



Federal Communications Commission
Washington, D.C. 20554

May 2, 2019

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW Washington DC 20554

Re: Proposed Communications Tower, Eger Communications, Inc., WT Docket No. 19-129

Dear Ms. Dortch:

By this letter, I am filing in the above-referenced docket the attached filings and other record materials. These filings and materials relate to a complaint filed against Eger Communications' proposed tower to be sited at 170 Eger Road, Town of Livingston, New York. Attachment A to this letter lists the documents I have entered into the docket.

Sincerely,

/s/ Louis Peraertz

Louis Peraertz

Wireless Telecommunications Bureau
Federal Communications Bureau

Enclosure

ATTACHMENT A

List of Documents to Be Placed In Eger Docket

September 1992 Letter from New York State Office of Parks, Recreation and Historic Preservation to Mark Eger & Bros., Inc.

June 2010 Eger Application to Town of Livingston Planning Board for Approval to site Proposed Tower

2010 Letter from Scenic Hudson to Town of Livingston including Letter from National Park Service

2011 Olana Partnership/Scenic Hudson Complaint to FCC

2011 Eger Opposition to Complaint

2011 Olana/Scenic Hudson Response to Eger Opposition to Complaint

2011 Eger Sur Reply in Opposition to Complaint

2012 Tectonic Visual Impact Assessment Report

[Undated] Eger Drawing of Proposed Tower Appurtenances

[Undated] Eger Site Plan of Proposed Tower

2011 Letters from Columbia County Public Safety Agencies in Support of Eger

2013 CIPD Letter Decision

2014 Eger Petition for Reconsideration (PFR)

2014 Olana/Scenic Hudson Opposition to PFR

2014 Eger Reply to Olana/Scenic Hudson Opposition to PFR

2014 NY State Supreme Court Decision

2014 Eger Motion for Leave to Amend PFR

2014 Olana/Scenic Hudson Opposition to Eger Motion for Leave to Amend

2015 CIPD Order on Reconsideration

2015 Letter from Robert Lopez of Columbia County Emergency Services Department

2015 Letter from National Park Service to Eger Seeking Consulting Party Status

2015 Eger Application for Review

2018 Letter from Congressman John J. Faso to FCC Chairman Ajit Pai

2019 Eger Petition for a Writ of Mandamus



New York State Office of Parks, Recreation and Historic Preservation
The Governor Nelson A. Rockefeller Empire State Plaza
Agency Building 1, Albany, New York 12238-0001

September 28, 1992

Mr. Mark Eger
Mark Eger & Bros., Inc.
RD 2, Box 11A
Hudson, New York 12534

Dear Mr. Eger:

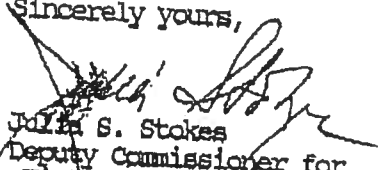
Re: SEORA
190' Communication Tower on Blue Hill
Greenport, Columbia County
92PR1602

The Office of Parks, Recreation and Historic Preservation (OPRHP) has received the documentation you provided on your project. As the state agency responsible for the coordination of the State's historic preservation programs, including the encouragement and assistance of local preservation programs, we offer the following comments.

Recently, staff from our Field Services Bureau visited the area of the proposed communication tower to assess the potential visual impact of the project. Based upon this review, it is the OPRHP's opinion that this project will have No Impact upon cultural resources in or eligible for inclusion in the State and National Registers of Historic Places.

If you have any questions, please call our Project Review Unit at (518) 474-0479.

Sincerely yours,


John S. Stokes
Deputy Commissioner for
Historic Preservation

JSS/RDK:tr

**APPLICATION FOR SITE PLAN APPROVAL
TOWN OF LIVINGSTON
COLUMBIA COUNTY, NEW YORK**

In accordance with the Zoning Law of the Town of Livingston, the Town Planning Board requires that the following information relating to the project identified below be submitted along with three (3) copies of the site plan (prepared by a professional engineer, surveyor, architect or other certified design professional in accordance with Article VI, Section 6.7 of Zoning Law), a completed Environmental Assessment form (EAF), site plan review checklist and the prescribed application fee.

Application Number: 06-01

Date Submitted: 06-02-10

Date Accepted as Complete: _____

(above to be completed by Zoning Administrator)

Name of Proposed Development: 190' SELF SUPPORTING COMMUNICATION TOWER

Applicant:

Name EGER COMMUNICATIONS
GENERAL PARTNERSHIP

Address 170 EGER RD.
HUDSON, N.Y. 12534

Plans Prepared by:

Name FRED A. NUDD CORP. & MARK EGER

Address 1743 ROUTE 104
ONTARIO, N.Y. 14519
TIM WILSON

Telephone 518-828-3570

Telephone 315-524-2531

Owner (if different) (If more than one owner, provide information for each)

Name _____

Address _____

Telephone _____

Ownership intentions, i.e., purchase options _____

Location of site 170 EGER RD., OFF OF CTY. RT-31

Tax map description _____

Section 139 Block 1 Lot 45

Current Zoning Classification LDR-2

Local, State and Federal permits needed (list type and department/agency) _____

EXISTING COMMUNICATIONS SITE, ALL TOWN, COUNTY, STATE,
AND FEDERAL PERMITS APPROVED 1992

Proposed use (s) of site CURRENTLY A COMMUNICATIONS SITE
2 BUILDING. 1-12'6"X24'4", 1-20'X11'5" AND 2-190 FT.
GUIDE CABLE TOWERS. WILL REPLACE 2-190' GUIDE CABLE
TOWERS WITH 1-190 FT SELF SUPPORTING TOWER (NEW)
SITE PLAN ATTACHED TOWER PLAN ATTACHED

Total Site Area (sq. ft. or acres) APP. 324 SQ. FT.

Anticipated construction time 2010 60 DAYS

Will development be staged YES

Current land use of site (agriculture, commercial, residential, undeveloped, etc.)
COMMUNICATIONS SITE, 2-190 FT TOWERS

Current condition of site (buildings, meadow, brush, forest) 1-12'X24', 1-20'X11'
BUILDINGS, 2-190 FT. COMMUNICATIONS TOWERS

Character of surrounding lands (agriculture, commercial, residential, undeveloped, etc.)
AGRICULTURE, BRUSH, FOREST

Estimated cost of proposed project (\$) 144,000.00

Anticipated increase in number of residents, shoppers, employees, etc (as applicable)

NA

Describe proposed use, including preliminary and secondary uses; ground floor area; and number of stores for each building:

- for residential buildings include the number of dwelling units by size (efficiency, one-bedroom, two-bedroom, three or more bedrooms) and total number of parking spaces to be provided)
- for nonresidential buildings, include total floor area; the number of automobile and truck parking spaces and loading area (s)
- other proposed structures

Is any portion of the property situated in a designated: Floodplain Yes _____ No X
Floodway Yes _____ No X
Wetland Yes _____ No X

Are there any existing easements, covenants or agreement pertaining to the use of this property or the use of buildings existing or proposed on this site: If yes, please attach such documents. Yes _____ No _____

Does this application contain all of the items indicated on the attached checklist? If not, please attach rationale for requesting a waiver of those items not included in the application or on the site plan. *THE LIVINGSTON TOWN PLANNING BOARD APPROVED A SPECIAL USE PERMIT 11/17/92, ZONING AREA VARIANCE 10/6/92 ATTACHED*
As referenced in Article VI, Section 6.7, the Planning Board may require the applicant to submit additional information and/or sketches. The applicant should refer to the Zoning Law for specific requirements.

(above to be completed by Zoning Administrator)

After a review of this application and Article VI, Section 6.7 of the Town Zoning Law, I have determined that this application is:

_____ accepted as complete and is forwarded to the Planning Board for review.

_____ incomplete and is returned to the Applicant for additional information

Zoning Administrator

Date

The following checklist has been prepared by the Town of Livingston Planning Board in accordance with Article VI, Section 6.7 of the Town Zoning Law. The checklist is designed to insure that all submittal requirements specified in the Zoning Law and by the Planning Board have been met by the applicant. Please review the application and plans thoroughly and mark the requirements which have been met in Column A below. The Zoning Administrator or designee will mark your submissions in column B. Items which are not applicable to the plan should be indicated as N/A. When all requirements have been met, the application will be certified as complete and referred to the Planning Board for review and action. The Planning Board may require additional information during its review as required.

Application number: _____
(to be assigned by Zoning Administrator)

	Item Satisfied	
	A	B
Site Data:		
Environmental Assessment Form:	✓	
Certification by licensed professional:	✓	
North arrow, scale, date:	✓	
Property boundary, dimensions, angles and size:	✓	
Topography with datum/5 foot contour intervals:	✓	
Location and vicinity map:	✓	
Easements, right of way and deed restrictions:	✓	
Names, location and widths of adjacent streets:	✓	
Zoning, ownership, and land use property:	✓	
Zoning, ownership and land use of adjacent property:	✓	
Existing zoning, school and special district boundaries within 500 feet of special parcel:	✓	
Zoning variances, special permits, amendments or interpretations needed:		N/A

	<u>Item Satisfied</u>	
	A	B
Existing Natural Features:		
Soil characteristics:	_____	<u>NA</u>
Rock outcrops:	_____	<u>NA</u>
Vegetation, including 10" dbh trees:	_____	<u>NA</u>
Hydrologic features:		
-streams, lakes	<u>✓</u>	_____
-NYSDEC freshwater wetlands	_____	<u>NA</u>
-100 yr. floodplain and floodway boundaries	_____	<u>NA</u>
-high water elevations	_____	<u>NA</u>
Proposed Development:		
Description of uses:	<u>✓</u>	_____
Grading and drainage plan:	_____	<u>NA</u>
Erosion control plan:	_____	<u>NA</u>
Landscaping plan:	_____	<u>NA</u>
Recreation Areas:	_____	<u>NA</u>
Building and Other Structures:		
-Architectural plans and elevations:	_____	<u>NA</u>
-Ground Floor Area:	_____	<u>NA</u>
- Total Floor Area:	_____	<u>NA</u>
- Finished and Lowest Floor Elevations:	_____	<u>NA</u>
- Height and number of stories:	_____	<u>NA</u>
- Setback dimensions:	_____	<u>NA</u>
- Number of units/ allocation of space:	_____	<u>NA</u>

	<u>Item Satisfied</u>	
	A	B
Vehicular and Pedestrian Ways:		
- Ingress and egress:	<u>✓</u>	<u> </u>
- Roadway layout	<u>✓</u>	<u> </u>
- Curb and pavement details:	<u> </u>	<u>NA</u>
- Traffic control:	<u> </u>	<u>NA</u>
- Parking areas:	<u>✓</u>	<u> </u>
- Number of spaces:	<u> </u>	<u>NA</u>
- Parking requirement calculations:	<u> </u>	<u>NA</u>
-Loading areas:	<u> </u>	<u>NA</u>
- Walkways:	<u> </u>	<u>NA</u>
- Handicap access features:	<u> </u>	<u>NA</u>
- Utility lines and facilities:	<u>✓</u>	<u> </u>
- Water system/ well location:	<u> </u>	<u>NA</u>
- Waste treatment system:	<u> </u>	<u>NA</u>
- Outdoor lighting:	<u> </u>	<u>NA</u>
- Signage:	<u> </u>	<u>NA</u>
- Fencing/screening:	<u> </u>	<u>NA</u>
- Dumpster (s) location:	<u> </u>	<u>NA</u>
- Construction phasing plan/ultimate development of site:	<u>✓</u>	<u> </u>
-Conformity with master plan:	<u>✓</u>	<u> </u>

Scenic Hudson, Inc.

