

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

In the Matter of
Amendment of Parts 1 and 17 of the
Commission's Rules Regarding Public
Notice Procedures for Processing Antenna
Structure Registration Applications for
Certain Temporary Towers
2012 Biennial Review of
Telecommunications Regulations
RM No. 11688
WT Docket No. 13-32

ORDER

Adopted: May 15, 2013

Released: May 16, 2013

By the Commission: Commissioner McDowell not participating.

I. INTRODUCTION

1. In this Order, we take initial action to remove an administrative obstacle to the availability of broadband and other wireless services during major events and unanticipated periods of localized high demand. Specifically, we grant an interim waiver, pending completion of an upcoming rulemaking proceeding, of our pre-construction environmental notice requirements for certain temporary towers that require antenna structure registration. By so doing, we create an efficient mechanism for the timely erection of temporary towers in response to unanticipated needs without creating a significant risk of environmental harm.

II. BACKGROUND

A. The Environmental Notification Process for Antenna Structure Registrations

2. Under the Antenna Structure Registration (ASR) program, owners of antenna structures that are taller than 200 feet above ground level or that may interfere with the flight path of a nearby airport must register those structures with the Commission. The antenna structure owner must obtain painting and lighting specifications from the Federal Aviation Administration (FAA) and include those specifications in its registration prior to construction. The ASR program allows the Commission to fulfill its statutory responsibility to require painting and lighting of antenna structures that may pose a hazard to air navigation.

3. The National Environmental Policy Act (NEPA) requires all federal agencies, including the FCC, to identify and take into account environmental effects when deciding whether to authorize or

1 See 47 C.F.R. § 17.4 (c).

2 See 47 C.F.R. § 17.7.

3 See 47 U.S.C. § 303(q).

undertake a major federal action.⁴ The Commission has deemed processing of antenna structure registration applications to be a major federal action.⁵ The Commission's NEPA rules and procedures, which have been approved by the Council on Environmental Quality, require preparation of an Environmental Assessment (EA) for any proposed action that may have a significant environmental effect under the criteria set out in Section 1.1307 of the Commission's rules.⁶ Proposed actions that are deemed individually and collectively to have no significant environmental effects and that are not covered by the environmental criteria set out in Section 1.1307 of the rules are categorically excluded from environmental processing.⁷ In such cases, the Bureau shall order preparation of an EA if it determines, based on its review of a petition from an interested person or on its own motion, that an otherwise categorically excluded action may have a significant environmental impact.⁸

4. One of NEPA's central goals is to facilitate public involvement in agency decisions that may affect the environment.⁹ The Commission's environmental notification process is intended to fulfill this goal with respect to ASR applications.¹⁰ Under the environmental notification rules, prior to filing a completed ASR application for a new antenna structure or an antenna structure modification that involves

⁴ 42 U.S.C. § 4321 *et seq.*

⁵ In the Matter of Streamlining the Commission's Antenna Structure Clearance Procedure, *Report and Order*, 11 FCC Rcd 4272, 4289, para. 41 (1995) (finding that the registration of an antenna structure constitutes a major federal action subject to NEPA) (*Antenna Structure Clearance R&O*). *Accord*, In the Matter of Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, *Report and Order*, 20 FCC Rcd 1073, 1084, para. 27 (2004), *aff'd sub nom. CTIA-Wireless Ass'n v. FCC*, 466 F.3d 105 (2006) (explaining that the Commission's treatment of tower registrations as federal undertakings within the meaning of Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f, is a permissible interpretation in light of the preconstruction approval process that it has implemented to assure that communications towers are not a risk to air safety under Section 303(q) of the Communications Act).

⁶ See 47 C.F.R. § 1.1307(a), (b) (listing circumstances where an EA is required); *see also id.* § 1.1307(d) Note (pending a final determination regarding permanent measures to protect migratory birds, an EA will be required for new towers over 450 feet in height above ground level, modifications of such towers that involve a substantial increase in size, or changes of lighting on such towers to a less preferred style).

