

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

In the Matter of Application of)
 SCANA Communications, Inc.)
 Proposed Antenna Tower, Georgetown, SC)
 Amendment to Antenna Structure Registration)
 Number 1044931)

MEMORANDUM OPINION AND ORDER

Adopted: April 26, 2001

Released: May 4, 2001

By the Commission:

I. INTRODUCTION

1. We have before us two applications for review filed by James M. Tennant (“Mr. Tennant”). Mr. Tennant’s first application for review¹ challenges the *Georgetown Order*, released by the Commercial Wireless Division (“Division”) of the Wireless Telecommunications Bureau (“Bureau”) on April 11, 2000, which denied environmental objections to the construction of a communications tower near historic sites in Georgetown, South Carolina.² Mr. Tennant’s second application for review concerns the *Stay Order*, dated May 26, 2000,³ which denied Mr. Tennant’s request for a stay of the *Georgetown Order*.⁴ For the reasons discussed below, we deny Mr. Tennant’s application for review of the *Georgetown Order* and dismiss as moot his application for review of the *Stay Order*.

¹ Application for Review of James M. Tennant, filed May 10, 2000 (“Tennant Application”). *See also* Reply Comments of James M. Tennant, filed June 12, 2000 (“Tennant Reply”).

² Application of SCANA Communications, Inc. Proposed Antenna Tower, Georgetown, SC, Amendment to Antenna Structure Registration No. 1044931, Memorandum Opinion and Order, 15 FCC Rcd. 6223 (Wireless Tel. Bur. 2000) (*Georgetown Order*).

³ Application of SCANA Communications, Inc. Proposed Antenna Tower, Georgetown, SC, Amendment to Antenna Structure Registration No. 1044931, Order, 15 FCC Rcd. 9203 (Wireless Tel. Bur. 2000) (*Stay Order*).

⁴ Application for Review of James M. Tennant, filed June 26, 2000 (“Tennant Stay Application”). *See also* Comments on Opposition to Application for Review, filed August 3, 2000 (“Tennant Stay Comments”).

II. BACKGROUND

2. On July 20, 1998, SCANA Communications, Inc. (“SCANA”) filed an antenna structure registration with the Federal Communications Commission (“Commission”),⁵ seeking approval for the construction of a 240-foot tower in Georgetown, South Carolina.⁶ On September 25, 1998, Mr. Tennant filed a petition to deny, challenging the SCANA application.⁷ In his petition, Mr. Tennant argued, among other things, that approval by the Commission of the tower construction would be improper because the procedural requirements of the National Historic Preservation Act (“NHPA”) had not been satisfied.⁸ SCANA filed an opposition to the Tennant petition on October 15, 1998.⁹ On April 11, 2000, the Division denied the Tennant petition and granted the SCANA application.¹⁰ The Division also denied Mr. Tennant’s subsequently filed stay request.¹¹

3. In the *Georgetown Order*, the Division concluded that the objections of Mr. Tennant and other interested parties were without merit because the proposed tower construction would not have an adverse effect on historic properties.¹² The Division found that the “no adverse effect” recommendation of the South Carolina State Historic Preservation Officer (“South Carolina SHPO”) was fully supported by the record, and that Mr. Tennant and other interested parties were afforded a full and fair opportunity to participate in the process.¹³ The Division further found that although SCANA’s initial application contained errors, those errors were not cause to deny the application because SCANA had corrected them promptly and the record showed that SCANA had acted in good faith.¹⁴

4. In his application for review, Mr. Tennant argues that the *Georgetown Order* is arbitrary and capricious because it relies solely upon the South Carolina SHPO’s “no adverse effect” finding rather than the record as a whole.¹⁵ The South Carolina SHPO’s recommendation is erroneous, Mr. Tennant contends,

⁵ See 47 C.F.R. § 17.4(a).

⁶ See Proposed Antenna Tower – Georgetown, South Carolina, Amendment to Antenna Structure Registration No. 1044931, filed July 20, 1998.

⁷ Major Environmental Action for SCANA Communications, Inc. Tower Registration Modification for Georgetown, South Carolina; Petition to Deny, filed September 25, 1998.