One Civic Center Plaza, Suite 200
Poughkeepsie, NY 12601-3156
Tel: 845 473 4440
Fax: 845 473 0740
email: info@scenichudson.org
www.scenichudson.org



November 2, 2010

BY FAX: 518-851-2466

Mr. Lawrence Hermance, Chairman
Town of Livingston Planning Board
PO Box 65
Livingston, NY 12541

RE: Eger Communications
Application 06-01 submitted 06-02-10 for a 190' self-supporting communications tower

Dear Mr. Hermance:

A prior commitment prevents me from attending the November 3rd Planning Board meeting at which Eger Communications' telecommunications tower will be the subject at a continued public hearing on the above-referenced application.

Scenic Hudson respectfully requests that this letter, as well as the two attached letters from 1) the New York State Office of Emergency Management (NYSOEM) and 2) the United States Department of the Interior National Parks Service (NPS) be read into the record at the November 3rd public hearing.

Contained in the application for the telecommunications tower is a June 28, 2010 letter from Eger Communications to the Town of Livingston Planning Board. This letter, on page 6, contains a statement that requires clarification:

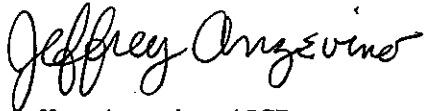
"In 2004 New York State Office of Emergency Management sought to place two 6' solid microwave dishes and one 8' solid microwave dishes (sic). Existing towers would not support it (sic). Proposed tower can accommodate them."

However, according to the attached letter dated October 27, 2010 from the NYSOEM, there is no longer a need to site the three solid microwave dishes (two 6' and one 8' diameter) on Blue Hill. The letter indicates that NYSOEM has determined that the cost of building and maintaining the proposed (in 2004) system was prohibitively expensive and, as a result, fiber optic cable was laid as an alternative to the large microwave dishes that were once sought to be sited on Eger Communications' tower on Blue Hill.

The second letter we are attaching is from the United Department of the Interior, National Park Service to Eger Communications. The letter indicates that Olana has since 2004 been listed on the National Parks Service's "Watch List of Threatened and Endangered National Historic Landmarks." The letter also requests that the National Park Service participate in the Section 106 consultation process for review of impacts on historic sites. The letter was copied to the federal Communications Commission, New York State Historic Preservation Office, and others, but we thought that the Town Planning Board, as lead agency in the SEQRA review, should also be aware of this information and this request.

Scenic Hudson has previously requested Consulting Party Status and looks forward to participating in this review. If you have any questions, please do not hesitate to call me at (845) 473-4440 x221.

Sincerely,

A handwritten signature in black ink that reads "Jeffrey Anzevino". The signature is fluid and cursive, with the first name "Jeffrey" and last name "Anzevino" clearly legible.

Jeffrey Anzevino, AICP
Director of Land Use Advocacy

Attachments: October 19, 2010 letter from United States Department of the Interior
October 27, 2010 letter from New York State office of Emergency Management

Cc Stephen DeSordo, Federal Communications Commission
John Bonafide, New York State Historic Preservation Office
Sara Griffen, The Olana Partnership
John Caffry, Esq.



**New York State Office of Emergency Management
1220 Washington Avenue
Building 22, Suite 101
Albany, NY 12226-2251**



David A. Paterson, Governor

Andrew X. Feeney, Director

October 27, 2010

**Jeffrey Anzevino, AICP
Director of Land Use Advocacy
Scenic Hudson, Inc.
One Civic Center Plaza, Suite 200
Poughkeepsie, NY 12601**

RE: NYSOEM Proposed Use of Tower on Blue Hill

Dear Mr. Anzevino,

I am writing in response to your request for information related to the use of a radio tower on Blue Hill by the New York State Office of Emergency Management (NYSOEM). During 2004, NYSOEM (formerly known as SEMO), hired a consultant for the purpose of providing a proposed communication solution, that would give NYSOEM communication redundancy between headquarters in Albany and offices in the lower Hudson Valley. The proposed solution included the placement of a 6' and an 8' microwave dish on the existing tower located on Blue Hill. However, because of the size of the dishes, the plan included strengthening the existing tower so that it could withstand the additional load. Building a second, stronger tower on the site was never part of the plan.

After carefully reviewing the proposal for the redundant system, NYSOEM determined that the cost of building and maintaining the proposed system was prohibitively expensive. As a result, NYSOEM sought other options and ultimately decided to lay fiber optic cable in order to ensure redundant communications capabilities between its offices. Because of this dedicated fiber network, NYSOEM no longer has any need to place microwave dishes on the tower on Blue Hill. The fiber network is a long term, cost effective solution that obviates any need for use of the radio tower.

If you have any additional questions or concerns regarding this issue, please do not hesitate to contact me at the number below.

Sincerely


**Kristine Hoffman
Counsel**



United States Department of the Interior

NATIONAL PARK SERVICE
Northeast Region
U.S. Custom House
200 Chestnut Street
Philadelphia, PA 19106-2878

IN REPLY REFER TO:

H30(4506)

OCT 19 2010

Mark Eger
Eger Communications
33 Eger Road
Hudson, NY 12534

Dear Mr. Eger:

The National Park Service (NPS) is writing to request to participate in the Section 106 consultation process for the Federal Communications Commission (FCC) permit for a communication tower at Blue Hill, Columbia County, NY. NPS will represent the Secretary of the Interior in the Section 106 consultation process. This proposed tower would be in the viewshed of the Frederic E. Church House (Olana), a National Historic Landmark (NHL) in Columbia County, NY. The NHL is owned by the State of New York as Olana State Historic Site. Olana was designated an NHL by the Secretary of the Interior on June 22, 1965.

We have listed Olana on our Watch List of Threatened and Endangered National Historic Landmarks since 2004. We hope the resolution of this project will reduce threats to Olana.

If you have any questions or have material for us to review, please contact Bill Brookover, Historical Architect, at 215-597-1774 or by e-mail at bill_brookover@nps.gov.

Sincerely,

Maryanne Gerbauckas
Associate Regional Director
Heritage Preservation, Planning & Compliance

cc:

Stephen DelSordo, Federal Communications Commission
John Bonafide, New York State Historic Preservation Office
Jeffrey Anzevino, Scenic Hudson
Sara J. Griffen, The Olana Partnership
Sara Olson, Superintendent, Roosevelt Vanderbilt National Historic Site

Caffry & Flower
ATTORNEYS AT LAW**100 BAY STREET
GLENS FALLS, NEW YORK 12801
(518) 792-1582 • FAX: 793-0541****JOHN W. CAFFRY
KRISTINE K. FLOWER****LEAH KELLY**
(Also Admitted in Florida)

MELISSA L. BAKER, Paralegal

April 5, 2011

Daniel Abeyta
Assistant Chief
Spectrum & Competition Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
1445 12th St. SW
Washington, DC 20554

Re: Complaint Regarding Eger Communications Tower Project
Blue Hill, Town of Livingston, Columbia County, New York

Dear Mr. Abeyta:

We represent Scenic Hudson, Inc. and The Olana Partnership in connection with the above-referenced matter. On their behalf, I am writing to request that the Federal Communications Commission do whatever is necessary, within its jurisdiction, to require Eger Communications ("Eger") to begin the National Historic Preservation Act ("NHPA") Section 106 consultation process for its proposed new tower project. Please consider this letter to be an "informal complaint" under the FCC's Nationwide Programmatic Agreement¹ and any other applicable processes of the FCC.

The proposed new tower would be located within the viewshed of the Olana State Historic Site ("Olana"), which was designated as a National Historic Landmark in 1965. Our clients believe, as does New York's State Historic Preservation Office ("SHPO"), the Office of Parks, Recreation and Historic Preservation ("OPRHP"), that the project will have an adverse visual effect on Olana and its viewshed.

¹ Nationwide Programmatic Agreement for Review of Effects on Historic Properties For Certain Undertakings Approved by the Federal Communications Commission, September 2004 ("Nationwide Programmatic Agreement").

Pursuant to the Nationwide Programmatic Agreement our clients have duly filed requests with Eger for consulting party status under NHPA Section 106 (copies enclosed as Exhibit A).² The National Park Service ("NPS") has filed a similar request (copy enclosed as Exhibit B). However, those requests have never been acknowledged by Eger, and Eger is pressing forward with the local application process for zoning approval of the tower. We are concerned that if this approval is received, Eger may start construction of the tower without the required NHPA consultation process having occurred.

The Proposed Eger Tower

Eger is the current owner and operator of two 190 foot tall guyed towers located on Blue Hill in the Town of Livingston, Columbia County, New York. Those towers support several antennas and other devices that are licensed by the FCC.³ Eger is now proposing to replace those two towers with a single 190 foot self-supporting tower. An application for approval of that tower is pending before the Town of Livingston Planning Board. Copies of the site plan and photos of the base area of the existing towers are enclosed as Exhibit D.

In addition, Eger also has an application pending before the Town of Livingston Zoning Board of Appeals for approval of another new tower on its Blue Hill property (hereinafter "the 2006 Application"). That application has been inactive for some time, but is still officially pending before the Town.

As shown by the enclosed photograph of Blue Hill that was taken from the Olana grounds (Exhibit E), the existing towers, and the site of the proposed new tower, are within the Olana viewshed and are visible from various significant locations on the Olana grounds. A map showing the relationship between Olana and Blue Hill is enclosed as Exhibit F.⁴ It is our clients' belief, and that of the SHPO, that the single new tower will actually have a greater adverse effect on Olana than the existing

² Exhibit A also includes a letter from Scenic Hudson to Eger requesting that the Area of Potential Effect under the Nationwide Programmatic Agreement be expanded to include Olana.

³ Copies of those licenses are enclosed as Exhibit C.

⁴ This map shows the location of the 2006 Application's proposed new tower. The site of the existing towers and the currently proposed replacement tower is slightly to the southwest, but is also on the ridgeline of Blue Hill.

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two towers, due to its greater bulk, and the fact that, for the most part, one of the existing towers currently screens the other tower from being visible from Olana.

FCC Jurisdiction Over the Project

If and when the new tower is approved by the Town, Eger will seek to relocate the existing antennas to the new tower. It also appears that Eger may seek to locate new antennas owned by current or new customers on the new tower. It is our understanding that either of these actions would trigger FCC's statutory jurisdiction over the project.

The FCC is required to consider these actions under the National Environmental Policy Act and the National Historic Preservation Act. It would be far more efficacious if these reviews were to occur before construction begins on the tower, rather than after it is built, so that any required alterations to the project and mitigation measures could be incorporated into the tower beforehand, rather than requiring it to be altered or demolished after the fact.

Preserving the Olana Viewshed Is an Issue of National Importance

Olana was the home of Frederic Church, the renowned painter of the Hudson River School in the Nineteenth Century. It is now owned by the State of New York and is operated by OPRHP as the Olana State Historic Site. It presently includes the Church House, outbuildings and about 336 acres of land. It is located in the Town of Greenport, less than 2 miles northwest of the proposed tower site. It receives over 100,000 visitors per year. The majority of these visitors do not tour the House and instead spend their entire visit on other parts of the property.