⁷ 47 C.F.R. § 1.1306.

⁸ See 47 C.F.R. § 1.1307(c), (d).

⁹ 40 C.F.R. §§ 1500.1(b), 1500.2(d) ("Federal agencies shall to the fullest extent possible ... encourage and facilitate public involvement in decisions which affect the quality of the human environment."); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) ("The statutory requirement that a federal agency contemplating a major action prepare ... an Environmental Impact Statement ... guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.").

¹⁰ See In the Matter of National Environmental Policy Act Compliance for Proposed Tower Registrations, In the Matter Effects of Communications Towers on Migratory Birds, WT Docket Nos. 08-61, 03-187, *Order on Remand*, 26 FCC Rcd 16700 (2011) (*Order on Remand*); The Wireless Telecommunications Bureau Provides Guidance on the Implementation of the Environmental Notification Process for the Registration of Antenna Structures, Public Notice, 27 FCC Rcd 5081 (WTB 2012) (*ASR Guidance PN*). The Commission adopted its environmental notification process in response to the decision of the Court of Appeals for the District of Columbia Circuit in *American Bird Conservancy v. FCC*, which held that the Commission's previous antenna structure registration procedures had impermissibly failed to offer members of the public a meaningful opportunity to request an EA for proposed towers that the Commission considers categorically excluded from review under NEPA. *American Bird Conservancy v. FCC*, 516 F.3d 1027, 1035 (D.C. Cir. 2008).

a substantial increase in size¹¹ or a change to a less preferred lighting style,¹² the ASR applicant must provide local and national notice of the application so that members of the public have an opportunity to comment on the environmental effects of the proposal. Specifically, the applicant must provide notice of the proposal to the community by publication in a local newspaper of general circulation or other appropriate means, and the Commission then posts information about the proposal on its website for thirty days.¹³ Commission staff then reviews the partially completed application and considers any timely filed comments received from the public to determine whether an Environmental Assessment (EA) is required for the tower. If staff determines that no EA is required, and if the applicant has determined that no EA is otherwise required under Section 1.1307(a) or (b), the applicant may then certify that the tower will have no significant environmental impact when it submits its completed application on FCC Form 854. At this point, if all other required information has been provided, the application will be granted and the applicant will be issued a Registration Number.

5. The following types of ASR applications are not subject to the environmental notification process: modification of an existing tower that does not involve a substantial increase in size or change in lighting to a less preferred lighting style; a collocation where the placement of the antenna does not involve a substantial increase in size or excavation more than 30 feet beyond the property; dismantlement of a registered tower; or construction of a replacement tower within the definition set forth in our rules.¹⁴ Additionally, the Commission's ASR public notice procedures provide for case-by-case waivers in "emergency situations, such as where temporary towers need to be built quickly to restore lost communications."¹⁵

B. CTIA's Petition

6. On December 21, 2012, CTIA—The Wireless Association (CTIA) filed a Petition for Expedited Rulemaking (Petition) asking the Commission to revise Section 17.4(c)(3)-(4) of its rules¹⁶ to relieve the burden of going through the environmental notification process for certain categories of temporary towers as defined in its Petition.¹⁷ CTIA asks that we exempt from environmental notification temporary towers that: (1) will be in use for 60 days or less; (2) require the filing of Form 7460-1¹⁸ with

¹¹ See 47 C.F.R. § 17.4(c)(1)(ii), referencing Nationwide Agreement for the Collocation of Wireless Antennas, 47 C.F.R. Pt. 1, App. B, § I.C.

¹² For the order of preference of lighting styles, see 47 C.F.R. § 17.4(c)(1)(iii).

¹³ See 47 C.F.R. § 17.4(c)(3)-(4). Members of the public have an opportunity to file a request for further environmental review (Request) of the proposed tower during this 30-day period. Oppositions are due 10 calendar days after expiration of the time for filing Requests, and Replies are due 5 business days after expiration of the time for filing oppositions. See 47 C.F.R. § 17.4(c)(5).

