

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

In the Matter of
Eger Communications, Inc.
Application for Review
Proposed Tower, Town of Livingston,
Columbia County, New York
WT Docket No. 19-129

MEMORANDUM OPINION AND ORDER

Adopted: June 19, 2019

Released: June 25, 2019

By the Commission:

I. INTRODUCTION

1. This Memorandum Opinion and Order grants an application for review filed by Eger Communications, Inc. We conclude that the proposed construction of a communications tower that would replace two existing towers in Livingston, New York, does not require a "Section 106 review" under the Commission's procedures for complying with the National Historic Preservation Act.

II. BACKGROUND

2. In 2010, Eger Communications, Inc. (Eger) filed an application with the Town of Livingston Planning Board (Town) to construct a new 190-foot self-supported lattice tower in the place of two existing 190-foot guyed towers. The existing towers are, and the proposed tower would be, visible from the Olana House State Historic Site (Olana Site), a National Historic Landmark listed in the National Register of Historic Places. The Olana Site includes the home of Frederic E. Church, an

1 Application for Review, or, in the alternative, Petition for Further Reconsideration, by Eger Communications, Inc. (filed Aug. 26, 2015) (Application for Review).

2 See Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, 47 CFR Part 1, App. C. (NPA or Nationwide Programmatic Agreement). The NPA provides procedures that FCC applicants must follow when considering the potential effects of proposed communications towers on historic properties. The NPA is an agreement among the Commission, the Advisory Council on Historic Preservation (ACHP), and the National Conference of State Historic Preservation Officers (NCSHPO) to streamline requirements for FCC undertakings subject to Section 106 of the National Historic Preservation Act (NHPA). NPA Introduction.

3 Application for a Special Use Permit and Site Plan Approval, filed by Eger Communications with the Town of Livingston Planning Board, Livingston, New York (filed July 2, 2010).

4 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, at 3-5 (filed Apr. 5, 2011) (Complaint). The Olana Site was designated in the National Register as a National Historic Landmark in 1965. Id. at 1. The National Register of Historic Places nomination form calls the property "The Frederic E. Church House." See National Register Number 66000509, https://npgallery.nps.gov/NRHP/AssetDetail?assetID=aa390ab0-df4c-4bf0-8db5-765293d06516 (last visited Apr. 26, 2019).

important figure in the Hudson River School of American landscape painting.⁵ On July 12, 2013, after considering pleadings from parties arguing that the new tower would have adverse impacts on historic properties, the Town granted Eger's application.⁶ The Olana Partnership and Scenic Hudson, Inc. challenged the Town's decision before the New York State Supreme Court (NY State Court), asserting that the Town had not properly considered the proposed tower's visual impact on the viewshed of the Olana Site.⁷ The NY State Court dismissed that challenge, finding that the Town had taken the required "hard look" at the impact of the tower on the Olana Site's viewshed and that the Town's decision was supported by substantial evidence.⁸

3. While the local approval process was playing out, a number of parties raised historic preservation concerns before the Commission as well. The Olana Partnership, Scenic Hudson, the National Park Service (NPS), and the New York State Historic Preservation Office (NYSHPO) at various times asked to participate in the Section 106 review of Eger's proposed tower, although Eger had not submitted a Form 620 initiating such a review.⁹ Olana/Scenic Hudson also filed an informal complaint with the Commission arguing that the tower would have an adverse effect on the Olana Site and should undergo full Section 106 review.¹⁰ Under its rules implementing the National Historic Preservation Act (NHPA), the Commission 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.¹¹ Eger argues that the proposed tower is excluded from Section 106 review under Section III(B) of the Nationwide Programmatic Agreement.¹² That provision 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 under elements 1–3 of the definition as defined in the Collocation Agreement ... and that does not expand the boundaries of the leased or owned property surrounding the tower by more than 30 feet in any

⁵ Metropolitan Museum of Art, Frederic E. Church (1826–1900) available at https://www.metmuseum.org/toah/hd/chur/hd_chur.htm (last visited Apr. 25, 2019).