⁸ See 16 U.S.C. § 470f. The Advisory Council on Historic Preservation has promulgated rules implementing the NHPA. See 36 C.F.R. Part 800. These rules were amended in 1999 (64 Fed. Reg. 27044 (May 18, 1999)) and were again recently amended in 2000. (65 Fed. Reg. 77698 (December 12, 2000)). Because SCANA filed its application with the Commission before the rules were amended, the pre-1999 rules set out the applicable NHPA procedures.

⁹ See SCANA Communications, Inc. Amendment to Tower Registration for Georgetown, South Carolina, Opposition to Petition to Deny, October 15, 1998 at 1-2.

¹⁰ *Georgetown Order*.

¹¹ *Stay Order*.

¹² *Georgetown Order*, 15 FCC Rcd. at 6230 and 6232, ¶¶ 14 and 23.

¹³ *Id.*, 15 FCC Rcd. at 6232-6233, ¶¶ 21, 24-25.

¹⁴ *Id.*, 15 FCC Rcd. at 6233-6235, ¶¶ 26-29.

¹⁵ Tennant Application at 10-11.

because the South Carolina SHPO incorrectly assumed that the tower would be temporary,¹⁶ because the South Carolina SHPO failed to consider the views of all interested parties, and because the South Carolina SHPO relied on inaccurate photographs of the proposed tower.¹⁷ In addition, Mr. Tennant alleges the South Carolina SHPO actually rendered a “conditional adverse effect” recommendation based on its erroneous assumption that the tower would become obsolete. Thus, Mr. Tennant argues, SCANA was required to mitigate the adverse effect,¹⁸ and removal of the tower at a future time is not a sufficient mitigation measure.¹⁹ Overall, Mr. Tennant contends the tower has an adverse effect on historic sites.²⁰ Moreover, Mr. Tennant alleges that he and other interested parties, including citizens of Georgetown, South Carolina, and the National Trust on Historic Preservation (“National Trust”), were denied a full and fair opportunity to participate in this proceeding²¹ in violation of the NHPA, the rules of the Advisory Council on Historic Preservation (“Advisory Council”), and the Commission’s rules.²² Finally, Mr. Tennant argues that SCANA made material misrepresentations in its applications and has engaged in otherwise illegal conduct sufficient to warrant reconsideration of this matter.²³

5. In its Opposition to the Tennant Application,²⁴ SCANA asserts the Division’s conclusion that the tower would have no adverse effect upon historic properties was fully supported by the record and therefore the Division did not act in an arbitrary and capricious manner.²⁵ In addition, SCANA argues that the South Carolina SHPO’s recommendation was not inherently inconsistent. By reviewing the record as a whole, SCANA maintains, the Division has considered fully any and all ambiguities raised by the contingent nature of the South Carolina SHPO’s order.²⁶ Finally, SCANA argues that any alleged inaccuracies in its application were based on good faith interpretations of the law and were immediately corrected by SCANA when identified.²⁷

¹⁶ *Id.* at 12-13, 15-16; Tennant Reply at 5-7.

¹⁷ Tennant Application at 17-18.

¹⁸ *See* 36 C.F.R. § 800.5(e).

¹⁹ Tennant Application at 13, 17, 19.

²⁰ Tennant Reply at 1-5.

²¹ Tennant Application at 17-18; Tennant Reply at 11.

²² *See* 36 C.F.R. § 800.1 and § 800.4(a)(iii). The Commission’s rules incorporate the rules of the Advisory Council by reference. *See* 47 C.F.R. § 1.1307(a)(4).

²³ Tennant Application at 14, 19-25; Tennant Reply at 7-13.

²⁴ Opposition to Application for Review, filed May 25, 2000 (“SCANA Opposition”).

²⁵ SCANA Opposition at 4-8 and 17.

²⁶ *Id.* at 9-10.

²⁷ *Id.* at 19-20.