¹⁴ See *Order on Remand*, 26 FCC Rcd. at 16719-16722, paras. 50-55; 47 C.F.R. § 17.4(c)(1).

¹⁵ *Order on Remand*, 26 FCC Rcd. at 16717, n. 117. There is also a limited exemption for antenna structures located on federal land for which the landholding agency has assumed responsibility for determining whether the facility will have a significant environmental impact. *Id.* at para 56.

¹⁶ 47 C.F.R. § 17.4 (c)(3)-(4).

¹⁷ CTIA Petition for Expedited Rulemaking, filed Dec. 21, 2012 (CTIA Petition).

¹⁸ FAA Form 7460-1, Notice of Proposed Construction or Alteration, must be filed with the FAA prior to construction or alteration of any structure that is over 200 feet in height above ground level (AGL); that is within the glide slope of an airport runway (as defined in the FAA rules); or that is on a listed type of airport or heliport. See 14 C.F.R. §§ 77.9, 77.7(a). Towers that require the filing of Form 7460-1 are required to be registered with the Commission. See 47 C.F.R. § 17.4(a). Thus, for example, a temporary tower under 200 feet in height that is within (continued....)

the FAA; (3) do not require marking or lighting pursuant to FAA regulations; and (4) will be less than 200 feet in height (Two Month Towers).¹⁹ CTIA also requests a waiver, pursuant to Sections 1.3 and 1.925 of the Commission's rules,²⁰ under which towers that fall under the foregoing criteria would be exempt from the ASR public notice requirements during the pendency of the Petition and any rulemaking initiated pursuant to its Petition.²¹

7. According to CTIA, although the Commission has provided for waivers of notice in emergency situations, many non-emergency situations arise in which carriers need temporary towers to address short-term capacity constraints but have insufficient advance notice to complete the public notice process. These events, such as major news events, may occur with little or no advance warning; do not fall squarely within the "emergency" category; and would cause significant disruption if temporary facilities could not be rapidly deployed. CTIA asserts that in other cases, even when the timing and location of an event are well known, carriers may be unable to obtain specific locations for temporary sites until shortly before the event, with insufficient time to complete local notice. A temporary tower also may be necessary in non-emergency situations in which a permanent tower must be repaired.²² CTIA asserts that over the past year there have been multiple race events, state fairs, and air shows at which temporary facilities could not be deployed due to the new ASR notice requirements.²³ It notes that a variety of newsworthy events, such as a presidential campaign stop or a forest fire, can occur with less than 30 days' notice and trigger significant short-term capacity demands on local wireless networks that can only be met using temporary towers.²⁴ CTIA states that an exemption from environmental notice and an interim waiver of notice for Two Month Towers would address the foregoing situations without undermining meaningful environmental or air safety review or significantly affecting avian mortality, and would therefore serve the public interest.²⁵

8. On January 25, 2013, the Wireless Telecommunications Bureau invited comment on CTIA's Petition and waiver request.²⁶ AT&T Services, Inc. (AT&T), Verizon Wireless (Verizon), NTCH, Inc. (NTCH), and PCIA—The Wireless Infrastructure Association (PCIA) filed comments supporting both the Petition and the request for an interim waiver.²⁷ CTIA and PCIA filed reply comments. No commenting party opposed either the Petition or the waiver request.

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20,000 feet (3.79 miles) of an airport runway may need FAA notice, ASR registration, and public notice, depending on its specific height and location. *See* 14 C.F.R. 77.9.

¹⁹ CTIA represents that the majority of Two Month Towers will be cells on light trucks (COLTs) and cells on wheels (COWs). CTIA Petition at 4.

²⁰ 47 C.F.R. §§ 1.3, 1.925.

²¹ CTIA Petition at 11-12.

²² *Id.* at 4-7.

²³ *Id.* at 6-7.

²⁴ *Id.* at 5-6.

