policy Division, dated October 7, 2011 (Olana/Hudson Reply).

⁵ 47 C.F.R. Pt. 1, App. C.

⁶ See Informal Complaint at 2.

towers.⁷ Eger proposes to construct a 199-foot self-support lattice tower on the site of one of the existing towers, move the existing licensees' antennas to the new tower, and remove the two guyed towers. The new construction would also provide additional collocation space for other service providers.

In their Informal Complaint and Reply, Olana/Hudson assert that the Eger tower should undergo full Section 106 review under the procedures specified in the Nationwide Agreement. Olana/Hudson assert that the proposed tower will be clearly visible near Olana, which is a National Historic Landmark (NHL) listed on the National Register of Historic Places.⁸ Olana/Hudson further contend that Olana has a unique and exceptional historic character as the home of the landscape painter Frederic Church, and that the views of the surrounding scenery in particular are integral to Frederic Church's paintings and thus to the historic character of Olana. Olana/Hudson also contend that the proposed self-support lattice tower will adversely affect the historic landscapes and views that contribute to Olana's historic character more than the two existing narrow guyed towers.⁹

The New York Parks and Recreation Department (NYSHPO), which is the designated New York State Historic Preservation Office under the NHPA,¹⁰ has raised similar arguments.¹¹ Specifically, the NYSHPO contends that a Section 106 review is necessary because the proposed Eger tower could adversely affect the historic views and scenery that were integral to Frederic Church's paintings. The NYSHPO also requests that the FCC conduct Section 106 review using the rules of the Advisory Council on Historic Preservation rather than the procedures in the Nationwide Agreement because of Olana's NHL status.¹²

Eger, in its Response, argues that the proposed tower need not complete Section 106 review because it is excluded from review under the Nationwide Agreement. Specifically, Section III.B of the Nationwide Agreement generally excludes from review a replacement for an existing tower that does not substantially increase the size of the existing tower, provided certain other conditions are met.¹³ Eger argues that the proposed tower qualifies for this exclusion because it will replace two existing guyed towers at the site of one of those towers.¹⁴ Eger also states that the NYSHPO provided no adverse effect determinations for the two guyed towers in 1993.¹⁵

⁷ *Id.*

⁸ *See* Informal Complaint at 3-5.

⁹ *Id.* at 4.

¹⁰ *See* 16 U.S.C. § 470a(b)(1).

¹¹ *See* E-mail from John Bonafide, New York Department of Parks and Recreation, to Stephen DelSordo, FCC Federal Preservation Officer, dated April 23, 2013.

¹² *Id.*; *see* 36 C.F.R. Part 800 (rules of the Advisory Council on Historic Preservation).

¹³ Nationwide Agreement, § III.B.

¹⁴ *See* Eger Response at 1-3.

¹⁵ *Id.* at 3.

After reviewing all of the pleadings, we find, based on the unique facts of this matter, that Eger must complete Section 106 review for the proposed tower under the procedures specified in the Nationwide Agreement. In reaching this decision, we need not resolve whether the proposed tower falls within the replacement tower exclusion. Rather, we rely on Section XI of the Nationwide Agreement.¹⁶ Section XI provides that any interested party may notify the Commission of its concerns regarding the Nationwide Agreement's application to the review of individual undertakings, and that the Commission shall consider such comments and take appropriate actions. Thus, Section XI affords the Division discretion to require appropriate procedures in unique unusual situations where strict adherence to the terms of the Nationwide Agreement would produce a result that is manifestly inconsistent with the intent of the Nationwide Agreement and the NHPA.

In this instance, several unique circumstances, considered in combination, render Section 106 review necessary to fulfill the purposes of the NHPA. First, the proposed tower would be plainly and prominently visible from Olana, which is an NHL. Moreover, as the home of a landscape artist and the site of many of his famous works, the view from Olana is not only a contributing characteristic to its historic integrity, but is uniquely important to understanding the life and experiences of its famous resident. In addition, the proposed lattice tower may present a significantly greater visual intrusion than the existing guyed towers on the Olana historic property and landscapes. Taking these considerations together, we find it necessary under these unique circumstances for the NYSHPO and the Division to assess under Section 106 whether the proposed tower will have an adverse effect on historic properties. Therefore, we find that Eger must complete Section 106 review pursuant to our authority under Section XI of the Nationwide Agreement.