6. In the *Stay Order*, the Division concluded that Mr. Tennant had failed to demonstrate likelihood of success on the merits, or irreparable injury should the stay be denied.²⁸ In addition, the Division concluded that Mr. Tennant had failed to demonstrate that other parties would be unharmed if the stay were granted and that grant was in the public interest.²⁹

7. In his Stay Application, Mr. Tennant contends that, because the issues he has raised are major, unusual, and unsettled, the full Commission, rather than the Division, should have handled his request for stay.³⁰ In the alternative, Mr. Tennant argues that the Division should not have considered his stay, but instead the Bureau Chief, personally, should have considered its merits. At any rate, according to Mr. Tennant, the Division's jurisdiction ended at the point he filed his Application for Review.³¹ SCANA, in its Opposition to the Stay Application,³² dismisses Mr. Tennant's delegation arguments as frivolous on the grounds that the Division acted in a manner consistent with delegated authority from the Commission and the Bureau.³³

III. DISCUSSION

A. Antenna Structure Registration

8. We disagree with Mr. Tennant's contention that the Division's determination in the *Georgetown Order* was arbitrary and capricious. The South Carolina SHPO made "effect" recommendations³⁴ for two historic sites, the Elmwood Cemetery and the Georgetown Historic District. By letter dated May 15, 1998, the South Carolina SHPO advised SCANA that the proposed tower would have only a "marginal impact"

²⁸ *Stay Order*, 15 FCC Rcd. at 9204-9205, ¶¶ 5-6.

²⁹ *Id.*, 15 FCC Rcd. at 9205, ¶ 7. See *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 182 U.S. App. D.C. 220, 559 F.2d 841 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Association v. FPC*, 104 U.S. App. D.C. 106, 259 F.2d 921 (D.C. Cir. 1958).

³⁰ Tennant Stay Application at 2-3.

³¹ *Id.* at 3-4.

³² Opposition to Application for Review of Order Denying Stay, filed July 20, 2000 ("SCANA Stay Opposition").

³³ SCANA Stay Opposition at 4-7.

³⁴ The Commission's rules direct licensees and applicants to initiate consideration of the environmental effects of facilities construction projects and to consult with the appropriate SHPO. See 47 C.F.R. § 1.1307(a) and Note to 47 C.F.R. § 1.1307(a)(4). This delegation of authority was recently affirmed by the Advisory Council. See letter from John M. Fowler, Advisory Council on Historic Preservation, to Federal Communications Commission, State Historic Preservation Officers, and Tribal Historic Preservation Officers, dated September 21, 2000. SHPOs generally make one of four recommendations when reviewing Commission projects. After defining a project's Area of Potential Effects, *i.e.*, the area in which effects may occur should historic sites be present, the SHPO may determine: (1) no historic sites are affected by the project (36 C.F.R. § 800.4(d)); (2) historic sites are present, but the project will have "no effect" on such sites (36 C.F.R. § 800.5(b)); (3) the proposed project affects historic sites, but that effect is not "adverse" (36 C.F.R. § 800.5(d)(1)); or (4) the proposed project will "adversely affect" historic properties (36 C.F.R. § 800.5(e)). Only the fourth type of recommendation triggers the need to "minimize, mitigate or avoid" that adverse effect. *Id.*

on the Elmwood Cemetery³⁵ -- a recommendation of “no adverse effect.” After receiving additional information from SCANA, the South Carolina SHPO concluded that the proposed tower would have “no adverse effect” on the Georgetown Historic District.³⁶ The South Carolina SHPO cited a number of considerations, including the tower’s distance from the Georgetown Historic District, the fact that it was visible from only a portion of the historic district, its *potentially* temporary nature, and the city’s consideration and rejection of other locations due to engineering unfeasibility.³⁷ In addition, the South Carolina SHPO noted that lowering the height of the tower would reduce its attractiveness for collocating other antennas, and thus lead to requests for additional tower sites from other wireless providers.³⁸ The South Carolina SHPO, however, conditioned its finding on SCANA’s agreement to reconsider the matter at the end of the five-year lease period (and at subsequent five-year intervals), and to take the tower down thereafter if it was no longer in use.³⁹ In the *Georgetown Order*, the Division granted the SCANA application “subject to the condition that SCANA will remove the tower if it is no longer in use five years from the date construction is completed, or within 120 days after it ceases to be used at any time thereafter.”⁴⁰