²⁵ *Id.* at 7-11.

²⁶ Wireless Telecommunications Bureau Seeks Comment on Petition of CTIA—The Wireless Association for Expedited Rulemaking and Blanket Waiver Regarding Public Notice Procedures for Temporary Towers, *Public Notice*, RM-11688, DA 13-53 (WTB January 25, 2013). Comments were due February 25, 2013. Reply comments were due March 12, 2013.

²⁷ NTCH also filed its comments in the Biennial Review docket. *See* Commission Seeks Public Comment in 2012 Biennial Review of Telecommunications Regulations, *Public Notice*, CG Docket No. 13-29, EB Docket No. 13-35, (continued....)

III. DISCUSSION

9. For the reasons set forth below, we grant an interim waiver from the environmental notice requirements for substantially all of the class of temporary towers that CTIA requests. We will not apply the interim waiver to a temporary tower that requires excavation unless the ground is already previously disturbed to a depth that exceeds the proposed construction depth by at least 2 feet.²⁸ Thus, the interim waiver adopted herein will cover temporary towers that (1) will be in use for no more than 60 days; (2) require notice of construction to the FAA; (3) do not require marking or lighting under FAA regulations; (4) will be less than 200 feet in height; and (5) involve no or only minimal ground disturbance. We intend in the near future to issue a Notice of Proposed Rulemaking that will consider CTIA's request for a permanent exemption from environmental notification procedures for the Two Month Towers. The interim waiver that we adopt in this order will remain in effect pending completion of that rulemaking proceeding.

10. We may grant a waiver when: (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and a grant of the requested waiver would be in the public interest; or (ii) in view of the unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.²⁹

11. We find that, during the interim period pending the initiation and completion of a rulemaking proceeding to consider CTIA's request to permanently exempt Two Month Towers from the ASR public notice procedures, requiring such notice does not serve the purpose of the rule and that an interim waiver is in the public interest.³⁰ The purpose of environmental notice is to facilitate public input on towers that may have a significant environmental impact. Towers eligible for the interim waiver will be in place for a mere two months or less, unlit and less than 200 feet in height. Our experience in administering the ASR public notice process is that antenna structures with these attributes rarely generate public comment regarding potentially significant environmental effects and rarely are determined to require further environmental processing.³¹ We note that the NPA completely exempts from historic preservation review under Section 106 of the National Historic Preservation Act (NHPA) a broader category of temporary towers, generally defined as towers that remain in place for up to 24 months.³²

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IB Docket No. 13-30, ET Docket No. 13-36, PS Docket No. 13-31, WT Docket No. 13-32, WC Docket No. 13-33, FCC 13-17 (rel. February 5, 2013).

²⁸ See para. 12, *infra*.

²⁹ 47 C.F.R. § 1.925(b)(3). Section 1.3 of the rules also provides that the Commission may grant a rule waiver for good cause shown. 47 C.F.R. § 1.3.

³⁰ See, e.g., Amendment of Part 101 of the Commission's Rules to Accommodate 30 MHz Channels in the 6525-6875 MHz Band, Amendment of Part 101 of the Commission's Rules to Accommodate 30 MHz Channels in the 6525-6875 MHz Band, WT Docket No. 09-114, *Notice of Proposed Rulemaking and Order*, 24 FCC Rcd. 9620 (2009) (granting waiver pending outcome of rulemaking where doing so would provide significant public interest benefits, and where there was no opposition).

³¹ See Verizon Comments at 5 (asserting that Verizon has not received any opposition to its ASR applications for temporary towers since implementation of the notice requirements); see also CTIA Reply Comments at 5; PCIA Reply Comments at 5.

³² See Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission (NPA), 47 C.F.R. Pt. 1, App.C, § III.C (“the term ‘temporary’ means ‘for no more than twenty-four months duration except in the case of those Facilities associated with national security’”).