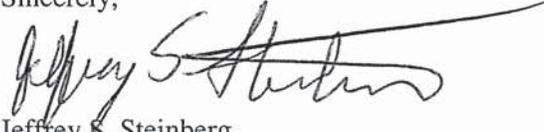
We reject the NYSHPO's request to conduct Section 106 review using the ACHP's rules only and not the Nationwide Agreement. We find that the process specified in the Nationwide Agreement will give all interested parties, including the NYSHPO, Eger, the existing licensees on the two towers, and any other potential consulting parties, a full opportunity to participate in the Section 106 process. For the same reasons, we also find it unnecessary to discuss any further arguments in the Informal Complaint.

Accordingly, the Division hereby GRANTS IN PART the Informal Complaint, filed by the Olana Partnership and Scenic Hudson, Inc., to the extent that it requests that the tower proposed by Eger Communications, Inc. complete Section 106 review. The Division otherwise DISMISSES IN PART the Olana/Hudson complaint as moot. The Division DENIES the request of the NYSHPO to use procedures other than those specified in the Nationwide Agreement. The Division FINDS that Eger Communications, Inc. must complete the Section 106 process pursuant to Sections IV through VII of the Nationwide Agreement.

¹⁶ Nationwide Agreement, § XI.

If you have any questions, please call Don Johnson of my staff at 202-418-7444.

Sincerely,



Jeffrey S. Steinberg
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Wireless Telecommunications Bureau

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Federal Communications Commission

DA 15-862

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

In the Matter of)	
)	
Eger Communications, Inc.)	Re: Proposed Communications Tower
Petition for Reconsideration)	Eger Communications, Inc.,
)	170 Eger Road, Town of Livingston,
Application for Leave to Amend)	Columbia County, New York
Petition for Reconsideration)	

ORDER ON RECONSIDERATION

Adopted: July 27, 2015**Released: July 27, 2015**

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

I. INTRODUCTION

1. The Competition and Infrastructure Policy Division (Division) of the Wireless Telecommunications Bureau, Federal Communications Commission (Commission), has before it a pending Petition for Reconsideration of the Division's letter regarding the above-referenced communications tower that Eger Communications, Inc. (Eger) proposes to construct in Livingston, Columbia County, New York.¹ Specifically, in response to an Informal Complaint filed by Scenic Hudson and the Olana Partnership (Olana/Hudson),² the Division found that Eger must complete the review process for the proposed tower under Section 106 of the National Historic Preservation Act (NHPA) pursuant to the procedures specified in the Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Commission (Nationwide Programmatic Agreement or NPA).³ Eger filed a Petition for Reconsideration of the Division Letter (Petition for Reconsideration), followed by an Application for Leave to Amend its Petition for Reconsideration (Application for Leave).⁴ For the reasons discussed below, we dismiss the Petition as an interlocutory appeal under Section 1.106(a)(1) of the Commission's Rules⁵ and also dismiss Eger's Application for Leave as moot.

¹ See In the Matter of Eger Communications, Inc., Columbia County, New York, Petition for Reconsideration, filed August 30, 2013 (Petition); Letter from Jeffrey S. Steinberg, Esq., Deputy Chief, Spectrum and Competition Policy Division to Jaqueline Phillips Murray, Esq., counsel for Eger Communications, Inc., dated August 5, 2013 (Division Letter). The Spectrum and Competition Policy Division was renamed as the Competition and Infrastructure Policy Division on May 13, 2015.

² See Complaint Regarding Eger Communications Tower Project, Blue Hill, Town of Livingston, Columbia County, New York, Letter from John W. Caffry, Esq., counsel for Olana Partnership and Scenic Hudson, Inc. to Dan Abeyta, Assistant Chief, Spectrum and Competition Policy Division, dated April 5, 2011 (Informal Complaint).

³ See Division Letter at 1, *citing* 16 U.S.C. § 470f; 47 C.F.R. Pt. 1, App. C. Section 106 of the NHPA has since been restated and reenacted as 54 U.S.C. § 306108. See Pub. L. 113-287, 128 Stat. 3094 (Dec. 19, 2014).

⁴ Application for Leave to Amend Petition for Reconsideration, Eger Communications, Inc., dated October 24, 2014 (Eger Application for Leave).

⁵ 47 C.F.R. §1.106(a)(1).