Olana is a National Historic Landmark, and is on the State and National Registers of Historic Places. It is located within the Catskill-Olana Scenic Area of Statewide Significance ("SASS") designated by the New York Department of State ("DOS") as part of the state's Coastal Zone Management Program. The preservation of the Olana viewshed is listed as a Priority Project in the 2009 New York State Open Space Conservation Plan (p. 82).

It is not just the Olana House that is historically significant. The entire property is important. In the late 1850s Church began a three year search that culminated in 1860 with his purchase of the first piece of the property that would become Olana. He would spend the next four decades of his life

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developing Olana into what has been called "perhaps the finest remaining example in the country of the Picturesque style" of landscape gardening. Comprehensive Plan, p. 15.⁵

The Picturesque style of gardening relied on creating artificial gardens that "were 'natural appearing.'" Toole Report, p. 3.⁶ Landscape artists like Frederic Church were "considered the most appropriate designer[s] of what came to be described as the 'Picturesque' landscape garden." Toole Report, p. 3. DOS, in the SASS Report⁷ (p. 121) has acknowledged this connection:

Selected and shaped by one of the Hudson River School's most important practitioners, the Olana landscape symbolizes a unique blend of the natural and the designed, the picturesque and sublime that formed the essence of the Hudson River School aesthetic.

This effect was created, at least in part, by the Olana grounds: "enhanced with planned outward views, framed by a foreground that the artist could manipulate with the design of buildings, roadways, and new plantings." Toole Report, p. 3.

According to the SASS Report (p. 98):

The panoramic views available from Olana and its grounds are similar in composition to many of Church's most renowned works - vegetated foreground of great variety and interest framing a middle ground containing open pastures and water elements such as ponds and winding creeks, and a deep

⁵ New York State Office of Parks, Recreation and Historic Preservation, Olana State Historic Site Final Comprehensive Plan and Final Environmental Impact Statement at 23 (2002), hereinafter "Comprehensive Plan". If the FCC would like to have copies of any of the Olana-related documents cited herein, please contact us and copies will be provided promptly.

⁶ Robert Toole, Opinion on the Matter of St. Lawrence Cement, March 16, 2005 (hereinafter "Toole Report"). Mr. Toole is a landscape architect who has worked on the Olana site for over twenty years and who developed Olana's Landscape Restoration Plan, which was approved by OPRHP in the Comprehensive Plan in 2002.

⁷ New York Department of State Division of Coastal Resources and Waterfront Revitalization, Scenic Areas of Statewide Significance (1993) (hereinafter "SASS Report").

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background encompassing majestic rivers and distant mountains.

The SASS Report recognized the importance of the many carefully composed panoramas carefully placed by Church throughout the Olana grounds. Id.

Olana's views were central to Church's vision for the property. He said of Olana:

[h]ere I am on my own farm - ! ... About an hour this side of Albany is the Center of the world - I own it.

1996 Historic Landscape Report,⁸ p. 50, quoting, Letter from Frederic E. Church to Erastus Dow Palmer, July 7, 1869.

Mr. Church personally oversaw the creation of the forested and panoramic views from his property. These were crafted as carefully as any of his paintings. During the construction of Ridge Road, a carriage path, the views from which were its primary feature, Church said that "he was creating 'more and better landscapes in this way than by tampering with canvas and paint in the studio.'" 1996 Historic Landscape Report, pp. 102-103.

Olana is one of the few places in the world where someone is able to review the work of an artist such as Church and then be able to gaze upon the real landscape which was the object of the painting. Constructing communications towers in that landscape would be severely detrimental to that experience.

OPRHP, as the SHPO, has consistently acknowledged and supported the protection and restoration of the historic landscape at Olana. The Comprehensive Plan was prepared in cooperation with, and approved by, OPRHP. The document outlines and analyzes the proposed restoration plans for the grounds and the house at Olana. The mission statement for OPRHP in the Comprehensive Plan (p. 25) states:

[a]t Olana State Historic Site, OPRHP is committed to the preservation of the historic structures, **the designed landscape, the views from the site**, the historical and artistic collections, and the archeological resources, and to the interpretation of

⁸ The Office of R.M. Toole, Historic Landscape Report - Olana State Historic Site (1996), hereinafter "1996 Historic Landscape Report".

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these collections and the history of the property to the broadest possible audience (emphasis added).

The Comprehensive Plan expands upon that statement of mission:

The broad vision guiding the development of the site is to restore Church's works of art-Olana, its historic buildings, its historic landscape, its views and its collections-to their condition in 1890-1900, creating an attractive late 19th century experience for the visitor; preserving a state, national and international treasure; and making it available for the enjoyment and education of current and future generations.

Comprehensive Plan, p. 27.

The landscape, which is of national significance, is a critical component of the Olana experience and the site's unique sense of place. The landscape is a work of art, a consciously designed composition that serves as the setting for expansive views and for the overall experience of anyone traversing the site. The landscape is also a work of 19th century landscape gardening and is as much a work of art as the house and paintings, and should be treated as such. Restoration and interpretation is a primary goal of the Plan.

Comprehensive Plan, p. 49. The national significance of the site has been a settled question 1965, when Olana was designated a National Historic Landmark. See Comprehensive Plan, p. 23.

No single view is the focus of OPRHP's protection. The Comprehensive Plan specifically notes that:

During Church's life time, the landscape and house offered 360 degree panoramic views of the Hudson River, Catskill Mountains, and the Berkshire and Taconic ranges ... These views were the principal subjects of many of Church's finest sketches, and also inspired two generations of Hudson River School artists.

Comprehensive Plan, p. 50. The importance of protecting a 360 degree view from the Olana property has been confirmed by numerous experts. According to Franklin Kelly, "[i]t is important to understand that there never was a single prime view

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from the property, but rather the possibility of multiple views...". Kelly Report, p. 2.⁹

Robert M. Toole has described the relationship between Frederick Church and Olana as follows:

Frederic Church was inspired by the Olana estate, calling it 'the Center of the world.' He intended that from this 'Center' one could look outward in all directions. Church described off-site views as linking Olana to a wider world, 'of mountains, rolling and savannah country, villages, forests and clearings.' Olana's setting and its overviews, were crucial element[s] of the property's sense of place.

Toole Report, p. 6. This demonstrates that there was no single view, from the Church house or otherwise, that was the focus of Mr. Church's work. The whole property, its landscapes and its views were all considered to be works of art.

Church's artistic interest in the view of Blue Hill from Olana is evidenced by the fact that Blue Hill, where the existing towers are located, and the new tower is proposed, was the subject of several paintings by Church. Copies of those paintings are enclosed herein as Exhibit G.¹⁰ A present-day viewer looking at Blue Hill, the object of these paintings, would also have a clear view of the proposed tower, if it is ever constructed.

The grounds of Olana and its historic landscape are a major attraction for Olana's visitors. Olana has over 100,000 visitors annually, only approximately 21,000 of whom tour the Church

⁹ Franklin Kelly, Supplemental Report, January 31, 2005 (hereinafter "Kelly Report"), submitted in opposition to the proposed Saint Lawrence Cement plant. The plans for the plant were ultimately rejected by New York State Department of State as inconsistent with the New York State's Coastal Zone Management Plan. Mr. Kelly was the Senior Curator of American and British Paintings at the National Gallery of Art in Washington, and is the foremost expert on Frederic Church and his art.

¹⁰ The copy of the painting entitled "Blue Hill from Cosy Cottage" has an arrow imposed on it showing the location of the 2006 Application. The currently proposed tower would be located to the right of the arrow.

House.¹¹ Even in a study of those who toured the house, "when people were asked what their favorite activity on the property was, 'enjoying the landscape' was the second most popular choice; only after seeing the House, itself." Id. "Among returning visitors, even more report that enjoying the landscape was their favorite activity at Olana." Id.

The Olana Partnership, OPRHP, the government of New York State, the federal government, and numerous charitable foundations and philanthropists have contributed large amounts of money to the restoration, maintenance, and improvement of Olana. Id., at 10-11. The total cost of the restoration project was predicted to be over \$8.9 million dollars. Comprehensive Plan at 67. Of that, approximately \$1.8 million was the predicted cost of restoring the historic landscape. Comprehensive Plan at 67. This is all money that is an investment in the surrounding communities. Members of the surrounding communities are often hired to work on the restoration projects, especially the landscape restoration. Moreover, Olana's ability to draw in tourists impacts local communities because Hudson River Valley tourism depends on the integrity of its attractions.

The New York State Department of State ("DOS") has recognized the importance of the views from Olana, and has never narrowed its consideration to only views from the house:

The Olana subunit was included in the Catskill-Olana SASS not only for its own beauty but also for the beauty of its surrounding views, which Church often included in his paintings. The Olana subunit is unique. The Olana property is a designed landscape of extraordinary importance that recognizes its connection to the landscape beyond its borders. Olana's viewsheds are some of the most dramatic and famous in the Hudson River Valley. The estate grounds and the views from the estate were represented in several of Church's paintings, and they are highly recognized by the public for their scenic, historic, and artistic values. The site is considered one of the finest designed landscapes and a masterpiece of American landscape design. Olana's landscape is recognized as one of national significance (Landscape Restoration Plan, Olana State Historic Site). The incorporation of the superlative views of the Hudson Valley in the design of both the mansion and the grounds establishes an

¹¹ "Report on Olana State Historic Site and The Olana Partnership" (p. 8), The Olana Partnership, March 18, 2005.

April 5, 2011

intrinsic connection between the property and the land outside its borders.¹²

In the Saint Lawrence Cement decision, quoted above, DOS determined that the proposed cement plant was inconsistent with New York State's Coastal Zone Management Plan. One of the reasons that DOS rejected the proposed cement plant was because it would have marred the views from Olana's grounds and from Cosy Cottage. This is consistent with the positions that OPRHP has taken over the years.

The OPRHP-approved Comprehensive Plan (p. 50) specifically encourages TOP and Scenic Hudson to actively advocate for the protection of the views from Olana.

Olana's viewshed is so important that OPRHP and The Olana Partnership should remain alert to possible adverse impacts and should seek to eliminate or mitigate them through educational efforts and cooperation with groups such as Scenic Hudson.

The Potential Adverse Visual Impacts of
the Eger Tower on Olana Would be Significant

As proven by the statement by Jeffrey Anzevino of Scenic Hudson (9/1/10), the letter by Sara Griffen of The Olana Partnership (8/31/10), the letter by The Saratoga Associates (9/1/10), the letter by Mr. Anzevino dated November 2, 2010, and the attachments to all four of these submittals,¹³ the proposed tower would have significant adverse effects on the scenic, historic and environmental characteristics of Olana, its viewshed and its surroundings. These documents also demonstrate that the applicant's visual impact documentation is extremely inadequate and inaccurate. They also show that even though the proposed new tower would replace two existing towers, due to its size and shape, **it will have a greater visual impact than the two existing towers.**

The enclosed December 2, 2010 letter from OPRHP to the Town of Livingston (Exhibit I) confirms this analysis: "the **newly**

¹² Department of State Coastal Zone Management Program "Objection to Consistency Certification" (p. 18), application by St. Lawrence Cement Company, LLC - Greenport Project - Hudson River, dated April 19 2005, F-2004-0863.

¹³ Copies of these documents are enclosed as Exhibit H.

April 5, 2011

proposed replacement tower would be significantly more visible in the historic viewshed" and it is **"demonstrably more visible in the landscape** than the exiting [sic] guyed units which are viewed one behind the other from Olana." (emphasis added) OPRHP also stated in this letter that it "views this new proposal as having a potential Adverse Effect on a historic resource."