While the purposes of the ASR public notice procedures and of the Section 106 historic preservation review are not identical, the NPA exclusion does evince a general recognition that temporary towers are less likely than permanent structures to have a significant environmental effect.³³ The fact that proposed towers qualifying for the interim waiver adopted herein will be relatively short and unlit further reduces the possibility of significant environmental impacts, particularly on migratory birds.³⁴ Further, the interim waiver does not relieve ASR applicants from having to comply with the Commission's other NEPA rules, including the obligation to certify environmental compliance on a completed ASR application. Under those rules, if an applicant determines that it needs to complete an EA, environmental notification will be required. We also note that granting this waiver does not jeopardize air safety, given that towers subject to lighting or marking under FAA regulations will be ineligible for the interim waiver.

12. To further ensure against significant environmental impacts, we limit the interim waiver of environmental notice to those proposals that either involve no excavation or involve excavation where the depth of previous disturbance exceeds the proposed construction depth (excluding footings and other anchoring mechanisms) by at least two feet. We are concerned that excavation of previously undisturbed ground may cause significant effects on historic or other environmental resources. For this reason, the NPA exclusion from Section 106 review for temporary towers is limited by the same excavation conditions that we adopt today.³⁵ As the Commission explained in adopting the NPA, "[s]o long as no excavation will occur on previously undisturbed ground, the risk of damage to archeological or other historic properties from a temporary facility is small."³⁶ The Commission further noted that temporary facilities usually involve little or no excavation.³⁷ We will seek comment on whether to retain this limitation in a Notice of Proposed Rulemaking when we consider whether to adopt any permanent rule.

13. In concluding that the interim waiver we adopt herein will not undermine the purposes of the ASR public notice requirements, we find it significant that no party filed comments opposing either the Petition or the request for waiver. The absence of objection bolsters our confidence that during the interim period until we complete a rulemaking proceeding, applying the ASR environmental notification procedures to the temporary towers addressed in this Order is not necessary to serve the purposes of the environmental notification rules.

³³ NTCH asks us to exempt from the notice process qualifying towers that will be in place for up to three months instead of two. NTCH Comments at 3; *see also* CTIA Reply Comments at 4 (supporting an exemption for Two Month Towers but not objecting to extending the exemption to include towers deployed for up to 90 days). We will consider this and all other comments in our rulemaking, but we limit the duration of these towers to two months for the purposes of this interim waiver.

³⁴ Based on a review and analysis of available peer-reviewed literature, the Final Programmatic Environmental Assessment found that, all other factors being equal: taller towers result in higher levels of avian mortality than shorter towers; towers with guy wires result in higher levels of avian mortality than towers without guy wires; and steady-burning lights result in higher levels of avian mortality than flashing lights. *See* Final Programmatic Environmental Assessment for the Antenna Structure Registration Program, released March 13, 2012, at 7-1, available at: <http://www.fcc.gov/pea>; *see also* *Order on Remand*, 26 FCC Rcd at 16722, para. 54 (finding that absence of lighting is the most preferred lighting style); *id.* at 16731-32, para. 80 (citing data indicating no evidence of large-scale bird mortality at towers less than approximately 450 feet in height).

³⁵ *See* NPA, 47 C.F.R. Pt. 1, App.C, §§ III.C., VI.D.2.c.i.

³⁶ Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Review Process, WT Docket No. 03-128, *Report and Order*, 20 FCC Rcd. 1073, 1091, para. 49 (2004), *recon. denied*, 24 FCC Rcd. 14841 (2009).

³⁷ *Id.*; *see also* PCIA Reply Comments at 3 (noting that temporary towers by their nature do not cause significant ground disturbance).