⁶ Application for Review at 2.

⁷ *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 at 7 (*Olana v. Town of Livingston*). The Olana Partnership is a private not-for-profit education corporation that works cooperatively with New York State to support the restoration, development, and improvement of the Olana Site. <https://www.olana.org/> (last visited Apr. 25, 2019). Scenic Hudson is a private not-for-profit advocacy organization that works to protect and restore the Hudson River basin. *Scenic Hudson*, <https://www.scenichudson.org/> (last visited Apr. 25, 2019). We refer to them jointly here as Olana/Scenic Hudson.

⁸ *Olana v. Town of Livingston* at 8.

⁹ See Complaint at 8 (listing letters from Olana Partnership and Scenic Hudson requesting consulting party status); Letter from Maryanne Gerbaukas, Associate Regional Director, National Park Service to Mark Eger, Eger Communications (Oct. 19, 2010) (2010 NPS Letter to Eger); Letter from National Park Service Letter attached to Letter from Jeffrey Anzevino, Scenic Hudson to Lawrence Hermance, Town of Livingston Planning Board (Nov. 2, 2010).

¹⁰ Complaint at 1–2. The NPA allows SHPOs, local governments, and members of the public to file complaints with the Commission or ACHP regarding "any activity covered under the terms of the [NPA]." NPA at Introduction.

¹¹ 54 U.S.C. § 306108. The procedures for a Section 106 review are set forth in the rules of the ACHP, as modified by the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas (Collocation Agreement) and the Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process. 47 CFR Pt. 1, App. B and C.

¹² Eger Opposition to the Complaint, at 1–3 (filed Aug. 29, 2011); Eger Sur-Reply to Olana/Hudson's Reply, at 1–2 (filed Oct. 23, 2011). Section III.B of the NPA generally excludes from Section 106 review a replacement for an

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direction or involve excavation outside these expanded boundaries or outside any existing access or utility easement related to the site. For towers constructed after March 16, 2001, this exclusion applies only if the tower has completed the Section 106 review process and any associated environmental reviews required by the Commission's rules.¹³

Eger asserts that all of these criteria are met.¹⁴

4. In a letter order addressing Olana/Scenic Hudson's complaint, the Competition and Infrastructure Policy Division (Division) of the Wireless Telecommunications Bureau 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. The Division noted that Section XI of the NPA provides the Commission with discretion to address unique circumstances and avoid results that are inconsistent with the intent of the Nationwide Programmatic Agreement and the NHPA, and found it appropriate to exercise such discretion to require Section 106 review.¹⁵

5. Eger filed a Petition for Reconsideration of the *Division Letter Decision* in which it reiterated that the proposed tower was a replacement tower excluded from Section 106 review.¹⁶ Eger also contended that it would serve the public interest to grant the Petition because the new tower would support additional antennas needed to upgrade public safety communications systems in the region.¹⁷ A number of public safety entities filed letters in support of Eger in which they discussed their need to collocate antennas on the proposed tower.¹⁸

6. The Division dismissed Eger's Petition for Reconsideration as a procedurally improper appeal of an interlocutory action, invoking section 1.106 of the Commission's rules, which generally provides that the Commission and its staff acting under delegated authority will reconsider only final actions.¹⁹ Eger then filed an Application for Review, arguing that the *Division Letter Decision* was not interlocutory.²⁰ In the alternative, Eger urged the Commission to exercise its discretion to reach the merits of the dispute regardless of whether the *Division Letter Decision* was final, and to find that the

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existing tower that does not substantially increase the size of the existing tower, provided certain other conditions are met. NPA § III.B; *Reconsideration Order*, 30 FCC Rcd at 8149–50, paras. 2–3.

¹³ Collocation Agreement, 47 CFR Part 1, App. B. § I.E(1)–(3).

¹⁴ Eger Opposition to the Complaint at 1–3; Eger Sur-Reply to Olana/Hudson's Reply (filed Oct. 23, 2011) at 1–2.

¹⁵ Eger Communications Proposed Communications Tower at Columbia County, New York, Letter Decision at 3 (WTB/CIPD Aug. 5, 2013) (*Division Letter Decision*).

¹⁶ In the Matter of Eger Communications, Inc., Columbia County, New York, Petition for Reconsideration (filed Aug. 30, 2013) (Eger Petition).

¹⁷ Eger Petition at 2.

¹⁸ In 2013, the Deputy County Attorney, Office of the of Columbia County Attorney, which is the county where the proposed project is located, filed a letter supporting Eger's petition for reconsideration. Letter from Andrew B. Howard, Deputy County Attorney, Columbia County, to Jeffrey Steinberg, Deputy Chief, Spectrum and Competition Policy Division, FCC (Sep. 19, 2013) (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). After the pleading cycle was complete, several public safety entities filed letters with the Division. *Reconsideration Order*, 30 FCC Rcd at 8149–50, para. 2 & n.10; *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 (Dec. 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 (Dec. 2, 2011); Letter from Benjamin A. Wheeler, Chief, Lebanon Valley Protective Association, Inc. to Daniel Abeyta, Assistant Chief, Spectrum and Competition Policy Division, FCC (Dec. 26, 2011).

¹⁹ *Eger Communications, Inc., Petition for Reconsideration; Application for Leave to Amend Petition for Reconsideration*, Order on Reconsideration, 30 FCC Rcd 8149 (CIPD 2015) (*Reconsideration Order*); 47 CFR §

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proposed tower is a replacement excluded from Section 106 review pursuant to Section III of the NPA.²¹ Eger also asked the Commission to reverse the *Division Letter Decision* in light of the NY State Court decision that upheld the Town of Livingston’s finding that the proposed replacement tower would not have an adverse effect on Olana site’s view shed²² and because the Division’s analysis of the Olana/Scenic Hudson complaint “did not take into consideration the critical and imminent need for the replacement tower to support upgrades to public safety communications systems that serve the area.”²³

III. DISCUSSION

7. We have fully evaluated whether Eger must complete a historic preservation review prior to constructing its proposed tower and find that no such review is necessary in this case.²⁴ Specifically, we find that the proposed tower is a “replacement tower” that satisfies the criteria for exclusion under Section III of the NPA and that, contrary to the conclusion in the *Division Letter Decision*, Section 106 review under Section XI of the NPA is not warranted. We therefore grant Eger’s Application for Review. Eger may, consistent with all applicable rules, proceed with construction of the proposed tower.

A. NPA Section III

8. Eger maintains that the proposed tower is excluded from Section 106 review because it is a “replacement tower” that satisfies the criteria set out in Section III.B. of the NPA.²⁵ Section III.B excludes from review a replacement for an existing tower that “does not substantially increase the size of the existing tower under elements 1–3 of the definition as defined in the Collocation Agreement ... [and] does not expand the boundaries of the leased or owned property surrounding the tower by more than 30 feet in any direction or involve excavation outside these expanded boundaries.”²⁶ Elements 1 through 3 of the Collocation Agreement’s definition specify that there is a “substantial increase in the size of the tower” when:

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1.106(a)(1). One exception, not relevant here, 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.*

²⁰ Application for Review at 1.

²¹ *Id.* at 14.

²² *Id.* at 14–15.

²³ *Id.* at 16.

²⁴ We make no determination here regarding whether the *Division Letter Decision* was interlocutory or final, but rather find that it is in the public interest to address on the merits the question of whether we should order a Section 106 review. To the extent necessary, therefore, we waive the finality requirement of Section 1.106(a)(1). The Commission may waive its rules for good cause shown, 47 CFR § 1.3, and may exercise its discretion to waive a rule when the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990). In considering whether to grant a waiver, the Commission may take into account, on an individual basis, considerations of hardship, equity, or more effective implementation of overall policy. *See WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969). We find good cause to waive 47 CFR § 1.106(a)(1) in order to provide guidance and finality concerning this long-pending infrastructure project.

²⁵ Eger Opposition to the Complaint, at 1–3 (filed Aug. 29, 2011); Eger Sur-Reply to Olana/Hudson’s Reply, at 1–2 (Oct. 23, 2011).

²⁶ NPA § III.B. Another criterion, not relevant here, states that for towers constructed after March 16, 2001, the exclusion applies only if the original tower has completed the Section 106 review process and any required environmental reviews. The existing Eger towers were constructed in 1992. *See* Eger Petition at Exhibit A (FCC Land User Screening Checklist for Proposed Replacement Tower prepared by Tectonic Engineering and Surveying Consultants P.C.)

- (1) the mounting of the proposed antenna on the tower would increase the existing height of the tower by more than 10%, or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to avoid interference with existing antennas; or
- (2) the mounting of the proposed antenna would involve the installation of more than the standard number of new equipment cabinets for the technology involved, not to exceed four, or more than one new equipment shelter; or
- (3) the mounting of the proposed antenna would involve adding an appurtenance to the body of the tower that would protrude from the edge of the tower more than twenty feet, or more than the width of the tower structure at the level of the appurtenance, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to shelter the antenna from inclement weather or to connect the antenna to the tower via cable.²⁷

9. Under the NPA, the determination that an undertaking is excluded from review is made in the first instance by the Applicant, based on the criteria set forth in Section III.B of the NPA and in the Collocation Agreement.²⁸ Here, Eger commissioned Tectonic, an environmental review firm, to conduct an assessment of the proposed tower. Based on that assessment, Eger asserts that the proposed tower satisfies the NPA's criteria for exclusion.²⁹

10. Neither the *Division Letter Decision* nor the *Reconsideration Order* reached a conclusion on whether the tower qualified for the Section III exclusion. Rather, they found it unnecessary to resolve the question given that the Division's decision was premised on an exercise of discretion under Section XI of the NPA. We therefore now address this issue for the first time. Nothing in the record contradicts Eger's demonstration that the proposed tower, which would replace two existing towers, qualifies for the NPA Section III exclusion, and our independent assessment of the facts before us confirms that it does qualify for the exclusion.

11. We first reject Olana/Scenic Hudson's contention that the proposed tower is not a replacement for the existing towers. Eger's proposal calls for constructing the new tower, relocating antennas from the old towers to the new one, and then removing the old towers.³⁰ This constitutes a replacement in the commonly understood sense of that word – a thing that takes the place of another.³¹ Olana/Scenic Hudson's argument about the possible impact of the new tower is relevant to our application of Section XI of the NPA, but not to whether the proposed tower constitutes a replacement.

²⁷ Collocation Agreement, 47 CFR Part 1, App. B. § I.E(1)–(3).

²⁸ NPA § III.

²⁹ Application for Review at 12 and Eger Petition at Exhibit A (Tectonic Aug. 8, 2011 FCC Land Use Screening Checklist for Proposed Replacement Tower). Tectonic determined that the original tower was constructed prior to March 16, 2001; that the proposed replacement tower and related construction activities would be limited to the current boundaries of the owned property; and that the proposed tower would “not substantially increase the size” of the existing guyed tower. *Id.*

³⁰ Visual Impact Assessment Report for the Proposed Eger Communications Replacement Telecommunications Facility, Tectonic Engineering & Surveying Consultants, at 1 (Nov. 28, 2012) (Eger Visual Impact Assessment Report).

³¹ See, e.g., Merriam-Webster dictionary, defining “replacement” as “one that replaces another especially in a job or function, and “replace” as “to take the place of especially as a substitute or successor.” <https://www.merriam-webster.com/dictionary/replacement> and <https://www.merriam-webster.com/dictionary/replaces>.

12. Next, Eger’s proposed tower would not constitute a “substantial increase in size.”³² Element one looks to the increase in height over the original tower; here there is no increase at all.³³ Element two considers whether the replacement would involve the installation of “more than the standard number of new equipment cabinets for the technology involved, not to exceed four, or more than one new equipment shelter.” The description of Eger’s proposed project includes no mention of new equipment cabinets, and it notes only “a” (*i.e., one*) equipment shelter.³⁴ Thus, element two is not triggered. Finally, element three focuses on increases in width, limiting them generally to 20 feet or the width of the tower, whichever is greater, to avoid classification as a significant increase in size. Eger’s proposed tower would be no more than 18.5 feet at the base, 16.3 feet wider than the 2.2-foot towers it is replacing and well within the standards established by element three.³⁵ The proposed tower will also include appurtenances—antennas and microwave dishes—but these will be the same as or similar to those on the existing towers.³⁶ Olana/Scenic Hudson allege that the new tower will have the “potential” to support larger antenna and other large equipment, but have not alleged that such structures actually will be added. Having evaluated each of the three elements, we conclude that the proposed tower would not cause a substantial increase in size as defined in the Collocation Agreement.³⁷

13. The final criterion for exclusion is that the replacement tower not expand the boundaries of the leased or owned property surrounding the tower by more than 30 feet in any direction or involve excavation outside these expanded boundaries or outside any existing access or utility easement related to the site.³⁸ The FCC Land User Screening Checklist for Proposed Replacement Tower prepared by Tectonic states that “[t]he proposed replacement tower and related construction activities will be limited to the current boundaries of the owned property.”³⁹ Thus, this criterion is satisfied. Olana/Scenic Hudson do not contend that Eger’s proposed tower would be a substantial increase in size under the NPA, and they have offered no evidence to refute Eger’s assertion that the proposed tower meets the criteria for exclusion of a replacement tower.

14. Based on our review of the record, we find that Eger has demonstrated that the proposed tower qualifies for the replacement tower exclusion in Section III of the NPA.

B. Section XI

15. Under Section XI of the NPA, any member of the public may notify the Commission of concerns “with regard to the review of individual Undertakings covered or excluded under the terms of

³² The NPA directs us to use the definition of “substantial increase in size” found in the Collocation Agreement. NPA at § III (B); Collocation Agreement at § I.E(1)–(3). Because that definition addresses the addition of collocated antennas rather than the construction of towers, its language is a somewhat inexact fit in the tower context. Accordingly, where the definition references “the mounting of the proposed antenna,” the only sensible interpretation is to consider the various elements by reference to “the construction of the proposed tower.” Collocation Agreement at § I.E(1)–(3).

³³ *See, e.g.*, Eger Visual Impact Assessment Report at 1.

³⁴ *Id.*

³⁵ Site plans submitted by Eger to the town planning board show a width of 18.5 feet at the base. Site Plan of Property of Blue Hill Fruit Farms, Inc. (Dec. 30, 2010) (listing tower base width as 18.5 feet) (Eger Site Plan).

³⁶ *See* Eger Visual Impact Assessment at 1 (The existing structures currently support 14 whip/dipole antennas, three 2.5-foot microwave dishes, and three panel antennas. All of these, with the exception of one of the whip antennas, will be moved to the new tower, and eight new whip antennas will be added.)

³⁷ Collocation Agreement, 47 CFR Part 1, App. B. § I.E(1)–(3).

³⁸ NPA § III (B).

³⁹ Eger Petition at Exhibit A; *see also* Eger Visual Impact Assessment Report at 1, noting that the proposed replacement tower will be located approximately five feet east of the existing structures.

this Agreement,” and the Commission will consider those comments and “take appropriate actions.”⁴⁰ Olana/Scenic Hudson, invoking Section XI, urge the Commission to require a Section 106 review of the Eger project as the appropriate action in response to their objections.⁴¹ Having carefully considered the entire record before us, we are not persuaded that requiring Section 106 review is the necessary and appropriate action in this case in light of the extensive and specific review already undertaken at the local level, which found no adverse impact on the Olana viewshed; our consideration of the objections before us; and the public interest in ensuring robust public safety communications in the area.

16. Olana/Scenic Hudson urge us to require a Section 106 review even if the proposed tower would be excluded under section III of the NPA because they are concerned that it may have an adverse impact on the Olana Site.⁴² They are particularly concerned about the Olana viewshed, in light of the fact that the site includes the home of Frederic E. Church, who created many notable works from a studio on the property.⁴³ The NPS⁴⁴ and the NYSHPO⁴⁵ similarly raise concerns about an adverse visual effect on the Olana Site. Olana/Scenic Hudson argue that the new tower would be more visible and thus have more of an impact on the viewshed than the current guyed towers do.⁴⁶ Much of what they cite on this point are materials that were filed with the Town during its review of the proposed project.⁴⁷

17. Eger claims that Section 106 review pursuant to Section XI of the NPA is unnecessary because an excluded replacement tower is by definition highly unlikely to have an adverse effect, and because “the Town of Livingston conducted an exhaustive assessment of visual effects.”⁴⁸ Olana/Scenic Hudson, in contrast, view the Town’s review as irrelevant under the National Historic Preservation Act.⁴⁹

18. Local historic preservation review does not render the Section 106 process superfluous. But in this specific instance, the process undertaken by the Town and upheld by the NY State Court was sufficiently rigorous and focused that Section XI does not compel us to override the Section III replacement tower exclusion or to undertake additional review under the NHPA. The NY State Court found that the Town specifically considered the proposed tower’s visual impacts on Olana’s viewshed, the same issue that a Section 106 review would address, and found that the visual impact from Olana would be minimal.⁵⁰ The record of the local proceeding shows that mitigation measures and alternatives were considered.⁵¹ The Town review found, reasonably in our view, that “the difference of less than 11 feet in width [at the treeline between the current and proposed towers] is not discernible at the distance of

⁴⁰ NPA § XI.B.

⁴¹ Complaint at 1–3, 9–10; Olana/Hudson Opposition to Application for Review at 15.

⁴² Olana/Hudson Opposition to Application for Review at 8–9.

⁴³ Complaint at 5–6.

⁴⁴ Letter from Maryanne Gerbaukas, Associate Regional Director, National Park Service to Mark Eger, Eger Communications (Oct. 19, 2010) (2010 NPS Letter to Eger).

⁴⁵ Complaint at 9–10.

⁴⁶ *Id.* at 1–3. Olana/Scenic Hudson contended that “for the most part, one of the existing towers currently screens the other tower from being visible from Olana.” *Id.* at 3.

⁴⁷ *See, e.g., id.* at 12–13 & nn. 37–42.

⁴⁸ Application for Review at 14.

⁴⁹ Olana/Hudson Opposition to Application for Review at 14.

⁵⁰ *Id.* (“[T]he record amply demonstrates that the Town identified Petitioners’ particular environmental concerns about the impact of the replacement antenna on Olana’s viewshed.”).

⁵¹ *Id.* at 9–10.

about 2 miles away from the site to Olana.”⁵² The Town noted that “the proposed tower would be one of many twentieth and twenty-first century additions to the Olana viewshed...” including three radio towers with blinking lights that are taller than the proposed tower and much closer to Olana.⁵³ And the NY State Court found that the Town’s determination was supported by substantial evidence that included visual analyses and photographic simulations submitted by both parties and professional opinion.⁵⁴ The Town’s review in this case is sufficient to allow us to conclude, without conducting a separate Section 106 review, that construction of the proposed tower will not have an impact on the Olana viewshed.⁵⁵

19. We have also considered the many comments from public safety entities that wish to collocate on Eger’s proposed tower and urge us to authorize construction in order to allow an upgrade of emergency communications equipment.⁵⁶ The current towers are inadequate to support the new antennas needed for that upgrade, and indeed, the eight new whip antennas that will be added to the proposed tower are to support county and local public safety radio communications.⁵⁷ The public safety entities emphasize that the topography of the county makes radio communications difficult, and that the proposed site of Eger’s tower is “ideal” and “one of our best sites.”⁵⁸ In 2018, the Columbia County Board of Supervisors passed a Resolution in support of Eger’s application, asserting that the new tower is important for the Town of Livingston’s local emergency communications capability, and requesting expedited review by local, state, and federal officials.⁵⁹ These public safety considerations also persuade us that the exclusion established in the NPA is properly applied in this case and would serve the public interest.

⁵² *Id.* at 7 (citing Planning Board Resolution (June 12, 2013) (2013 Resolution)). Note that the proposed tower would only be 2.3 feet wider at the top than the existing towers. *Id.* at 2 FN1. We note also that the New York SHPO reviewed the original towers before they were constructed, and found that they would have no adverse impact on the Olana Site. Letter from Julia S. Stokes, Deputy Commissioner for Historic Preservation, New York State Office of Parks, Recreation and Historic Preservation to Mark Eger, Mark Eger & Bros., Inc. (Sep. 28, 1992). Thus, the new tower represents an insignificant change in size compared to towers that underwent historic preservation review.

⁵³ *Olana v. Town of Livingston* at 7–8 (citing 2013 Resolution).

⁵⁴ *Id.* at 8.

⁵⁵ Moreover, we have reviewed the Eger Visual Impact Assessment Report that was provided to and considered by the Town; that report specifically and in detail addressed visual impacts on the Olana viewshed, as well as steps taken to mitigate any impact. See Eger Visual Impact Report at 11, 13–14.

⁵⁶ Application for Review at 10–11 (listing public safety entities). For instance, County of Columbia – Emergency Medical Services notes that the construction of the replacement tower will “help resolve critical gaps in coverage around the county... Unfortunately, it is on hold under the Eger Communications replacement tower is erected.” Eger Petition at Exhibit C (Letter from P.J. Keeler, EMS Coordinator, County of Columbia – Emergency Medical Services, to Daniel Abeyta, Assistant Chief, Spectrum & Competition Policy Division, Wireless Telecommunications Bureau, Federal Communications Commission at 1 (Dec. 2, 2011)).

⁵⁷ Eger Visual Assessment Report at 1.

20. We fully acknowledge the Commission's obligations under the NHPA and the NPA, including the particular standard of care applicable when a National Historic Landmark is involved.⁶⁰ Given the review already undertaken, however, requiring additional review under Section 106 based on allegations that were previously raised before the NY State Court would place form over substance, and unnecessarily delay the deployment of critical public safety communications in the affected communities.

IV. ORDERING CLAUSES

21. IT IS THEREFORE ORDERED, pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), Section 106 of the National Historic Preservation Act of 1966, as amended, 54 U.S.C. § 306108, and Sections 1.2, 1.3, 1.106(a)(1), 1.925(a), 1.1307(a)(4), and 1.115(g) of the Commission's rules, 47 C.F.R. §§ 1.2, 1.3, 1.106(a)(1), 1.925, 1.1307(a)(4), 1.115(g), that a waiver of Section 1.106(a)(1)'s finality requirement is GRANTED by the Commission on its own motion, and the Application for Review or, in the alternative, Petition for Further Reconsideration filed by Eger Communications, Inc., is GRANTED, and the joint complaint filed by Olana Partnership and Scenic Hudson is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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⁵⁸ Eger Petition at Exhibit C; Letter from Mark Brown, Vice President – Operations, NDP Emergency Medical Services, to Daniel Abeyta, Assistant Chief, Spectrum & Competition Policy Division, Wireless Telecommunications Bureau, Federal Communications Commission at 1 (Dec. 14, 2011); Letter from Robert C. Lopez, Director of 911, Columbia County 911, to Daniel Abeyta, Assistant Chief, Spectrum & Competition Policy Division, Wireless Telecommunications Bureau, Federal Communications Commission at 1 (Nov. 30, 2011).

⁵⁹ Resolution to Support the Application of Eger Communications for a Telecommunications Tower, Resolution No. 190-2018, available at <https://sites.google.com/a/columbiacountyny.com/columbia-county-board-of-supervisors/board-resolutions/2018/may> (last visited Apr. 25, 2019).

⁶⁰ See 54 U.S.C. § 306107.