9. We find first that the Division’s ultimate determination of “no adverse effect” was based upon the record as a whole, and not based solely upon the South Carolina SHPO’s recommendation.⁴¹ During the nearly two-year period between the time the South Carolina SHPO issued its finding and the date the *Georgetown Order* was issued, a large administrative record was developed, including comments from numerous parties, an environmental assessment (including a description of the proposed tower site with photographs), the briefs of the parties, and the review and opinion of the Advisory Council.⁴² As prescribed by the NHPA, findings under the NHPA are to be made by the Commission as the responsible agency, and not by the SHPO.⁴³ While the South Carolina SHPO’s recommendation was the starting point, the Division considered the environmental assessment filed by SCANA, the comments of the other interested parties (including the National Trust), the briefs of the parties themselves, and the concurrence of the Advisory Council that the tower would have no adverse effect on historic properties.⁴⁴ Thus, we agree with the Division that there is no adverse effect in this case.

³⁵ Letter from Mary W. Edmonds, Deputy State Historic Preservation Officer, South Carolina Archives and History Center, to Gary C. Pennington, Counsel for SCANA, dated May 15, 1998. No issues specifically regarding the Elmwood Cemetery were raised on appeal.

³⁶ Letter from Mary W. Edmonds, Deputy State Historic Preservation Officer, South Carolina Archives and History Center, to Gary C. Pennington, Counsel for SCANA, dated June 2, 1998.

³⁷ *Id.* at 1-2. As discussed below, the potentially temporary nature of the tower, while relevant to the totality of the SHPO’s recommendation, was not the basis for its finding of “no adverse effect.”

³⁸ *Id.* at 2.

³⁹ SCANA agreed to this condition. See Letter from Gary C. Pennington, Counsel for SCANA, to Mary W. Edmonds, Deputy State Historic Preservation Officer, South Carolina Department of Archives and History, dated June 4, 1998. See also Letter from Gary P. Schonman, Enforcement Division, Wireless Telecommunications Bureau, to Raymond V. Wallace, Historic Preservation Technician, Office of Planning and Review, Advisory Council on Historic Preservation, dated June 15, 1998.

⁴⁰ *Georgetown Order*, 15 FCC Rcd. at 6237, ¶ 34.

⁴¹ *Id.*, 15 FCC Rcd. at 6230, ¶ 14.

⁴² *Id.*, 15 FCC Rcd. at 6223-6228, ¶¶ 1-8.

⁴³ 36 C.F.R. §§ 800.1(a), 800.4, and 800.5.

⁴⁴ *Georgetown Order*, 15 FCC Rcd. at 6232, ¶ 23.

10. Second, we disagree with Mr. Tennant that the Division, by relying in part on the South Carolina SHPO recommendation, endorsed or necessarily accepted the concept that the tower will be obsolete within five years or more.⁴⁵ Indeed, the South Carolina SHPO did not make this conclusion. Rather, the South Carolina SHPO recommended that if the tower were to become obsolete in the near term or distant future, then SCANA would be obligated to take the tower down. It appears Mr. Tennant may be confusing a finding of “no adverse effect” – the finding here – with a “no effect” finding. By indicating a “no adverse effect” finding, the South Carolina SHPO found that there would be an *effect* on historic properties, but that effect would not be *adverse*. And, by asking that the tower be removed if it becomes obsolete, the South Carolina SHPO stated that the effect, in the future, could be eliminated altogether by removal of the tower, not that the effect would be currently *adverse*. The South Carolina SHPO plainly did not render some type of “conditional adverse effect” recommendation, as Mr. Tennant appears to allege. As the South Carolina SHPO clarifies in the June 8, 2000, correspondence with Mr. Tennant, the recommendation was one of “no adverse effect,” and it in no way was based upon the idea that the tower might, at some point, be deemed obsolete.⁴⁶

11. We note that, because the Advisory Council’s rules do not require mitigation of “no adverse effect” findings,⁴⁷ including the consideration of alternatives, the Commission was not required to enter into a memorandum of agreement or other arrangements in order to adopt the South Carolina SHPO’s condition here. Because imposition of the condition was not inconsistent with the record, the Division found it appropriate to incorporate the South Carolina SHPO’s condition into its own grant of the application.⁴⁸ In so doing, however, the Division in no way either found that the tower would have an adverse effect or found that it was likely to be temporary.