Federal Communications Commission DA 05-[Click to enter order number]

II. BACKGROUND

2. On July 2, 2010, Eger filed an Application for a Special Use Permit and Site Plan Approval with the Town of Livingston Planning Board (Town) to construct a new 190-foot self-support lattice tower to replace two existing 190-foot guyed towers that were built in 1992.⁶ The proposed Eger tower site is located near the Olana House State Historic Site (Olana Estate), the former home of the artist Frederic Church.⁷ The Olana Estate is a National Historic Landmark (NHL) and is listed in the National Register of Historic Places (National Register).⁸ Eger did not submit the proposed tower for federal review under Section 106 of the NHPA. On April 5, 2011, Olana/Hudson filed an Informal Complaint with the Division arguing that Eger's proposed tower should undergo full Section 106 review under the procedures specified in the NPA and that the tower would have an adverse effect on the Olana Estate.⁹ In its Opposition and Sur-Reply, however, Eger argued that the proposed tower is a replacement tower expressly excluded from Section 106 review under Section III(B) of the NPA.¹⁰

3. *Division Letter.* Based on its review of all the pleadings, in a letter dated August 5, 2013, the Division determined that several circumstances in this case render Section 106 review necessary to fulfill the purposes of the NHPA.¹¹ In particular, the Division noted that the view from the Olana Estate is not only a contributing characteristic to its historic significance, but is uniquely important to understanding the life and experience of its famous resident. Considering that the proposed tower would be plainly and prominently visible from the Olana Estate, which is an NHL, combined with other factors, the Division found it necessary for the NYSHPO and the Division to assess under Section 106 whether the proposed tower will have an adverse effect on historic properties.¹² The Division further found that the process specified in the NPA will give all interested parties, including the NYSHPO, Eger, the

⁶ Application for a Special Use Permit and Site Plan Approval, filed by Eger Communications with the Town of Livingston Planning Board, Livingston, New York, on July 2, 2010. On November 12, 2012, Eger amended its Application. On July 12, 2013, the Town of Livingston awarded Eger the municipal approvals necessary to install the proposed tower.

⁷ See Division Letter at 1, *citing* Informal Complaint at 2.

⁸ See Informal Complaint at 3-5. The Olana Estate was designated in the National Register as an NHL in 1965. The National Register nomination calls the property "The Frederic Church House" (National Register Number 66000509). The Olana Estate was added to the National Park Service's Watch List of Threatened and Endangered National Historic Landmarks in 2004. See <http://tps.cr.nps.gov/nhl/detail.cfm?ResourceId=365&ResourceType=Building>

⁹ See Informal Complaint; see also Olana/Hudson Reply to Eger's Opposition, filed Oct. 7, 2011. The New York Parks and Recreation Department (NYSHPO), as the designated New York State Historic Preservation Office under the NHPA, has also raised similar arguments. See E-mail from John Bonafide, New York Department of Parks and Recreation, to Stephen DelSordo, FCC Federal Historic Preservation Officer, dated April 23, 2013.

¹⁰ See Eger Opposition to the Informal Complaint, filed Aug. 29, 2011 at 1-3; Eger Sur-Reply to Olana/Hudson's Reply, filed Oct. 23, 2011 at 1-2. Section III.B of the NPA generally excludes from Section 106 review a replacement for an existing tower that does not substantially increase the size of the existing tower, provided certain other conditions are met. NPA, § III.B.

After the pleading cycle was complete, several public safety entities filed letters with the Division discussing their need to collocate antennas on the proposed tower. See, e.g., Letter from Paul Jahns, Livingston Fire District, Board of Fire Commissioners, to Daniel Abeyta, Assistant Chief, Spectrum and Competition Policy Division, FCC, dated December 27, 2011; Letter from P.J. Keeler, EMS Coordinator, County of Columbia – Emergency Medical Services, to Daniel Abeyta, Assistant Chief, Spectrum and Competition Policy Division, FCC, dated December 2, 2011; Letter from Benjamin A. Wheeler, Chief, Lebanon Valley Protective Association, Inc. to Daniel Abeyta, Assistant Chief, Spectrum and Competition Policy Division, FCC, dated December 26, 2011.

¹¹ See Division Letter at 3.

¹² See *id.*

Federal Communications Commission DA 05-[Click to enter order number]

existing licensees on the two towers, and any other potential consulting parties, a full opportunity to participate in the Section 106 process.¹³ In reaching this decision, the Division found that it was not necessary to resolve whether the proposed tower falls within the replacement tower exclusion under the NPA.¹⁴ The Division relied on Section XI of the NPA, which provides that any interested party may notify the Commission of its concerns regarding the NPA's application to the review of individual undertakings, and the Commission shall consider such comments and, where appropriate, take appropriate action.¹⁵ Therefore, the Division Letter found, pursuant to the authority found in Section XI, that Eger must complete Section 106 review pursuant to Sections IV through VII of the NPA prior to construction of the proposed tower.

4. *Petition for Reconsideration.* On August 30, 2013, Eger filed its Petition for Reconsideration of the Division Letter, reiterating its argument that the proposed tower is excluded from Section 106 review as a replacement tower.¹⁶ Eger also contends that under Section 1.106(c)(2) of the Commission's Rules, the Petition should be granted since it is in the public interest to consider public safety agencies' need for the replacement tower and the consequences to public safety in the event that construction of the replacement tower is delayed or prohibited.¹⁷ In particular, Eger argues that it needs to replace the twin towers with a stronger tower of the same height to support additional antennas needed to upgrade public safety communications systems in the region.¹⁸ In a letter supporting Eger's petition, Columbia County similarly urges the Division to consider public safety's interest in the construction of the proposed tower.¹⁹ In its Opposition to the Petition, however, Olana/Hudson argue that Eger's Petition should be dismissed under Section 1.106(d) and (p) of the Commission's Rules because it fails to present new facts or arguments.²⁰ Olana/Hudson further argue that the Section 106 process must proceed without further delay to determine the proposed tower's potential adverse effects on the Olana Estate.²¹

5. *Application for Leave.* On October 24, 2014, Eger filed its Application for Leave, requesting to supplement its Petition to include a New York State Supreme Court (NY State Court) Decision dated August 26, 2014.²² In a proceeding filed by Olana/Hudson challenging the Town's

¹³ See *id.*

¹⁴ See *id.*

¹⁵ See *id.*

¹⁶ Eger Petition at 8.

¹⁷ *Id.* at 11; Eger Reconsideration Reply at 3-4; see 47 C.F.R. § 1.106(c)(2) (in the case of any order other than an order denying an application for review, a petition for reconsideration which relies on facts or arguments not previously presented to the Commission or to the designated authority may be granted if the Commission or the designated authority determines that consideration of the facts or arguments relied on is required in the public interest).

¹⁸ Eger Petition at 2.

¹⁹ See Letter from Andrew B. Howard, Deputy County Attorney, Columbia County, to Jeffrey Steinberg, Deputy Chief, Spectrum and Competition Policy Division, FCC, dated September 19, 2013 (Columbia County Letter) (noting that on January 11, 2013, Columbia County's public safety agencies and departments became co-applicants to Eger's application for the proposed tower before the Town).

²⁰ See Olana/Hudson, Opposition to Petition for Reconsideration (Olana/Hudson Opposition to Eger's Petition), filed September 12, 2013, at 3-4; 47 C.F.R. § 1.106(d), (p).

²¹ Olana Opposition to Eger's Petition at 3-4.

²² See Eger Application for Leave; see also *Scenic Hudson, Inc., The Scenic Hudson Land Trust, Inc., and The Olana Partnership v. Town of Livingston Planning Board, Eger Communications, and Blue Hill Farms, Inc.*, Decision/Order, Index No. 6454-13, R.J.I. No. 10-13-0493, Supreme Court of the State of New York, County of Columbia, August 26, 2014 (*Olana v. Town of Livingston*) (Appendix A to Eger Application for Leave). On

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Federal Communications Commission DA 05-[Click to enter order number]

decision to grant municipal approvals for Eger's proposed tower, the NY State Court upheld the Town's decision and dismissed Olana/Hudson's petition.²³ At issue in the NY State Court petition was whether the Town failed to "take a hard look" at or make a rational decision about the proposed tower's visual impact upon the viewshed of the Olana Estate under the New York State Environmental Quality Review Act (SEQRA).²⁴ In dismissing Olana/Hudson's petition, the court stated that the Town was responsible for determining the significance of the proposed tower's visual impact under SEQRA, and that the court was constrained not to second-guess its decision.²⁵

6. Invoking Section 1.106(f) of the Commission's Rules, Eger argues that the NY State Court Decision is a new fact that merits inclusion in the record for its relevance to whether the proposed tower will have an adverse impact upon the Olana viewshed.²⁶ In its Opposition to Eger's Application for Leave, however, Olana/Hudson argue that the NY State Court Decision under SEQRA is not relevant to the Commission's administration of the NHPA Section 106 review.²⁷ Olana/Hudson further argue that the NY State Court's determination that the Town met its obligation under SEQRA has no bearing on the administration of Section 106 since the two statutes have different criteria.²⁸

III. DISCUSSION

7. Section 106 of the NHPA requires Federal agencies, including the Commission, to take into account the effects of their undertakings on historic properties included or eligible for inclusion in the National Register.²⁹ To fulfill its responsibilities under Section 106, the Commission's rules require proponents of facilities to ascertain prior to construction whether the proposed facility has the potential to affect such properties.³⁰ Applicants perform this assessment following the procedures set forth in the rules of the Advisory Council on Historic Preservation, as modified and supplemented by the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas and the NPA.³¹

8. The NPA provides detailed procedures, tailored to the context of communications towers

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November 4, 2014, Olana filed an Opposition to Eger's Application for Leave. On November 20, 2014, Eger filed a Reply to Olana's Opposition to Application for Leave.

²³ See *Olana v. Town of Livingston*.

²⁴ See N.Y. ENVT. CONSERV. LAW §§ 8-0101 to 8-0117 (McKinney 2005).

²⁵ See *Olana v. Town of Livingston* at 8.

²⁶ See Eger Application for Leave at 5-7; Eger Reply to Olana's Opposition to Application for Leave at 2-3; 47 C.F.R. § 1.106(f). Pursuant to Section 1.106(f), a supplement or addition to a petition for reconsideration which has not been acted upon by the Commission or by the designated authority may be filed after expiration of the 30-day period in a separate pleading for leave to file, setting forth the grounds therefor. Such a supplement or addition to a petition for reconsideration will be considered only after the application for leave is granted by the Commission or the designated authority. *Id.*

²⁷ See Olana Opposition to Eger's Application for Leave at 2-3.

²⁸ See *id.* at 3.

²⁹ See 54 U.S.C. § 306108.

³⁰ See 47 C.F.R. § 1.1307(a)(4). If the proposed construction may affect historic properties, the applicant must prepare an Environmental Assessment for Commission review and processing. *Id.* § 1.1307(a).

³¹ See *Id.*

Federal Communications Commission DA 05-[Click to enter order number]

construction, for ascertaining the effects to be caused by proposed communications towers.³² In addition, Section III of the NPA establishes that certain types of activities, including certain replacement towers, are excluded from Section 106 review, while providing that “concerns regarding the application of these exclusions from Section 106 review may be presented to and considered by the Commission pursuant to Section XI.”³³ Section XI of the NPA provides that “any member of the public may notify the Commission of concerns it has regarding the application of this Nationwide Agreement . . . with regard to the review of individual Undertakings covered or excluded under the terms of this Agreement.”³⁴ Thus, the Commission is authorized under Section XI to take appropriate actions in specific cases to ensure that potential effects on historic properties are assessed. In its Petition, Eger challenges the Division’s finding under Section XI that Section 106 review must be completed under Section 1.1307(a)(4) in order to assess the proposed tower’s potential effects on the Olana Estate, a National Historic Landmark.

9. *Interlocutory Action under Section 1.106(a)(1) of the Commission’s Rules.* Based on our review of the record and the regulatory background, we find that Eger’s Petition is procedurally improper and should be dismissed under Section 1.106(a)(1) of the Commission’s rules as addressing an interlocutory action.³⁵ Section 1.106(a)(1) of the Commission’s rules generally prohibits the filing of petitions for reconsideration of interlocutory actions.³⁶ With one exception that is not relevant here, the rule provides that the Commission and its staff acting under delegated authority will only entertain petitions requesting reconsideration of a final action.³⁷ 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.³⁸ For an agency action to be “final,” it must mark the “consummation” of the agency’s decision-making process, and not be merely of a tentative or interlocutory nature; in addition, the action must determine rights or obligations or otherwise result in legal consequences for one or more parties.³⁹

10. Here, the Division’s letter neither terminated Eger’s right to participate in the Section 106 review nor finally determined whether or not the proposed tower would have an adverse effect on the Olana Estate. Under the NHPA and the NPA, the Section 106 process consists of a number of steps,

³² See 47 C.F.R. Pt. 1, App. C, §§ IV (Participation of Indian Tribes and Native Hawaiian Organizations in Undertakings of Tribal Lands), V (Public Participation and Consulting Parties), VI (Identification, Evaluation, and Assessment of Effects), VII (Procedures).

³³ See 47 C.F.R. Pt. 1, App. C. § III.

³⁴ 47 C.F.R. Pt. 1, App. C. § XI.

³⁵ 47 C.F.R. § 1.106(a)(1).

³⁶ *Id.*

³⁷ *Id.* The exception is that “a petition for reconsideration of an order designating a case for hearing will be entertained if, and insofar as, the petition relates to an adverse ruling with respect to petitioner’s participation in the proceeding.” *Id.*

³⁸ 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); *see also* In the Matter of Global Tower, LLC, ASR App. No. A0785797, *Order on Reconsideration*, 29 FCC Rcd 8339 (WTB/SCPD 2014) (*Global Tower*) (affirming Division’s decision requiring Global Tower to submit an Environmental Assessment for a proposed new antenna tower and dismissing a Petition for Reconsideration as interlocutory).

³⁹ See *Jet Fuel Broadcasting* at 2471-72 ¶ 2, citing *Bennett v. Spear*, 520 U.S. 154, 177-78, 117 S. Ct. 1154, 1168 (1997); *see also Global Tower* at 8341, citing *Jet Fuel Broadcasting*.

Federal Communications Commission DA 05-[Click to enter order number]

including initiation of the process, identification of historic properties, assessment of adverse effects, and resolution of adverse effects.⁴⁰ Rather than marking the “consummation” of the Section 106 review process, the Division Letter was an initial determination under Section XI of the NPA Agreement that the proposed tower must complete Section 106 review to inform the final decision as to whether it would have an adverse effect on the Olana Estate, and if so, how to avoid, minimize or mitigate the adverse effect. Accordingly, the Division Letter was interlocutory as preliminary to a Section 106 review under Section 1.1307(a)(4) of the Commission’s Rules.

11. For these reasons, we find that the Division Letter’s finding that Eger must complete the Section 106 process for the proposed tower pursuant to Sections IV through VII of the NPA was an interlocutory action and not subject to Petition for Reconsideration under the Commission’s rules. Therefore, the Petition for Reconsideration must be dismissed. As such, the Application for Leave must also be dismissed as moot.

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 Eger Communications, Inc. IS DISMISSED.

13. IT IS FURTHER 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 Application for Leave to Amend its Petition for Reconsideration, filed by Eger Communications, Inc. IS DISMISSED AS MOOT. 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

Jeffrey S. Steinberg
Deputy Chief, Competition and Infrastructure Policy Division
Wireless Telecommunications Bureau

⁴⁰ See 36 C.F.R. §§ 800.3, 800.4, 800.5, 800.6; 47 C.F.R. Pt. 1, App. C. §§ VI, VII.

<u>Date Circulated</u>	<u>Bureaus Office</u>	<u>Docket Number</u>	<u>Title</u>
05/03/2019	WCB		Rural Health Care Support Mechanism
05/03/2019	WTB		In the Matter of Eger Communications, Inc., Application for Review, Proposed Tower, Town of Livingston, Columbia County, New York
04/29/2019	PSHSB		Review of the Emergency Alert System
04/24/2019	MB		Equal Employment Opportunity Enforcement Notice of Proposed Rulemaking (NPRM).
04/17/2019	MB		Glenn Cherry, Permittee of FM Translator Station W264DP, Daytona Beach, Florida, Application for Construction Permit
04/17/2019	MB		Threshold Communications, Application for Construction Permit, KVNW(FM), Napavine, Washington, Order on Reconsideration (Order)
03/26/2019	WCB		Universal Service Contribution Methodology
03/07/2019	PSHSB		License Acquisitions, LLC
02/19/2019	WCB		2019 Broadband Deployment Report
02/15/2019	EB		Enforcement Bureau Order
10/01/2018	EB		Enforcement Bureau Order
05/17/2018	MB		In the Matter of Complaints Involving the Political Files of WCNC-TV, Inc., licensee of Station WCNC-TV, Charlotte, NC, et al., Memorandum Opinion and Order
05/17/2018	MB		Complaint Involving the Political Files of Scripps Media, Inc., licensee of Station WCPO-TV, Cincinnati, OH
04/11/2017	WTB		Expanding Access to Mobile Wireless Services Onboard Aircraft
01/06/2017	OET		Amendment of Part 2 of the Commission's Rules for Federal Earth Stations Communicating with Non-Federal Fixed Satellite Service Space Stations; Federal Space Station Use of the 399.9-400.5 MHz Mobile Satellite Service Band; and Allocation of Spectrum