14. We further find that an interim waiver is in the public interest. Commenters have detailed four broad categories of non-emergency situations in which temporary towers must be deployed quickly in order to avoid disruption of service to the public and in which such deployment is delayed by the environmental notification process: (1) newsworthy events that occur without any prior notice, such as the Virginia Tech shooting and train derailments; (2) other events that occur with less than 30 days advance notice, such as some political events and parades for sports teams; (3) events of which the timing and general location are known in advance, but the event manager may not convey the specific locations for temporary towers to the wireless carriers until days before the event, such as state fairs and major sporting events; and (4) situations in which unexpected difficulties with permanent structures require the deployment of temporary towers while permanent facilities are repaired.³⁸ The record, as well as our own experience administering the environmental notice rule, shows that substantial numbers of such non-emergency temporary towers -- although not all -- require registration. Accordingly, it is reasonable to anticipate that additional instances will arise during the pendency of the rulemaking proceeding in which, absent the waiver we adopt here, service disruptions may occur because of insufficient time to complete the ASR notice process before a temporary tower subject to registration must be placed in service to address short-term capacity constraints.

15. The ASR notice process takes approximately 40 days,³⁹ as carriers must provide local and national public notice, allow 30 days for the filing of any requests for further environmental review, and wait for the Commission to clear the tower for a final certification. If a request for environmental review is filed, even if it lacks merit, the deployment could be delayed longer. Commission staff endeavors to resolve all pending ASR applications promptly, and has entertained case-by-case waiver requests for non-emergency temporary towers where the applicant has shown that completing the notice process is impractical. We agree with AT&T, however, that this process is inefficient and that the notice process may ultimately be unnecessary for the narrow category of temporary towers within the scope of the interim waiver that we are granting.⁴⁰ Moreover, while we ordinarily require that environmental notice be provided within a short period after construction when pre-construction notice is waived due to an emergency situation, the Commission recognized that in some circumstances post-construction notice may be impractical or not in the public interest.⁴¹ Because towers subject to this waiver will be in place for no more than two months, we find for purposes of this interim waiver that post-construction notice of these towers is not in the public interest.

16. In sum, pending the expeditious completion of a rulemaking proceeding to consider CTIA's request for a permanent exemption from the ASR public notice procedures, we find that granting interim relief from these requirements does not undermine the purpose of the environmental notice rule because the towers subject to the waiver are unlikely to have a significant environmental impact. Further, an interim waiver serves the public interest because situations frequently arise where there is insufficient time to complete the notice process before a temporary tower must be constructed to meet near-term demand. While staff has endeavored to accommodate these situations on a case-by-case basis, this process is inefficient and creates uncertainty. For all those reasons, it is in the public interest to waive the notice requirement in the interim for all towers covered by this Order until we determine in the forthcoming rulemaking whether to permanently exempt the Two Month Towers, or a subset of the Two Month Towers, from the ASR public notice rules.

³⁸ See CTIA Petition at 5-6; AT&T Comments at 5-6; NTCH Comments at 1; PCIA Comments at 4; Verizon Wireless Comments at 3-4, 7-8; CTIA Reply Comments at 3.

³⁹ See *ASR Guidance PN*, 27 FCC Rcd. at 5082.

⁴⁰ See AT&T Comments at 5, 7-8.

⁴¹ *Order on Remand*, 26 FCC Rcd. at 16717, n. 117.

17. Applicants seeking to register towers that are eligible for the interim waiver granted here should answer "Yes" to Question 45 on FCC Form 854, and attach an explanation of how the proposed tower meets the criteria set forth in this Order. Such applicants will be required to certify environmental compliance and must comply with FAA rules and procedures, as applicable.

IV. ORDERING CLAUSES

18. Accordingly, IT IS ORDERED that, pursuant to Sections 1.3 and 1.925 of the Commission's rules, 47 C.F.R. §§ 1.3, 1.925, the request of CTIA—The Wireless Association for a waiver of Sections 17.4(c)(3)-(4) of the Commission's rules, 47 C.F.R. § 17.4(c)(3)-(4) is GRANTED to the extent provided in this Order pending the resolution of CTIA's Petition for Expedited Rulemaking and any consequent rulemaking proceeding.

19. IT IS FURTHER ORDERED that this waiver IS EFFECTIVE immediately upon release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary