

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Amendment of Parts 1 and 17 of the) RM - _____
Commission's Rules Regarding Public)
Notice Procedures for Processing Antenna)
Structure Registration Applications for)
Certain Temporary Towers)

To: The Commission

PETITION FOR EXPEDITED RULEMAKING

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CTIA—The Wireless Association® (“CTIA”)¹ hereby petitions the Federal Communications Commission (“FCC” or “Commission”) to initiate an expedited rulemaking proceeding pursuant to Section 1.401 of its rules to amend Section 17.4(c)(1) of the interim antenna structure registration (“ASR”) rules² to add a limited exception from the public notice requirements set forth in Section 17.4(c)(3)-(4)³ for temporary towers that (i) will be in use for 60 days or less, (ii) require the filing of a Form 7460-1 with the FAA, (iii) do not require marking or lighting pursuant to FAA regulations, and (iv) will be less than 200 feet (hereinafter “Two Month Towers”). CTIA also respectfully requests grant of a blanket waiver under Sections 1.3 and 1.925 of the Commission’s rules exempting Two Month Towers from the ASR public notice requirements during the pendency of this rulemaking proceeding. This exception and waiver is necessary because CMRS licensees often need to erect temporary towers in

¹ CTIA is the international organization of the wireless communications industry for both carriers and manufacturers. Membership in the organization covers Commercial Mobile Radio Service (“CMRS”) providers and manufacturers, including cellular, Advanced Wireless Service, 700 MHz, broadband PCS, and ESMR, as well as providers and manufacturers of wireless data services and products.

² See 47 C.F.R. §§ 1.401; 17.4(c)(1).

³ See 47 C.F.R. §§ 17.4(c)(3)-(4).

response to unanticipated events that present significant short-term capacity issues. As discussed in more detail below, absent the requested exception from the public notice requirement, the FCC’s interim ASR rules would effectively preclude CMRS licensees from responding to capacity issues in a timely manner.

BACKGROUND AND SUMMARY

In 2008, the U.S. Court of Appeals for the District of Columbia invalidated the Commission’s ASR rules due, in part, to the absence of a mechanism for public comment on proposed towers prior to ASR approval.⁴ The Court noted that the Council on Environmental Quality (“CEQ”) “regulations require agencies to make ‘diligent efforts to involve the public in preparing and implementing their NEPA procedures.’”⁵ In remanding the case, the Court noted that a simple solution may be for “the Commission to update its website when it receives individual tower applications.”⁶ The Court did not require adoption of any specific public notice process and did not address how temporary towers should be treated.

In response to the *American Bird Conservancy* remand, the Commission adopted new rules designed to expand the opportunity for the public to comment on tower proposals.⁷ The Commission stated that its objective was “to minimize the impact of communications towers on migratory birds while preserving the ability of communications providers rapidly to offer innovative and valuable services to the public.”⁸ Notably, the Commission pointed out that it has

⁴ See *American Bird Conservancy v. FCC*, 516 F.3d 1027 (D.C. Cir. 2008).

⁵ *Id.* at 1035 (citing 40 C.F.R. § 1506.6(a)).

⁶ *Id.* at 1035.

⁷ *National Environmental Policy Act Compliance for Proposed Tower Registrations*, Order on Remand, 26 FCC Rcd 16700 (2011) (“*Remand Order*”).

⁸ *Id.* at 16701.

“‘wide discretion in fashioning its own procedures’ to implement its environmental obligations.”⁹

The new rules require applicants for new towers and substantial modifications to existing towers to provide local notice of tower proposals in local newspapers (or other appropriate means).¹⁰ In addition, notice of the proposed construction must be posted on the FCC’s website for 30 days.¹¹ Only after the notice provisions are satisfied will the Commission act on an ASR application.

The Commission created a number of categories of ASR applications, however, that were exempt from the new public notice process. Specifically, the Commission concluded that the notification process is not necessary in a number of situations, including the following:

- A non-substantial increase in tower height;
- Tower dismantlement or a decrease in tower size; and
- Replacement of an existing antenna structure that (i) does not require an environmental assessment, (ii) does not substantially increase the tower size, and (iii) does not require excavation more than 30 feet beyond the existing site.

The Commission also carved out a limited exemption from the notice requirements for emergency situations where temporary towers need to be built quickly to restore communications. The Commission noted that:

[C]ases may arise that involve emergency situations, such as where temporary towers need to be built quickly to restore lost communications. Such situations often require grants of special temporary authority (STAs). In such cases, upon an appropriate showing and at the request of the applicant, the processing Bureau may waive or postpone the notice requirement.¹²

⁹ *Id.* at 16717.

¹⁰ 47 C.F.R. § 17.4(c)(3).

¹¹ *Id.* § 17.4(c)(4).

¹² *Remand Order*, 26 FCC Rcd at 16717, n.117.

As discussed below, however, there are many non-emergency situations that occur without any significant advance notice and require the construction of temporary towers to address significant short-term capacity constraints. The current ASR notice requirements can effectively prevent the actions necessary to address these capacity concerns and ensure service availability. To remedy this unintended consequence, the Commission should modify its rules to exempt Two Month Towers from the ASR public notice requirements. Most Two Month Towers will be cell sites on light trucks (“COLTs”) and cell sites on wheels (“COWs”). Given the public interest associated with preserving capacity and ensuring the viability of wireless communications networks during unique, non-emergency events, such an exemption will serve the public interest. To ensure that carriers can respond to these capacity situations as they arise, the Commission also should grant a blanket waiver exempting Two Month Towers from the ASR public notice requirements during the pendency of the rulemaking.

DISCUSSION

I. THE PUBLIC NOTICE REQUIREMENT IN THE INTERIM ASR RULES INADVERTENTLY CONTRAVENES THE PUBLIC INTEREST WHEN APPLIED TO TWO MONTH TOWERS

There are many non-emergency situations that require the construction of temporary towers to address short-term capacity constraints. Although these events are varied in nature, they have the following traits in common: (i) they may occur with little or no advance warning; (ii) they do not fall squarely into the “emergency” category; and (iii) they would cause significant disruption if temporary facilities could not be rapidly deployed.

Many newsworthy events occur with no prior notice, such as the Virginia Tech campus shooting, train derailments, *etc.* In those instances, demand for wireless services rapidly spikes as news organizations scramble to marshal their resources to cover the event and subscribers use their wireless phones to find out whether friends and family are safe. This increased demand

remains significant and thus problematic for days after the event. Similarly, temporary towers can play an important role in assisting local law enforcement in their efforts, including for example, finding missing persons. By the very nature of the situation, law enforcement have no prior notice and must ask carriers to deploy additional facilities to increase coverage and capacity to aid in search efforts as events unfold.

There are also numerous instances where carriers need to deploy temporary towers in non-emergency situations with less than 30 days of advance notice. These events often occur with only a few days of advance notice, with carriers learning about the need for additional capacity at the last moment.¹³ These events nevertheless place significant short-term demands on the local wireless networks and require temporary facilities to address these capacity issues.

For example:

- In 2011, President Obama vacationed in Martha's Vineyard. Carriers did not receive sufficient advance notice of the vacation and had to quickly deploy temporary facilities to accommodate the increased capacity necessitated by the influx of press personnel and additional tourists;
- States and localities often hold ticker-tape parades to celebrate their teams' sports championships. Carriers do not have advance notice regarding teams that will win championships and the parades usually are held shortly after the championship game;
- During presidential campaigns, candidates made stops in various towns and carriers receive less than 30 days notice due, in part, to security concerns. Once carriers learn of planned campaign stops, they mobilize to deploy temporary facilities. The lack of 30 days notice would preclude the deployment of these temporary facilities;

In 2011, the City of Philadelphia requested that carriers supply additional coverage for a July 4th concert. At least one carrier had no plans to deploy additional temporary facilities for the concert until the City made its request shortly before the event. In September 2011, at least one carrier deployed a COW in Isabella, Minnesota on an emergency and expedited basis to provide

service to support first responders and support teams battling forest fires within and around a wilderness area. This was an unexpected, unplanned deployment. Also in September 2011, at the request of the United States Marshalls and the California Highway Patrol, a carrier deployed a COW in Mendocino, CA to provide service in support of law enforcement. This, too, was an unplanned, unexpected request that would not have had time to go through the environmental notification process. Separately, in May 2011, a carrier deployed a COW in Joplin, MO to replace a permanent tower that was damaged by a tornado. Again, this urgent, immediate service need would not have had sufficient time to work through the environmental notification process.

Absent temporary facilities for events like these, wireless network reliability may be compromised by the spike in demand from these events, with the result that some wireless networks may be unable to handle all calls, including emergency 9-1-1 calls and communications between public safety first responders that also may utilize commercial wireless networks. One CTIA member alone has identified nearly 20 instances since 2011 where that carrier needed to deploy a temporary tower in a non-emergency situation with less than 30 days advance notice in order to accommodate a significant increase in wireless traffic that was triggered by an event. The new ASR rules threaten to further complicate the deployment process for these Two Month Towers.

In other situations, the timing and location of an event is well known – a state fair, air show, a NASCAR race, etc. – but carriers are unable to obtain specific locations for temporary sites until days before the event. For example, carriers may know that additional capacity will be needed at a state fair but officials may not authorize the deployment of sites on the fairgrounds and identify the actual location for a temporary site until days before the event. Over the past

year alone, there have been multiple race events, state fairs, and airshows at which temporary facilities could not be deployed due to the new ASR public notice requirements.

Unexpected tower difficulties also may occur that require the deployment of a temporary base station while the permanent facility is repaired. These situations are distinct from “emergency” situations where facilities are rendered inoperative due to floods, hurricanes, or other disasters. Although the causes are less dramatic – such as repairs to a building roof requiring temporary relocation to another site, unexpected equipment failures requiring use of a temporary facility, or localized power outages not associated with an emergency – the wireless network would be adversely impacted unless temporary facilities can be rapidly deployed.

The new ASR procedures can have the unintended result of effectively precluding carriers from addressing these significant potential service degradation issues because the necessary ASR approvals cannot be obtained until the local and federal public notice process is complete – a process that, based on the experience of CTIA members, usually takes at least 60 days. If temporary facilities cannot be deployed, the ability to place and receive calls – including 9-1-1 calls and public safety first responders that also may utilize commercial wireless networks – in the vicinity of the event could be compromised.

II. EXEMPTING TEMPORARY TWO MONTH TOWERS FROM THE PUBLIC NOTICE REQUIREMENT WILL SERVE THE PUBLIC INTEREST

In designing its Interim ASR rules, the Commission concluded that it had broad discretion to design procedures for addressing environmental obligations.¹⁴ The Commission deliberately fashioned its Interim ASR procedures to address issues of which it was aware. It did so, in part, recognizing that the rules must balance the need to minimize the impact of communications towers on migratory birds against the need to allow communications providers

¹⁴ *Remand Order*, 26 FCC Rcd at 16717.

to offer service rapidly.¹⁵ This balancing test would be satisfied by a limited exemption from the public notice requirement for Two Month Towers. As discussed below, such an exemption would allow carriers to respond to temporary capacity issues and ensure service continuity, including the ability to place emergency calls, without (i) undermining meaningful review of environmental or air safety concerns or (ii) significantly impacting avian mortality.

A. The Requested Exemption for Two Month Towers Will Not Create Environmental or Air Safety Issues

The Commission previously determined that there are circumstances in which public notice is unnecessary, including those found in Section 17.4(c)(1), and situations where the rules may be waived, such as emergency situations.¹⁶ Creating an exemption from the public notice requirements for Two Month Towers would serve a similar objective: ensuring continuity of service that would otherwise be jeopardized by events outside of a carrier's control that occur with little or no advance warning.

Moreover, in the Section 106 context, the FCC, the Advisory Council on Historic Preservation, and the National Commission of State Historic Preservation Officers jointly determined in the 2004 Nationwide Programmatic Agreement that temporary towers can be exempted from Section 106 (and its public notice requirements) without adversely impacting historic structures.¹⁷ While the signatories to the 2004 NPA concluded that temporary towers that remained in place for up to twenty four (24) months would be exempt from Section 106

¹⁵ *Id.* at 16701.

¹⁶ *Id.* at 16717, n.117.

¹⁷ Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission, 20 FCC Rcd 1073, 1086 - 1133 (2004) ("2004 NPA") (Section III.C). The 2004 NPA also excludes replacement towers from the Section 106 process. *Id.* at 1079-86 (Section III.B).

review,¹⁸ CTIA is requesting a much more limited exemption for NEPA purposes by circumscribing the subset of towers to only those towers that will remain in place for no more than two months.

This action can be taken without diminishing the environmental review that tower owners afford temporary towers.¹⁹ Importantly, the proposed exemption would not obviate the need for an ASR applicant to conduct its standard NEPA screening analysis for new towers. Thus, the ASR applicant still will be required to certify on the Form 854 that the proposed tower does not have a significant environmental effect and thus remains liable for non-compliance.

Finally, exempting Two Month Towers from public notice will not in any way diminish air safety. Every tower owner's bedrock obligation to determine whether a tower would require an FAA determination of No Air Hazard will remain unaffected. If a "Determination of No Air Hazard" is required, the applicant would still file a Form 854 so the FCC and the FAA would be aware of the tower and its status. The proposed exemption also does not alter the FAA's opportunity to fully consider what effect, if any, the temporary tower will have on air safety. In fact, if the FAA were to decide that the tower required marking and/or lighting, the tower would not be eligible for the public notice exemption because a pre-condition for the exemption from the FCC's public notice requirements is that the FAA determines that the towers do not require marking or lighting.

B. The Requested Exemption Would Not Significantly Impact Avian Mortality

For the reasons set forth below, Two Month Towers are unlikely to have a significant avian impact and an exemption from the public notice requirement will not result in a significant

¹⁸ *Id.* at 1086-1133.

¹⁹ In addition, as this exemption does not apply to permanent towers, the exemption will have no effect upon the standard of NEPA review conducted for permanent towers by tower owners.

adverse impact on avian mortality. The Commission has recognized that the potential impact of a proposed tower on migratory birds and the environment is influenced by the scope of the proposal. For example, the Commission automatically requires the submission of an environmental assessment for towers in excess of 450 feet.²⁰ In contrast, towers below 450 feet are treated differently – an Environmental Assessment is not required initially unless required by Section 1.1307(a). The proposed exception would be limited to towers that do not exceed 200 feet in height.

Applying the Wireless Bureau’s findings in the Final Programmatic Environmental Assessment (“PEA”) to the instant case, it is clear that avian mortality will not be significantly affected. The PEA found that “[t]all towers, steady-burning lights, and guy wires are the primary tower characteristics contributing to avian mortality.”²¹ Temporary towers that would be subject to the exemption would be neither tall nor lighted. Moreover, because the proposed exemption is limited to towers 200 feet or less in height, it is extremely unlikely that such towers would require guying. As noted above, most Two Month Towers will be COLTs and COWs. Based on the foregoing, Two Month Towers are unlikely to significantly contribute to avian mortality.

The PEA also states that “[i]n general, impacts from construction of towers are negligible or minor, given the relatively small footprints of the towers; in most instances, construction impacts are also temporary” *and that the impacts from a tower are limited to the length of time a tower is in place.*²² While an average tower’s useful life is often measured in decades, Two

²⁰ *Remand Order*, 26 FCC Rcd at 16701.

²¹ Final Programmatic Environmental Assessment for the Antenna Structure Registration Program, 2012 FCC LEXIS 1141 (Mar. 13, 2012).

²² *Id.*

Month Towers, by definition, would only be permitted to be used at a site for a maximum of 60 days. Accordingly, their potential impact is far more negligible than that of traditional towers.

III. A BLANKET WAIVER SHOULD BE GRANTED PENDING CONCLUSION OF THE RULEMAKING

Pursuant to Sections 1.3 and 1.925 of the Commission's rules, the Commission should grant a blanket waiver of the public notice requirement for Two Month Towers during the pendency of this Petition.²³ A waiver is appropriate where conduct is covered by the Commission's rules but there are sound public policy reasons to waive compliance in a particular case, and a waiver would not undermine the general policy served by the rule.²⁴ The Commission previously has granted blanket waivers pending completion of a notice of proposed rulemaking.²⁵

²³ 47 C.F.R. §§ 1.3, 1.925.

²⁴ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

²⁵ See, e.g., *Amendment of Part 101 of the Commission's Rules to Accommodate 30 Megahertz Channels in the 6525-6875 MHz Band*, 24 FCC Rcd 9620, 9629-30 (2009) (granting a blanket waiver to implement conditional authority on certain frequencies prior to the Commission completing a rulemaking to change its rules); *Petition of Spacenet, Inc. for a Declaratory Ruling that Section 25.134 of the Commission's Rules Permits VSAT Remote Stations in the Fixed Satellite Service to Use Network Access Schemes that Allow Statistically Infrequent Overlapping Transmissions of Short Duration, or, in the Alternative, for Rulemaking to Amend that Section*, 15 FCC Rcd 23712 (IB 2000) (granting a blanket waiver to allow existing VSAT systems using certain protocols to continue operating pending resolution of relevant interference issues in a rulemaking proceeding); *BellSouth Petition for Waiver of Section 32.22 of the Commission's Rules to Permit the Implementation of Flash-Cut Normalization Relating to Tax/Timing Difference Originating in 1988*, Memorandum Opinion and Order, 2 FCC Rcd 5146, 5147 (CCB 1987) (granting blanket waiver of rule 32.22 until the Commission either denies the petition for rulemaking or issues a final order in the rulemaking proceeding); *Ameritech Operating Companies Revisions to Tariff FCC No. 2*, 8 FCC Rcd 4589, 4603 (CCB 1993) (granting a blanket waiver of the tariffing requirements for microwave collocation contained in the Expanded Interconnection Order, pending reconsideration of the rulemaking).

Pursuant to Section 1.3, the Commission may waive its rules for “good cause shown.”²⁶ This standard is satisfied here because, as noted above, a limited exemption from the public notice requirement for towers that will be in place for 60 days or less would allow carriers to respond to temporary capacity issues and ensure service continuity without undermining meaningful review of environmental or air safety concerns.

Pursuant to 1.925, a waiver is appropriate if, due to unique or unusual factual circumstances, application of the rule would be inequitable, unduly burdensome, or contrary to the public interest.²⁷ Here, enforcement of the public notice requirement would be unduly burdensome and contrary to the public interest because the requirement would preclude the deployment of Two Month Towers to address capacity issues necessary to ensure the continuation of wireless service or to prevent significant service degradation. As noted above, the ASR notice requirements already have unintentionally prevented the deployment of temporary facilities at multiple race events, state fairs, and airshows. The ASR notice requirements also will inhibit the ability of wireless carriers to deploy temporary facilities to assist in missing person searches and to respond to increased capacity necessitated by tragic, non-emergency events, such as press coverage in the aftermath of the Virginia Tech shootings.

CONCLUSION

For the foregoing reasons, the Commission should exempt Two Month Towers from the public notice requirements of the Interim ASR rules. Such an exemption is necessary to allow carriers to maintain service during non-emergency events that create capacity issues with little or no advance warning. Moreover, given the public interest associated with service continuity, the

²⁶ 47 C.F.R. § 1.3.

²⁷ *Id.* § 1.925.

Commission should grant a blanket waiver of the ASR public notice requirements for Two Month towers during the pendency of this proceeding.

Respectfully submitted,

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