12. We find Mr. Tennant’s claim that he and other parties were denied a full and fair opportunity to participate at all stages in this proceeding frivolous. As the Division states, and as the record reflects, Mr. Tennant, the National Trust, the Advisory Council, and some 260 citizens of Georgetown clearly participated in this proceeding. Moreover, the Division afforded parties repeated opportunities to file comments, even after the environmental assessment was filed.⁴⁹ In sum, we conclude the requirement for environmental review in this case has been satisfied fully.

13. We have reviewed in full the other arguments raised by Mr. Tennant, including his challenges of certain representations made by SCANA in its environmental filings and SCANA’s conduct shortly before and during the early stages of the NHPA review process, and conclude that all of Mr. Tennant’s arguments were addressed fully by the Division in the *Georgetown Order*. We agree with the Division that, while SCANA did make inaccurate representations in its original efforts to register the Georgetown tower, it immediately corrected these inaccuracies upon being notified of its error.⁵⁰ Moreover, as the Division found, SCANA immediately stopped construction of the tower upon learning that it had failed to comply

⁴⁵ Mr. Tennant argues the South Carolina SHPO believes satellite technologies will eventually render towers obsolete. Tennant Reply at 5-7 and Attachment C. We express no opinion on this issue.

⁴⁶ Tennant Reply at Attachment C.

⁴⁷ 36 C.F.R. § 800.5(d)(2).

⁴⁸ *Georgetown Order*, 15 FCC Rcd. at 6237, ¶ 34.

⁴⁹ *Id.*, 15 FCC Rcd. at 6233, ¶ 24.

⁵⁰ *Georgetown Order*, 15 FCC Rcd. at 6234-6235, ¶ 28.

with the NHPA – a further sign of good faith in this case.⁵¹ Having reviewed the other arguments raised by Mr. Tennant, we deem them frivolous.

B. Request for Stay

14. In light of our denial of Mr. Tennant’s application for review of the *Georgetown Order*, we dismiss his application for review of the *Stay Order* as moot.⁵² Moreover, Mr. Tennant’s argument that either the Bureau or the Division improperly exercised delegated authority in handling his request for stay is without merit. The request for stay did not raise new or novel questions of law or policy that required resolution by the Commission.⁵³ In addition, Section 0.204(b) of the Commission’s rules provides that “authority delegated to any official to issue orders or to enter into correspondence . . . may be exercised by that official or by appropriate subordinate officials acting for him.”⁵⁴ Thus, it was not improper for the Division to act on behalf of the Bureau Chief in this matter. Finally, as we have previously noted, “the delegation of authority rules are a matter between the Commission and its staff and do not give private parties rights.”⁵⁵

IV. CONCLUSION

15. After carefully reviewing the Tennant applications for review, we conclude that James M. Tennant has failed to present sufficient facts and/or arguments to support his claims that the Commercial Wireless Division of the Wireless Telecommunications Bureau erred in its decisions. Therefore, we deny Mr. Tennant’s application for review of the *Georgetown Order* and dismiss as moot his application for review of the *Stay Order*.

V. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 155(c)(5), and Section 1.115 of the Commission’s rules, 47 C.F.R. § 1.115, the Application for Review of the *Georgetown Order* filed by James M. Tennant on May 10, 2000, IS DENIED.

⁵¹ *Id.*, 15 FCC Rcd. at 6233-6234, ¶ 26.

⁵² We note that at the time Mr. Tennant filed his application for review of the *Stay Order*, the tower had already been constructed. Tennant Reply at 2, 4; Tennant Stay Comments at 2-3. Thus, the Stay Application was at least arguably moot even at the time it was filed.

⁵³ *See* 47 C.F.R. § 0.331(a)(2).

⁵⁴ 47 C.F.R. § 0.204(b).

⁵⁵ *Beehive Telephone Inc. v. Bell Operating Cos.*, Memorandum Opinion and Order, 12 FCC Rcd. 17930, 17938-39, ¶ 16 (1997); *aff’d*, 221 F.3d 195 (D.C. Cir. 2000).

17. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 155(c)(5), and Section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, the Application for Review of the *Stay Order* filed by James M. Tennant on June 26, 2000, IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary