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

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

ORDER ON RECONSIDERATION

Adopted: July 27, 2015 **Released: July 27, 2015**
By the Deputy Chief, Competition and Infrastructure Policy Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. The Competition and Infrastructure Policy Division (Division) of the Wireless Telecommunications Bureau, Federal Communications Commission (Commission), has before it a pending Petition for Reconsideration of the Division's letter regarding the above-referenced communications tower that Eger Communications, Inc. (Eger) proposes to construct in Livingston, Columbia County, New York.[1] Specifically, in response to an Informal Complaint filed by Scenic Hudson and the Olana Partnership (Olana/Hudson),[2] the Division found that Eger must complete the review process for the proposed tower under Section 106 of the National Historic Preservation Act (NHPA) pursuant to the procedures specified in the Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Commission (Nationwide Programmatic Agreement or NPA).[3] Eger filed a Petition for Reconsideration of the Division Letter (Petition for Reconsideration), followed by an Application for Leave to Amend its Petition for Reconsideration (Application for Leave).[4] For the reasons discussed below, we dismiss the Petition as an interlocutory appeal under Section 1.106(a)(1) of the Commission's Rules[5] and also dismiss Eger's Application for Leave as moot.

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

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

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

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

[5] 47 C.F.R. §1.106(a)(1).

II. BACKGROUND

2. On July 2, 2010, Eger filed an Application for a Special Use Permit and Site Plan Approval with the Town of Livingston Planning Board (Town) to construct a new 190-foot self-support lattice tower to replace two existing 190-foot guyed towers that were built in 1992.[6] The proposed Eger tower site is located near the Olana House State Historic Site (Olana Estate), the former home of the artist Frederic Church.[7] The Olana Estate is a National Historic Landmark (NHL) and is listed in the National Register of Historic Places (National Register).[8] Eger did not submit the proposed tower for federal review under Section 106 of the NHPA. On April 5, 2011, Olana/Hudson filed an Informal Complaint with the Division arguing that Eger's proposed tower should undergo full Section 106 review under the procedures specified in the NPA and that the tower would have an adverse effect on the Olana Estate.[9] In its Opposition and Sur-Reply, however, Eger argued that the proposed tower is a replacement tower expressly excluded from Section 106 review under Section III(B) of the NPA.[10]

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

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

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

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

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

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

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

[11] *See* Division Letter at 3.

[12] *See id*.

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

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

5. *Application for Leave.* On October 24, 2014, Eger filed its Application for Leave, requesting to supplement its Petition to include a New York State Supreme Court (NY State Court) Decision dated August 26, 2014.[22] In a proceeding filed by Olana/Hudson challenging the Town's

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[13] *See id*.

[14] *See id*.

[15] *See id*.

[16] Eger Petition at 8.

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

[18] Eger Petition at 2.

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

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

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

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

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

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

III. DISCUSSION

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

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

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

[23] *See Olana v. Town of Livingston.*

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

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

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

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

[28] *See id.* at 3.

[29] *See* 54 U.S.C. § 306108.

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

[31] *See Id.*

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

9. *Interlocutory Action under Section 1.106(a)(1) of the Commission's Rules.* Based on our review of the record and the regulatory background, we find that Eger's Petition is procedurally improper and should be dismissed under Section 1.106(a)(1) of the Commission's rules as addressing an interlocutory action.[35] Section 1.106(a)(1) of the Commission's rules generally prohibits the filing of petitions for reconsideration of interlocutory actions.[36] With one exception that is not relevant here, the rule provides that the Commission and its staff acting under delegated authority will only entertain petitions requesting reconsideration of a final action.[37] An interlocutory action by definition is one that is non-final in that it neither denies nor dismisses an application nor terminates an applicant's right to participate in the proceeding.[38] For an agency action to be "final," it must mark the "consummation" of the agency's decision-making process, and not be merely of a tentative or interlocutory nature; in addition, the action must determine rights or obligations or otherwise result in legal consequences for one or more parties.[39]

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

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

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

[34] 47 C.F.R. Pt. 1, App. C. § XI.

[35] 47 C.F.R. § 1.106(a)(1).

[36] *Id.*

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

[38] In the Matter of Jet Fuel Broadcasting Application for a New AM Broadcast Station at Orchard Homes, Montana and Bott Communications, Inc., Application for a New AM Broadcast Station at Black Hawk, South Dakota, *Memorandum Opinion and Order*, 29 FCC Rcd 2471, 2471-72 ¶ 2 (2014) (*Jet Fuel Broadcasting*) (affirming Bureau's finding that grant of a comparative preference to a broadcast license applicant was interlocutory and that a Petition for Reconsideration of the grant was therefore subject to dismissal); *see also* In the Matter of Global Tower, LLC, ASR App. No. A0785797, *Order on Reconsideration*, 29 FCC Rcd 8339 (WTB/SCPD 2014) (*Global Tower*) (affirming Division's decision requiring Global Tower to submit an Environmental Assessment for a proposed new antenna tower and dismissing a Petition for Reconsideration as interlocutory).

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

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

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

IV. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED that pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, the Petition for Reconsideration filed by Eger Communications, Inc. IS DISMISSED.

13. IT IS FURTHER ORDERED that pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, the Application for Leave to Amend its Petition for Reconsideration, filed by Eger Communications, Inc. IS DISMISSED AS MOOT. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

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