As discussed above, the potential for significant adverse impacts to Olana is so great that the NPS requested consulting party status for this project under Section 106. As stated in that request, Olana has been on NPS's "Watch List of Threatened and Endangered National Historic Landmarks" since 2004.

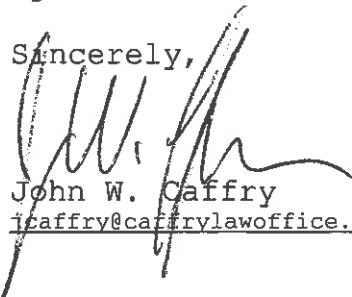
During the review of the 2006 Application, OPRHP expressed its concerns about the project several times.¹⁴ It concluded, in a letter dated February 23, 2009, that the 2006 Application's proposed new tower would have a significant adverse impact on Olana. That finding is equally as valid for the current proposed tower, which may be as big as, or bigger than, the 2006 Application's tower.

OPRHP's letters also refute many of the claims made in connection with the current application, including that the existing intrusions into the viewshed justify approving the new tower. Indeed, the February 23, 2009 letter described the existing tower, which the larger new one would replace, as an "intrusion".

Conclusion

For all of these reasons, it is essential that the proposed new Eger tower be reconsidered, relocated, or redesigned, to avoid or mitigate its adverse effects on Olana. The Section 106 consulting process and FCC's NEPA review could be crucial in doing so. Therefore, we request that FCC do whatever it can to commence those processes prior to any construction occurring.

Sincerely,



John W. Caffry
jcaffry@caffrylawoffice.com

¹⁴ Attached as Exhibit J are copies of letters from OPRHP regarding the 2006 Application, dated April 30, 2007, May 30, 2007, August 15, 2007, May 30, 2008, and February 23, 2009.

Daniel Abeyta
Re: Eger Communications Tower Project

11

April 5, 2011

JWC/ljs
enc.

cc: Stephen DelSordo, FCC
Mark Eger, Eger Communications
Robert Gagen, Esq., Attorney for Eger
Town of Livingston Planning Board
Theodore Hilscher, Esq., Attorney for Planning Board
Maryanne Gerbauckas, NPS
Ruth Pierpont, OPRHP
Sara Griffen, TOP
Jeffrey Anzevino, Scenic Hudson
(w/enc.)

\\C_f_data\public\Client.Files\Scenic-Liv.2163\FCC.let.wpd

EXHIBIT “A”

Scenic Hudson, Inc.
One Civic Center Plaza, Suite 200
Poughkeepsie, NY 12601-3157
Tel: 845 473 4440
Fax: 845 473 2648
email: info@scenichudson.org
www.scenichudson.org



September 1, 2010

Mr. Mark Eger
Eger Communications
33 Eger Road
Hudson, NY 12534

RE: Request for Consulting Party Status
Proposed Self Supporting 190' Wireless Telecommunications Facility on Blue Hill
Application Number 06-01 submitted on June 2, 2010

Dear Mr. Eger:

Scenic Hudson is writing to request "Consulting Party" status under the National Historic Preservation Act Section 106, pursuant to the "Nationwide Programmatic Agreement for Review of Effects on Historic Properties For Certain Undertakings Approved by the Federal Communications Commission."

It has come to our attention that you have submitted to the Town of Livingston Planning Board an application for a new 190-foot telecommunications tower to replace the existing 190' twin guyed towers at Blue Hill.

We understand that some may interpret the programmatic agreement to categorically exclude "replacement towers" from Section 106 Review. However, while this application is for a tower that would replace a tower of similar height, the proposed lattice tower's design (18.5 feet wide at the base, visible above the treeline as 13.6 feet wide when viewed from the Olana State Historic Site) would be substantially more visible than the existing facility. The existing facility is comprised of two thin 190-foot tall masts, visible from Olana as one mast because of their siting. It is supported by guy wires and about 2.2 feet wide. Therefore the proposed "replacement" tower would be about six (6) times as wide as the tower it would replace. Therefore, we believe it appropriate that the Federal Communications Commission and State Historic Preservation Office consider the additional visual impacts that the proposed replacement tower would impose upon visitors to Olana.

In addition, the applicant has an outstanding 2006 application for another 190-foot lattice tower approximately 900 feet to the southeast of the proposed 2010 facility before the Town of Livingston Zoning Board of Appeals. Scenic Hudson has previously requested Consulting Party Status on that application as well.

The combination of these two proposed telecommunications facilities would set a dangerous precedent that could potentially lead to a tower farm marring one of New York State's most important historic viewsheds – one that attracts tens of thousands of visitors annually and substantially contributes to the regional economy.

As you know, Blue Hill is one of the principal natural features in the viewshed of the Olana State Historic Site, a National Historic Landmark listed on the National and State Registers of Historic Places. The above-referenced proposed telecommunications facility would have an adverse effect on the view from Olana, which was the home of the renowned 19th Century painter Frederic Church.

Scenic Hudson is a 501(c) (3) not-for profit organization that works to protect and restore the Hudson River and its majestic landscape as an irreplaceable national treasure and a vital resource for residents and visitors. Since 1986, we have protected over 1,000 acres in the Olana viewshed.

Scenic Hudson's interest in the proposed telecommunications tower on Blue Hill is directly related to our investment in the Olana viewshed. The site of the proposed tower is approximately 135 feet from a 242-acre conservation easement held by Scenic Hudson. The purpose of the easement is to protect the view from the Olana State Historic Site, the property line of which is less than two miles from the proposed site of the tower.

The historic significance of Olana includes not only the home and landscape created by Church, but also the views that inspired him as well. Simply stated, the view from Olana is world renowned. Last year, approximately 130,000 people visited Olana, availing themselves of these views. In fact, Olana has produced a brochure entitled *Olana Views* documenting the importance of views to Frederic Church, as well as to the tens of thousands of visitors each year to Olana.

Thus, Scenic Hudson requests Consulting Party Status in order that we may participate in the historic preservation review of the application for the telecommunications facility on Blue Hill.

Sincerely,

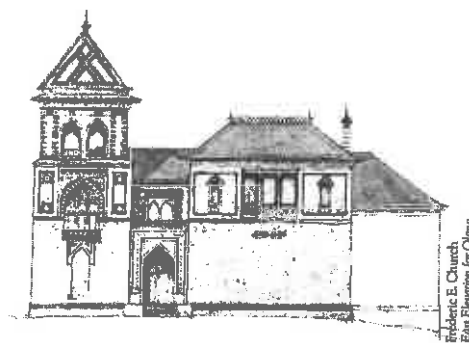
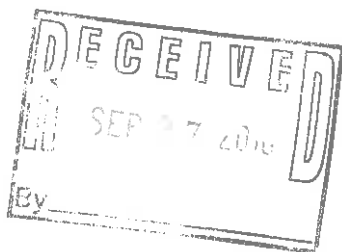
A handwritten signature in black ink, appearing to read "Jeffrey Anzevino". The signature is fluid and cursive, with the first name "Jeffrey" being more prominent and the last name "Anzevino" written in a continuous script.

Jeffrey Anzevino, AICP

Cc: John Bonafide, Historic Preservation Office
Stephen Del Sordo, Cultural Resources Specialist,
Federal Communications Commission
Lawrence Hermance Chair
Town of Livingston Planning Board
Katry Harris, Advisory Council on Historic Preservation
John Caffry, Esq.
Sara Griffen, The Olana Partnership
Ted Hilscher, Esq.
Daniel McKay, Preservation League of New York
Roberta Lane, National Trust for Historic Preservation

September 23, 2010

Mr. Mark Eger
Eger Communications
33 Eger Road
Hudson, NY 12534



The Olana Partnership

RE: Request for Consulting Party Status
Proposed Self Supporting 190' Wireless Telecommunications Facility
on Blue Hill
Application Number 06-01 submitted on June 2, 2010

Dear Mr. Eger:

At the suggestion of the Federal Communications Commission, The Olana Partnership is writing to request "Consulting Party" status under the National Historic Preservation Act Section 106, pursuant to the "Nationwide Programmatic Agreement for Review of Effects on Historic Properties For Certain Undertakings Approved by the Federal Communications Commission."

I am writing in reference to your application to the Town of Livingston Planning Board for a new 190-foot telecommunications tower which would replace the existing 190' twin guyed towers at Blue Hill. We understand that the proposed lattice tower's design would be about six (6) times as wide as the tower it would replace. Therefore, we believe it appropriate that the FCC and the Historic Preservation Office consider the additional visual impacts that the proposed replacement tower would impose upon visitors to Olana.

In addition, the applicant has an outstanding 2006 application for another 190-foot lattice tower approximately 900 feet to the southeast of the proposed 2010 facility before the Town of Livingston Zoning Board of Appeals.

We are concerned that the two proposed telecommunications facilities would set a dangerous precedent that could potentially lead to a tower farm on Blue Hill which would be directly in the viewshed of the Olana State Historic Site, a National Historic Landmark listed on the National and State Registers of Historic Places.

The Olana Partnership is a 501(c) (3) not-for profit organization that works cooperatively with New York State in the operation of Olana. The eminent Hudson River School painter Frederic Edwin Church (1826-1900) designed Olana, his family home, studio, and estate as an integrated environment embracing architecture, art, and landscape. Considered one of the most important artistic residences in the United States, Olana embraces unrivaled panoramic views of the vast Hudson Valley. And as

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Mr. Mark Eger
Page 2

you know, Blue Hill is one of the principal natural features in Olana's viewshed. The Olana Partnership requests Consulting Party Status in order that we may participate in the discussion and review of the application for the telecommunications facility on Blue Hill.

You are welcome to respond either by mail or via email at sgriffen@olana.org. If you would like to discuss this or any other matter related to your application I would welcome the opportunity. I can be reached at (518) 828-1872 ext. 106.

Sincerely,



Sara J. Griffen
President

Cc: John Bonafide, Historic Preservation Office
Robert J. Gagen, Esq.
Stephen Del Sordo, Cultural Resources Specialist,
Federal Communications Commission
Lawrence Hermance, Chair
Town of Livingston Planning Board
Katry Harris, Advisory Council on Historic Preservation
Jeffrey Anzevino, AICP, Scenic Hudson
John Caffry, Esq.
Ted Hilscher, Esq.
Daniel McKay, Preservation League of New York
Roberta Lane, National Trust for Historic Preservation

Scenic Hudson, Inc.
One Civic Center Plaza, Suite 200
Poughkeepsie, NY 12601-3157
Tel: 845 473 4440
Fax: 845 473 2648
email: info@scenichudson.org
www.scenichudson.org



October 7, 2010

Mr. Mark Eger
Eger Communications
33 Eger Road
Hudson, NY 12534

RE: Request for expansion of "Area of Potential Effect" ("APE")
Proposed Self Supporting 190' Wireless Telecommunications Facility on Blue Hill
Application Number 06-01 submitted on June 2, 2010

Dear Mr. Eger:

Scenic Hudson is writing to request that the "Area of Potential Effect" ("APE") for the above-referenced telecommunications facility be expanded from ½ mile to include the Olana State Historic Site ("Olana"). Olana has since 1978 been listed on the National Register of Historic Places and was designated a National Historic Landmark in 1965.

While the "Nationwide Programmatic Agreement for Review of Effects on Historic Properties For Certain Undertakings Approved by the Federal Communications Commission" ("Programmatic Agreement") identifies a default APE of ½ mile for a tower of less than 200 feet in height, the Programmatic Agreement also authorizes the Applicant and State Historic Preservation Office ("SHPO") to mutually agree upon an alternative APE. Since the proposed tower is proposed on Blue Hill, one of the principal natural features in Olana's viewshed and depicted in several paintings by the renowned 19th Century painter Frederic Church, and the tower would introduce a discordant element into and would likely have an adverse impact on the viewshed, it is appropriate to expand the APE.

Scenic Hudson is a 501(c) (3) not-for profit organization that works to protect and restore the Hudson River and its majestic landscape as an irreplaceable national treasure and a vital resource for residents and visitors. Since 1986, we have protected over 1,000 acres in the Olana viewshed. Scenic Hudson's interest in the proposed telecommunications tower on Blue Hill is directly related to our investment in the Olana viewshed. The site of the proposed tower is approximately 135 feet from a 242-acre conservation easement held by Scenic Hudson. The purpose of the easement is to protect the view from the Olana.

The historic significance of Olana includes not only the home and landscape created by Church, but also the views that inspired him as well. Simply stated, the view from Olana is world renowned. Last year, approximately 130,000 people visited Olana, availing themselves of these views. In fact, Olana has produced a brochure entitled *Olana Views* documenting the importance of views to Frederic Church, as well as to the tens of thousands of visitors each year to Olana.

Thus, Scenic Hudson requests that the APE be amended to include the entire property of the Olana State Historic Site.

Sincerely,

A handwritten signature in cursive script, reading "Jeffrey Anzevino".

Jeffrey Anzevino, AICP
Director of Land Use Advocacy

Cc: John Bonafide, Historic Preservation Office
Stephen Del Sordo, Cultural Resources Specialist,
Federal Communications Commission
Lawrence Hermance Chair
Town of Livingston Planning Board
Blythe Semmer, Advisory Council on Historic Preservation
John Caffry, Esq.
Sara Griffen, The Olana Partnership
Ted Hilscher, Esq.
Daniel McKay, Preservation League of New York
Roberta Lane, National Trust for Historic Preservation

EXHIBIT “B”



United States Department of the Interior

NATIONAL PARK SERVICE

Northeast Region
U.S. Custom House
200 Chestnut Street
Philadelphia, PA 19106-2878

IN REPLY REFER TO:

H30(4506)

OCT 19 2010

Mark Eger
Eger Communications
33 Eger Road
Hudson, NY 12534

Dear Mr. Eger:

The National Park Service (NPS) is writing to request to participate in the Section 106 consultation process for the Federal Communications Commission (FCC) permit for a communication tower at Blue Hill, Columbia County, NY. NPS will represent the Secretary of the Interior in the Section 106 consultation process. This proposed tower would be in the viewshed of the Frederic E. Church House (Olana), a National Historic Landmark (NHL) in Columbia County, NY. The NHL is owned by the State of New York as Olana State Historic Site. Olana was designated an NHL by the Secretary of the Interior on June 22, 1965.

We have listed Olana on our Watch List of Threatened and Endangered National Historic Landmarks since 2004. We hope the resolution of this project will reduce threats to Olana.

If you have any questions or have material for us to review, please contact Bill Brookover, Historical Architect, at 215-597-1774 or by e-mail at bill_brookover@nps.gov.

Sincerely,

Maryanne Gerbauckas
Associate Regional Director
Heritage Preservation, Planning & Compliance

cc:

Stephen DelSordo, Federal Communications Commission
John Bonafide, New York State Historic Preservation Office
Jeffrey Anzevino, Scenic Hudson
Sara J. Griffen, The Olana Partnership
Sara Olson, Superintendent, Roosevelt Vanderbilt National Historic Site

EXHIBIT “C”



Federal Communications Commission
Wireless Telecommunications Bureau

RADIO STATION AUTHORIZATION

LICENSER: NEW YORK COMMUNICATIONS CO., INC.

ATTN: RICHARD M. LACQUETTE
NEW YORK COMMUNICATIONS CO., INC.
53 WEST CEDAR STREET
POUGHKEEPSIE, NY 12601

Call Sign WPTP340	File Number 0003856665
Radio Service YG - Industrial/Business Pool, Trunked	
Regulatory Status PMRS	
Frequency Coordination Number	

FCC Registration Number (FRN): 0003450673

Grant Date 11-14-2001	Effective Date 06-03-2009	Expiration Date 11-14-2011	Print Date 06-03-2009
--------------------------	------------------------------	-------------------------------	--------------------------

STATION TECHNICAL SPECIFICATIONS

Fixed Location Address or Mobile Area of Operation

Loc. 1 Address: BLUE HILL RD 2 BOX 111A
City: HUDSON County: COLUMBIA State: NY
Lat (NAD83): 42-11-10.3 N Long (NAD83): 073-48-48.5 W ASR No.: Ground Elev: 192.0

Loc. 2 Area of Operation
Land Mobile Control Station meeting the 6.1 Meter Rule: COLUMBIA county, NY

Loc. 3 Area of Operation
Operating within a 32.0 km radius around fixed location 1

Antennas

Loc. No.	Ant. No.	Frequencies (MHz)	Sta. Cls.	No. Units	No. Pagers	Emission Designator	Output Power (watts)	ERP (watts)	Ant. Ht./Tp meters	Ant. AAT meters	Construct Deadline Date
1	1	000451.21250000	PMR	1		11K0F3E	100.000	200.000	36.0	151.0	11-14-2002
1	1	000451.61250000	PMR	1		11K0F3E	100.000	200.000	36.0	151.0	11-14-2002
2	1	000456.61250000	FX1	1		11K0F3E	40.000	40.000			
2	1	000456.21250000	FX1	1		11K0F3E	40.000	40.000			
3	1	000451.21250000	MC	100		11K0F3E	40.000	40.000			11-14-2002
3	1	000451.61250000	MC	100		11K0F3E	40.000	40.000			11-14-2002

Conditions:

Pursuant to §309(h) of the Communications Act of 1934, as amended, 47 U.S.C. §309(h), this license is subject to the following conditions: This license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized herein. Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of the Communications Act of 1934, as amended. See 47 U.S.C. § 310(d). This license is subject in terms to the right of use or control conferred by §706 of the Communications Act of 1934, as amended. See 47 U.S.C. §606.



Page 1 of 2
Federal Communications Commission
Wireless Telecommunications Bureau

40

RADIO STATION AUTHORIZATION

Licensee: New York Communications Company Inc

FCC Registration

Number (FRN): 0003450673

RICHARD LACQUETTE
NEW YORK COMMUNICATIONS COMPANY INC
53 W CEDAR ST
POUGHKEEPSIE NY 12601

Call Sign WQGS559	File Number 0002978274
Radio Service 1G - Industrial/Business Pool, Conventional	
Regulatory Status PMRS	
Frequency Coordination Number 20070402132636	

Grant Date	Effective Date	Expiration Date	Print Date
04-05-2007	04-05-2007	04-05-2017	04-05-2007

STATION TECHNICAL SPECIFICATIONS

Fixed Location Address or Mobile Area of Operation

Loc. 1
Address
BLUE HILL
City
HUDSON
County
COLUMBIA
State
NY
Lat (NAD83): 42-11-13.3 N Long (NAD83): 73-48-40.1 W ASR No.: 1257734 Ground Elev: 190.8
Loc.
Area of Operation
Operating within a 32.0 km radius around fixed location number 1.

Antennas

Loc. No.	Ant. No.	Frequencies (MHz)	Sta. Cls.	No. Units	No. Pagers	Emission Designator	Output Power (watts)	ERP (watts)	Ant. Ht./Tp meters	Ant. AAT meters	Construct Deadline Date
1	1	463.262500	FB6	1	0	11K2F9W	50.000	100.000	60.4	175.2	04-05-2008
1	1	464.437500	FB6	1	0	11K2F9W	50.000	100.000	60.4	175.2	04-05-2008
1	1	464.737500	FB6	1	0	11K2F9W	50.000	100.000	60.4	175.2	04-05-2008
2	1	469.737500	MO6	200	0	11K2F9W	20.000	20.000			04-05-2008
2	1	483.262500	MO6	200	0	11K2F9W	20.000	20.000			04-05-2008
2	1	464.437500	MO6	200	0	11K2F9W	20.000	20.000			04-05-2008
2	1	464.737500	MO6	200	0	11K2F9W	20.000	20.000			04-05-2008
2	1	468.262500	MO6	200	0	11K2F9W	20.000	20.000			04-05-2008
2	1	469.437500	MO6	200	0	11K2F9W	20.000	20.000			04-05-2008

Control Points

Address

Conditions:

Pursuant to Section 309(h) of the Communications Act of 1934, as amended, 47 U.S.C. Section 309(h), this license is subject to the following conditions: This license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized herein. Neither the license nor the right granted hereunder shall be assigned or otherwise transferred in violation of the Communications Act of 1934, as amended. See 47 U.S.C. Section 310(d). This license is subject in terms to the right of use or control conferred by Section 706 of the Communications Act of 1934, as amended. See 47 U.S.C. Section 606.

Regulatory Status

PMRS

Frequency Coordination Number

FCC Registration Number (FRN): 0003450673

Grant Date

04-18-2001

Effective Date

06-03-2009

Expiration Date

04-18-2011

Print Date

06-03-2009

STATION TECHNICAL SPECIFICATIONS

Fixed Location Address or Mobile Area of Operation

Loc. 1 Address: BLUE HILL, RD 2

City: HUDSON

County: COLUMBIA

State: NY

Lat (NAD83): 42-11-10.3 N

Long (NAD83): 073-48-48.5 W

ASR No.: N/A

Ground Elev: 192.0

Loc. 2 Area of Operation

Land Mobile Control Station meeting the 6.1 Meter Rule: NY

Loc. 3 Area of Operation

Operating within a 32.0 km radius around fixed location 1

Antennas

Loc. No.	Ant. No.	Frequencies (MHz)	Sta. Cls.	No. Units	No. Pagers	Emission Designator	Output Power (watts)	ERP (watts)	Ant. Ht./Tp meters	Ant. AAT meters	Construct Deadline Date
1	1	000461.86250000	F88	1		11K2F3E	90.000	200.000	36.0	151.0	04-18-2002
1	1	000463.83750000	F88	1		11K2F3E	90.000	200.000	36.0	151.0	04-18-2002
1	1	000464.83750000	F88	1		11K2F3E	90.000	200.000	36.0	151.0	04-18-2002
2	1	000466.86250000	FX1	1		11K2F3E	90.000	90.000			
2	1	000468.83750000	FX1	1		11K2F3E	90.000	90.000			
	1	000469.83750000	FX1	1		11K2F3E	90.000	90.000			

Conditions:

Pursuant to §309(h) of the Communications Act of 1934, as amended, 47 U.S.C. §309(h), this license is subject to the following conditions: This license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized herein. Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of the Communications Act of 1934, as amended. See 47 U.S.C. § 310(d). This license is subject in terms to the right of use or control conferred by §706 of the Communications Act of 1934, as amended. See 47 U.S.C. §606.

ULS License

**Industrial/Business Pool, Conventional License - KT7565 -
VALLEY OIL CO INC**

Call Sign	KT7565	Radio Service	IG - Industrial/Business Pool, Conventional
Status	Active	Auth Type	Regular
Dates		Expiration	05/02/2014
Grant	03/16/2004	Cancellation	
Effective	03/16/2004		
Control Points			
1	P: (518)851-3921		

Licensee		Type	Corporation
FRN	0010568327		
Licensee			
VALLEY OIL CO INC		P:(518)851-3921	
RT 9H BOX 430		F:(518)851-3930	
CLAVERRACK, NY 12513			
ATTN RUSSELL BECK			

Contact

Land Mobile Data

Extended Implementation (Slow Growth)	Assoc. Call Signs
---	----------------------

Eligibility

90

Ownership and Qualifications

Radio Service Type Mobile

Regulatory Status Interconnected

Alien Ownership

Is the applicant a foreign government or the representative of any foreign government?

Is the applicant an alien or the representative of an alien?

Is the applicant a corporation organized under the laws of any foreign government?

Is the applicant a corporation of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a



October 1, 2008

Mr. Mark Eger
Eger Communications
33 Eger Road
Hudson, NY 12534

Mr. Jack Schroeder, Chairman
Town of Livingston Zoning Board of Appeals
Town Hall, County Route 19
Livingston, NY

RE: Letter of Intent to Co-Locate
AT&T Proposed Equipment Upgrade
Eger Communications Proposed Tower Location
33 Eger Road
Hudson, NY 12534
Coordinates: Latitude: N42° - 11' - 13.36343"
W73° - 48' - 40.16541

Gentlemen:

AT&T is an FCC licensed, nationwide provider of wireless communications services, currently in the process of making significant expansions and improvements to its network of communications facilities in upstate New York. Specifically, we have identified a need for substantial upgrades to the existing equipment currently operating on the Eger Communications facility, located in the Town of Livingston, NY.

We have been provided with a copy of the structural analysis completed by Clough Harbour and Associates, LLP, dated March 18, 2008 indicating that the facility that is currently accommodating AT&T's equipment is structurally incapable of additional loading. We have also been informed that there are plans for a new facility to be located at the above referenced coordinates. AT&T has reviewed the proposed location and would like to express interest in acquiring space on the proposed facility, to make the necessary upgrades to the existing equipment servicing the areas around the Town of Livingston, NY.

Sincerely,

A handwritten signature in dark ink, appearing to read "Jay Min".

AT&T Mobility - Upstate NY
Sr. Mgr - Real Estate & Construction

REFERENCE COPY

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Federal Communications Commission

Wireless Telecommunications Bureau

RADIO STATION AUTHORIZATION

LICENSEE: ALBANY COMMUNICATIONS LTD

ATTN: CINDY MIRELLA
ALBANY COMMUNICATIONS LTD
91 COLVIN AVE
ALBANY, NY 12206

Call Sign WPNV626	File Number 0001689211
Radio Service YG - Industrial/Business Pool, Trunked	
Regulatory Status PMRS	
Frequency Coordination Number	

FCC Registration Number (FRN): 0004490413

Grant Date 04-13-2004	Effective Date 04-13-2004	Expiration Date 07-07-2014	Print Date
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STATION TECHNICAL SPECIFICATIONS

Fixed Location Address or Mobile Area of Operation

Loc. 1 Address: RD 2 BOX 111A
City: HUDSON County: COLUMBIA State: NY
Lat (NAD83): 42-11-10.3 N Long (NAD83): 073-48-48.5 W ASR No.: N/A Ground Elev: 192.0
Loc. 2 Area of operation
Land Mobile Control Station meeting the 6.1 Meter Rule: NY
Loc. 3 Area of operation
Operating within a 32.0 km radius around fixed location 1

Antennas

Loc	Ant No.	Frequencies (MHz)	Sta. Ck.	No. Units	No. Pagers	Emission Designator	Output Power (watts)	ERP Power (watts)	Ant. Ht./Tp (meters)	Ant. AAT (meters)	Construct Deadline Date
1	1	000451.38750000	FB8	1		11K0F3E	110.000	200.000	36.0	151.0	
1	1	000451.58750000	FB8	1		11K0F3E	110.000	200.000	36.0	151.0	
2	1	000456.38750000	FX1	1		11K0F3E	40.000	40.000			
2	1	000456.58750000	FX1	1		11K0F3E	40.000	40.000			

Conditions:

Pursuant to §309(h) of the Communications Act of 1934, as amended, 47 U.S.C. §309(h), this license is subject to the following conditions: This license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized herein. Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of the Communications Act of 1934, as amended. See 47 U.S.C. § 310(d). This license is subject in terms to the right of use or control conferred by §706 of the Communications Act of 1934, as amended. See 47 U.S.C. §606.

Licensee Name: ALBANY COMMUNICATIONS LTD

Call Sign: WPNV626

File Number: 0001689211

Print Date:

Antennas

Loc No.	Ant No.	Frequencies (MHz)	Sta. Cls.	No. Units	No. Pagars	Emission Designator	Output Power (watts)	ERP (watts)	Ant. Ht./Tp meters	Ant. AAT meters	Construct Deadline Date
3	1	000456.38750000	MO8	125		11K0F3E	110.000	75.000			
3	1	000456.58750000	MO8	125		11K0F3E	100.000	100.000			

Control Points

Control Pt. No. 1

Address: RT 9 W

City: PORT EWEN County: State: NY Telephone Number: (914)331-7555

Associated Call Signs

Waivers/Conditions:

NONE



Page 1 of 2
Federal Communications Commission
Wireless Telecommunications Bureau

37

RADIO STATION AUTHORIZATION

Licensee: Diederich, Thomas E

FCC Registration
Number (FRN): 0006526666

THOMAS DIEDERICH
DIEDERICH, THOMAS E
749-RT, 408
PO BOX 92
WESTERLO NY 12193

Call Sign WPRS934	File Number 0002553577		
Radio Service IG - Industrial/Business Pool, Conventional			
Regulatory Status PMRS			
Frequency Coordination Number 26-0283			
Grant Date 01-24-2006	Effective Date 04-04-2006	Expiration Date 01-18-2016	Print Date 04-05-2006

STATION TECHNICAL SPECIFICATIONS

Fixed Location Address or Mobile Area of Operation

Loc. 1
Address
110 HILL RD
City
HUDSON County
COLUMBIA State
NY
Lat (NAD83): 42-11-10.3 N Long (NAD83): 73-48-48.5 W ASR No.: N/A Ground Elev.: 179.0

Loc. 2
Area of Operation
Nationwide: South of Line A US
Area of Operation:
Operating within a 32.0 km radius around fixed location number 1.

Antennas

Loc. No.	Ant. No.	Frequencies (MHz)	Sta. Ctr.	No. Units	No. Pagers	Emission Designator	Output Power (watts)	ERP (watts)	Ant. Ht./Tp. meters	Ant. AAT meters	Construct. Deadline Date
1	1	461.250000	FB6	1	0	20K0F3E	110.000	165.000	36.0	137.0	01-18-2002
1	1	464.275000	FB6	1	0	20K0F3E	80.000	165.000	36.0	137.0	01-18-2002
1	1	461.700000	FB6	1	0	20K0F3E	70.000	70.000	36.0	137.0	01-18-2002
2	1	151.525000	MDI	20	0	20K0F3E	35.000				04-04-2007
2	1	464.500000	MDI	20	0	20K0F3E	35.000				
2	1	469.500000	MDI	20	0	20K0F3E	35.000				
3	1	461.250000	MD	100	0	20K0F3E	110.000				01-18-2002
3	1	464.275000	MD	100	0	20K0F3E	110.000				01-18-2002
3	1	466.250000	MD	100	0	20K0F3E	110.000				01-18-2002
3	1	469.275000	MD	100	0	20K0F3E	110.000				01-18-2002

Conditions:

Pursuant to Section 309(h) of the Communications Act of 1934, as amended, 47 U.S.C. Section 309(h), this license is subject to the following conditions: This license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized herein. Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of the Communications Act of 1934, as amended, Sec 47 U.S.C. Section 310(d). This license is subject in its right of use or control conferred by Section 706 of the Communications Act of 1934, as amended, 47 U.S.C. Section 606.

REFERENCE COPY

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Federal Communications Commission
Wireless Telecommunications Bureau

RADIO STATION AUTHORIZATION

LICENSEE: USA MOBILITY WIRELESS, INC.

ATTN: KATHRYN WENRICK, VP
USA MOBILITY WIRELESS, INC.
3000 TECHNOLOGY DRIVE # 400
PLANO, TX 75074

Call Sign WPSG659	File Number
Radio Service GS - Private Carrier Paging, 929-930 MHz	
Regulatory Status CMRS	
Frequency Coordination Number	

FCC Registration Number (FRN): 0015608417

Grant Date 04-18-2001	Effective Date 10-30-2008	Expiration Date 04-18-2011	Print Date 12-17-2008
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STATION TECHNICAL SPECIFICATIONS

Fixed Location Address or Mobile Area of Operation

Loc. 1 Area of operation

Operating Nationwide including Hawaii, Alaska, and US Territories.

Antennas

Loc Ant Frequencies
No. No. (MHz)

Sta. Cls.	No. Units	No. Pagers	Emission Designator	Output Power (watts)	ERP (watts)	Ant. Ht./Tp meters	Ant. AAT meters	Construct Deadline Date
FB6C	1	30000	20K0F1D 20K0F3E	500.000	3500.000			

1 1 000929.61250000

Control Points

Control Pt. No. 1

Address: 3000 TECHNOLOGY BLVD., SUITE 400

City: PLANO **County:** COLLIN **State:** TX **Telephone Number:** (800)989-1296

Associated Call Signs

Conditions:

Pursuant to §309(h) of the Communications Act of 1934, as amended, 47 U.S.C. §309(h), this license is subject to the following conditions: This license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized herein. Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of the Communications Act of 1934, as amended. See 47 U.S.C. § 310(d). This license is subject in terms to the right of use or control conferred by §706 of the Communications Act of 1934, as amended. See 47 U.S.C. §606.

Licensee Name: USA MOBILITY WIRELESS, INC.

Call Sign: WPSG659

File Number:

Print Date: 12-17-2008

Waivers/Conditions:

This nationwide license is authorized in accordance with WT Docket No. 96-18, FCC 97-59, released 2/24/1997.

Unauthorized Copy



Federal Communications Commission
Public Safety and Homeland Security Bureau

RADIO STATION AUTHORIZATION

LICENSEE: COLUMBIA, COUNTY OF

ATTN: DIRECTOR OF 911
COLUMBIA, COUNTY OF
85 INDUSTRIAL TRACT RD
HUDSON, NY 12534

Call Sign WNEL354	
File Number 0004021303	
Radio Service MW - Microwave Public Safety Pool	
SMSA	Station Class FXO

FCC Registration Number (FRN): 0004484622

Grant Date	Effective Date	Expiration Date	Print Date
09-10-2009	11-12-2009	11-01-2019	11-13-2009

LOCATION

Fixed Location Address or Area of Operation:

BLUE HILL FARM

City: LIVINGSTON

County: COLUMBIA

State: NY

Loc No.	Location Name	Latitude	Longitude	Elevation	Antenna Structure Registration No.
001	BLUE HILL	42-11-10.3 N	073-48-48.5 W	192.0	
002	0358	42-15-05.3 N	073-44-58.4 W	51.8	
003	COLUMBIA HSP	42-14-47.1 N	073-46-39.9 W	61.9	

FREQUENCY PATHS

Frequency (MHz)	Tol (%)	Emission Desig	EIRP (dBm)	Constr Date	Path No	Seg	Emit Loc No	Ant Hgt (m)	Gain (dBi)	Beam (deg)	POL	AZIM (deg)	Rec Loc No	Rec Call Sign
2184.0	0.00100	800KF9W	44.700		001	1	001	18.3	26.7	7.1	V	36.0	002	WGY730
10626.25	0.00100	2M50D7W	53.700	05-12-2011	002	1	001	18.6	34.6	3.1	V	23.8	003	

Waivers/Conditions:

NONE

Conditions:

Pursuant to §309(h) of the Communications Act of 1934, as amended, 47 U.S.C. §309(h), this license is subject to the following conditions: This license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized herein. Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of the Communications Act of 1934, as amended. See 47 U.S.C. § 310(d). This license is subject in terms to the right of use or control conferred by §706 of the Communications Act of 1934, as amended. See 47 U.S.C. §606.

ULS License

Public Safety Pool, Conventional License - WYV332 - Columbia County of

Call Sign	WYV332	Radio Service	PW - Public Safety Pool, Conventional
Status	Active	Auth Type	Regular
Dates			
Grant	11/25/2003	Expiration	12/01/2013
Effective	11/25/2003	Cancellation	
Control Points			
1	610 State Street, HUDSON, NY P: (518)828-1263		

Licensee

FRN	0004484622	Type	Governmental Entity
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Licensee

Columbia County of PO Box P. O. Box 324 610 STATE ST HUDSON, NY 12534 ATTN P. J. Keeler, EMS Coordinator	P:(518)828-1263 F:(518)828-1279
--	------------------------------------

Contact

Columbia County Wayne F Gearing 11 Real View Drive East Chatham, NY 12060	P:(518)392-5704 F:(518)392-9385
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Land Mobile Data

Extended Implementation (Slow Growth)	Assoc.Call Signs
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Eligibility

No Eligibility Activity Information on File

Ownership and Qualifications

Radio Service Type	Mobile		
Regulatory Status	Private Comm	Interconnected	No

Alien Ownership

The Applicant answered "No" to each of the Alien Ownership questions.

Basic Qualifications

The Applicant answered "No" to each of the Basic Qualification questions.

Public Safety Pool, Conventional License - WYV332 - Columbia County of

Locations Summary

Call Sign WYV332 Radio Service PW - Public Safety Pool,
Conventional

4 Total Locations
10 Locations per Summary Page

 = Special Condition  = Termination Pending

Location	Transmitter Address / Area of Operation	Latitude, Longitude	Status
1 - Fixed	BLUE HILL FARM LIVINGSTON, NY COLUMBIA County	42-11-10.3 N, 073-48-48.5 W	
2 - Mobile	40.0 km radius around a fixed location 1		
3 - Fixed	W Hill Rd Austerlitz, NY COLUMBIA County	42-18-22.0 N, 073-29-27.0 W	
4 - Fixed	610 State Street Hudson, NY COLUMBIA County	42-14-56.3 N, 073-46-56.5 W	

4 Total Locations
10 Locations per Summary Page

Public Safety Pool, Conventional License - WYV332 - Columbia County of

Frequencies Summary

Call Sign WYV332

Radio Service PW - Public Safety Pool,
Conventional

8 Frequencies for all locations
20 Frequencies per Summary Page

SC = Special Condition **TP** = Termination Pending

Frequency	Loc#	Ant#	Freq ID	Station Class	Units	Paging Rec.	Output Power	Maximum ERP
000150.80500000	2	1	3	MO	560		50.000	50.000
000150.80500000	4	1	1	FX1	1		20.000	50.000
000155.29500000	1	1	1	FB	1		350.000	350.000
000155.29500000	2	1	1	MO	50		100.000	
000155.32500000	2	1	2	MO	560		50.000	50.000
000155.32500000	3	1	2	FB	1		125.000	90.000
000155.32500000	3	1	1	FB2	1		125.000	65.000
000155.32500000	4	1	2	FB	1		100.000	70.000

8 Frequencies for all locations
20 Frequencies per Summary Page

ULS License

**Public Safety Pool, Conventional License - WPCD775 -
GREENPORT RESCUE SQUAD**

Call Sign	WPCD775	Radio Service	PW - Public Safety Pool, Conventional
Status	Active	Auth Type	Regular
Dates			
Grant	01/16/2003	Expiration	03/30/2013
Effective	01/16/2003	Cancellation	

Control Points

1 610 STATE ST, HUDSON, NY.
P: (518)828-1263

Licensee

FRN	0003438355	Type	Corporation
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Licensee

GREENPORT RESCUE SQUAD PO Box 275 HUDSON, NY 12534	P:(518)829-8511 F:(518)822-0047
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Contact

Land Mobile Data

Extended Implementation (Slow Growth)	Assoc.Call Signs
---	---------------------

Eligibility

90.20 - 1. AMBULANCE SERVICE PROVIDING TREATMENT AND TRANSPORTATION 2. RADIO SYSTEM USED TO A) PAGE MEMBERS OF EMERGENCY CALLS, AND B) ALLOW TWO WAY COMMUNICATIONS BETWEEN EMERGENCY VEHICLES AND DISPATCHERS.

Ownership and Qualifications

Radio Service Type Mobile

Regulatory Status Private Comm Interconnected No

Alien Ownership

The Applicant answered "No" to each of the Alien Ownership questions.

Basic Qualifications

The Applicant answered "No" to each of the Basic Qualification questions.

Demographics

Public Safety Pool, Conventional License - WPCD775 - GREENPORT RESCUE SQUAD

Frequencies Summary

Call Sign WPCD775

Radio Service PW - Public Safety Pool,
Conventional

6 Frequencies for all locations
20 Frequencies per Summary Page

SC = Special Condition **TP** = Termination Pending

Frequency	Loc#	Ant#	Freq ID	Station Class	Units	Paging Rec.	Output Power	Maximum ERP
000155.20500000	1	1	1	FB	1		100.000	100.000
000155.20500000	2	1	1	FB	1		25.000	25.000
000155.20500000	3	1	1	FB	1		25.000	25.000
000155.20500000	4	1	1	FB	1		100.000	100.000
000155.20500000	5	1	1	MO	45		5.000	
000155.20500000	5	1	2	MO	16		100.000	

6 Frequencies for all locations
20 Frequencies per Summary Page

Public Safety Pool, Conventional License - WPCD775 - GREENPORT RESCUE SQUAD
Locations Summary

Call Sign WPCD775

Radio Service PW - Public Safety Pool,
Conventional

5 Total Locations
10 Locations per Summary Page

SC = Special Condition **TP** = Termination Pending

Location	Transmitter Address /Area of Operation	Latitude, Longitude	Status
1 - Fixed	610 STATE ST HUDSON, NY COLUMBIA County	42-14-35.3 N, 073-46-54.5 W	
2 - Fixed	218 RT 23B HUDSON, NY COLUMBIA County	42-14-37.3 N, 073-46-36.5 W	
3 - Fixed	71 PROSPECT AVE HUDSON, NY COLUMBIA County	42-14-36.3 N, 073-46-34.5 W	
4 - Fixed	85 INDUSTRIAL TRACT HUDSON, NY COLUMBIA County	42-14-38.3 N, 073-46-37.5 W	
5 - Mobile	40.0 km radius around a fixed location 2		

5 Total Locations
10 Locations per Summary Page

ULS License

**Public Safety Pool, Conventional License - KEG594 - COLUMBIA,
COUNTY OF**

Call Sign	KEG594	Radio Service	PW - Public Safety Pool, Conventional
Status	Active	Auth Type	Regular
Dates			
Grant	08/05/2005	Expiration	08/24/2015
Effective	04/04/2006	Cancellation	

Control Points

2 85 Industrial Tract, COLUMBIA, Hudson, NY
P: (518)828-1263

Licensee

FRN	0004484622	Type	Governmental Entity
-----	------------	------	---------------------

Licensee

COLUMBIA, COUNTY OF 610 STATE ST HUDSON, NY 12534 ATTN JAMES VAN DEUSEN FIRE COORDINATOR	P:(518)828-4114
---	-----------------

Contact

Columbia county 911 Robert C Lopez 85 Industrial Tract Hudson, NY 12534	P:(518)828-1263 F:(518)828-9088 E:lope38@govt.co.columbia.ny.us
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Land Mobile Data

Extended Implementation (Slow Growth)	Assoc.Call Signs
---	---------------------

Eligibility

90.20(A) - APPLICANT IS A GOVERNMENT ENTITY WHICH PROVIDES COMMUNICATIONS
ESSENTIAL TO ITS OFFICIAL ACTIVITIES.

Ownership and Qualifications

Radio Service Type	Mobile		
Regulatory Status	Private Comm	Interconnected	No

Alien Ownership

The Applicant answered "No" to each of the Alien Ownership questions.

Basic Qualifications

The Applicant answered "No" to each of the Basic Qualification questions.

Public Safety Pool, Conventional License - KEG594 - COLUMBIA, COUNTY OF

Locations Summary

Call Sign KEG594

Radio Service PW - Public Safety Pool,
Conventional

5 Total Locations

10 Locations per Summary Page

SC = Special Condition **TP** = Termination Pending

Location	Transmitter Address / Area of Operation	Latitude, Longitude	Status
1 - Fixed	BLUE HILL FARM LIVINGSTON, NY COLUMBIA County	42-11-10.3 N, 073-48-48.5 W	
2 - Fixed	W HILL RD AUSTERLITZ, NY COLUMBIA County	42-18-21.9 N, 073-29-26.7 W	
3 - Fixed	WILLIAM BLACK RESIDENCE NEW LEBANON CENTER, NY COLUMBIA County	42-26-51.3 N, 073-26-04.4 W	
4 - Fixed	610 STATE STREET HUDSON, NY COLUMBIA County	42-14-56.3 N, 073-46-56.5 W	
5 - Mobile	20.0 km radius around centerpoint	42-10-00.3 N, 073-39-58.4 W	

5 Total Locations

10 Locations per Summary Page

Public Safety Pool, Conventional License - KEG594 - COLUMBIA, COUNTY OF

Frequencies Summary

Call Sign KEG594

Radio Service PW - Public Safety Pool,
Conventional

17 Frequencies for all locations
20 Frequencies per Summary Page

SC = Special Condition **TP** = Termination Pending

Frequency	Loc#	Ant#	Freq ID	Station Class	Units	Paging Rec.	Output Power	Maximum ERP
000045.88000000	1	1	1	FB	1		100.000	134.000
000045.88000000	5	1	1	MO	20		100.000	100.000
000046.24000000	5	1	2	MO	150		100.000	100.000
000046.30000000	5	1	3	MO	150		10.000	10.000
000046.38000000	1	2	1	FB	1		100.000	132.000
000046.38000000	2	1	1	FB	1		100.000	148.000
000046.38000000	5	1	4	MO	150		100.000	100.000
000046.44000000	1	2	2	FB	1		100.000	132.000
000046.44000000	2	1	2	FB	1		100.000	148.000
000046.44000000	5	1	5	MO	150		100.000	100.000
000046.50000000	1	2	3	FB	1		100.000	132.000
000046.50000000	2	1	3	FB	1		100.000	148.000
000046.50000000	3	1	1	FB	1		100.000	76.000
000046.50000000	5	1	6	MO	150		100.000	100.000
000153.83000000	5	1	7	MO	50		10.000	10.000
000154.13000000	4	1	1	FB	1		100.000	120.000
000154.13000000	5	1	8	MO	50		50.000	50.000

17 Frequencies for all locations
20 Frequencies per Summary Page



Wednesday, August 18, 2010

NYAir
207 Jefferson Heights
Catskill, NY 12414
(518)966-4747

Eger Communications
33 Eger Rd
Hudson, NY 12534

NYAir, as part of our normal routine in sighting equipment for Information Services look at and take into consideration several key factors prior to testing signal levels.

- Scope, where is the demand for services
- Demographics
- Resources, existing structures, power, security, ease of access
- Maximum signal penetration per location to scope of project

NYAir completed a study of the Livingston boarders including over 1 (one) dozen surrounding towers and silo's and found that the signal produced from equipment NYAir uses for Information Services that is covered under Part 15 of the FCC rulings and recommended by the Manufacture is best suited at the site of Eger Communications to accomplish the Scope of the Project under project name "Livingston". Attached is an accurate representation of the type of studies NYAir completes for Sighting equipment, the pins are actual locations of the named sites.

Regards

A handwritten signature in black ink, appearing to read 'Arnie Cavallaro', with a large, stylized flourish at the end.

NYAir
Arnie Cavallaro

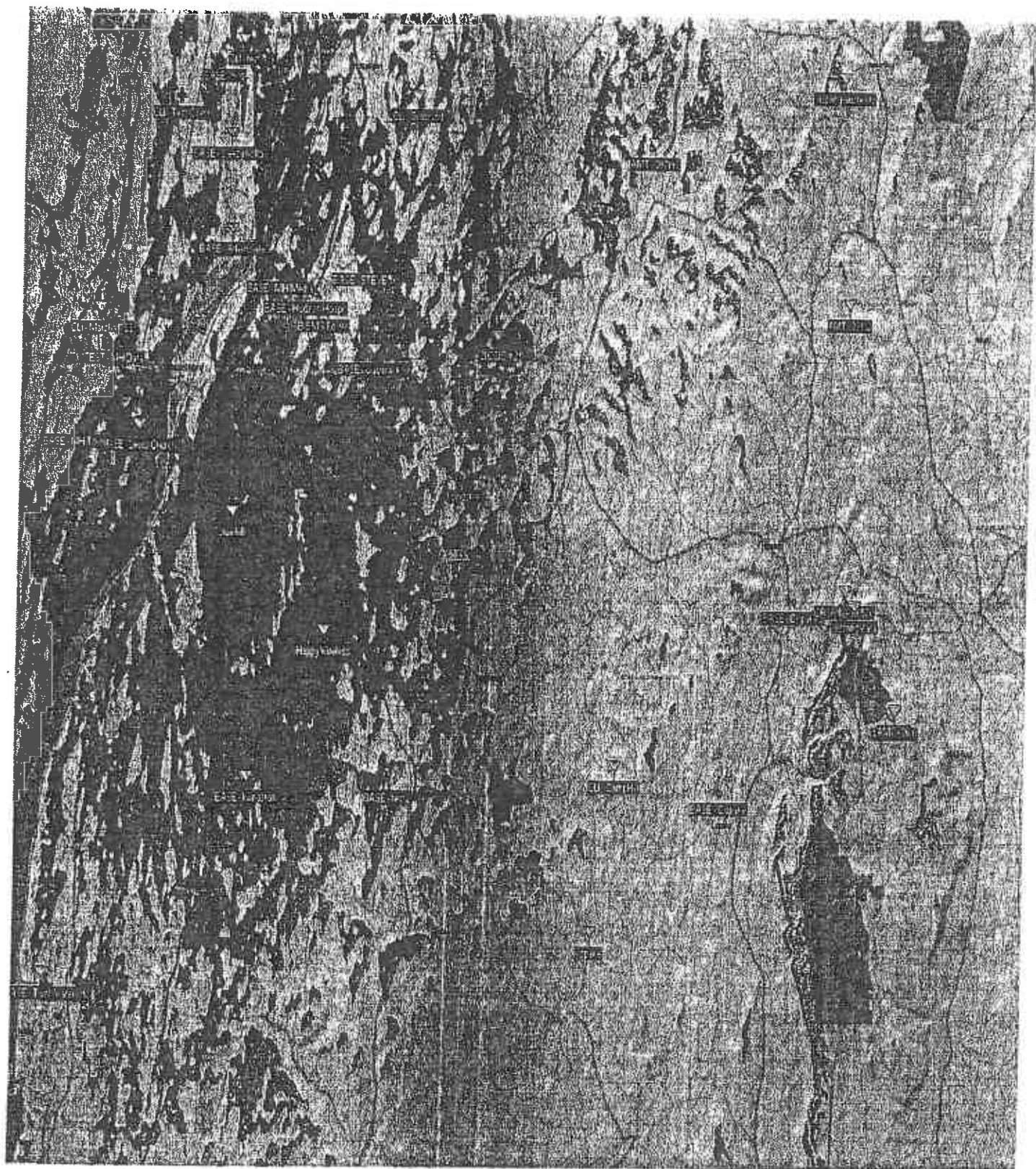
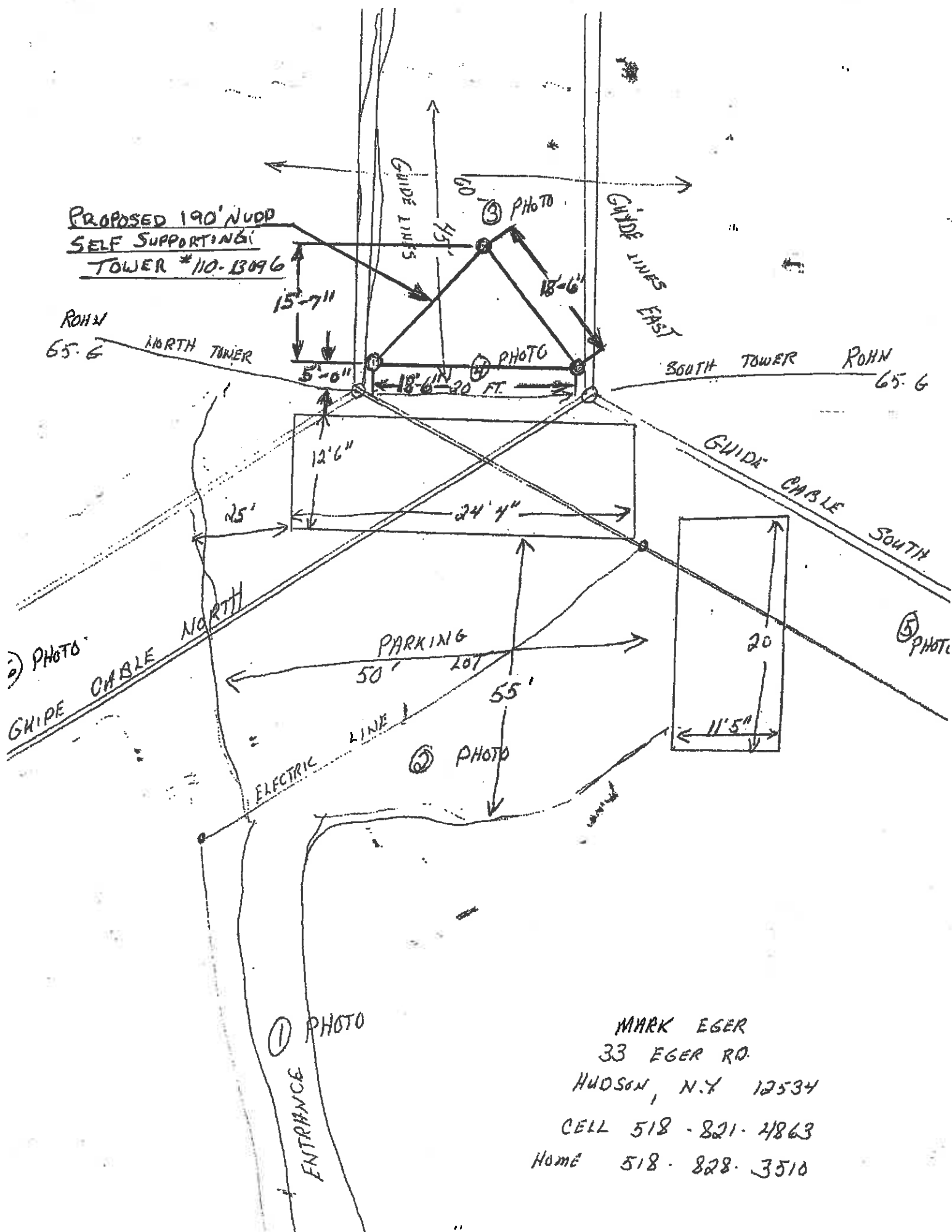


EXHIBIT “D”



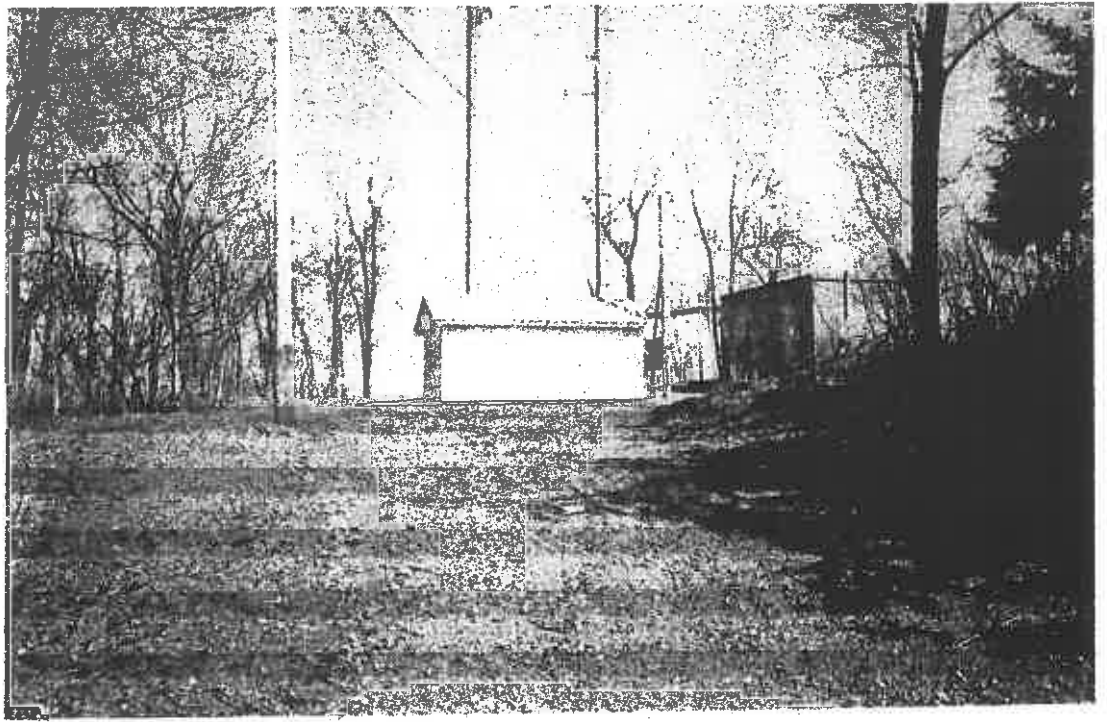


PHOTO # 2

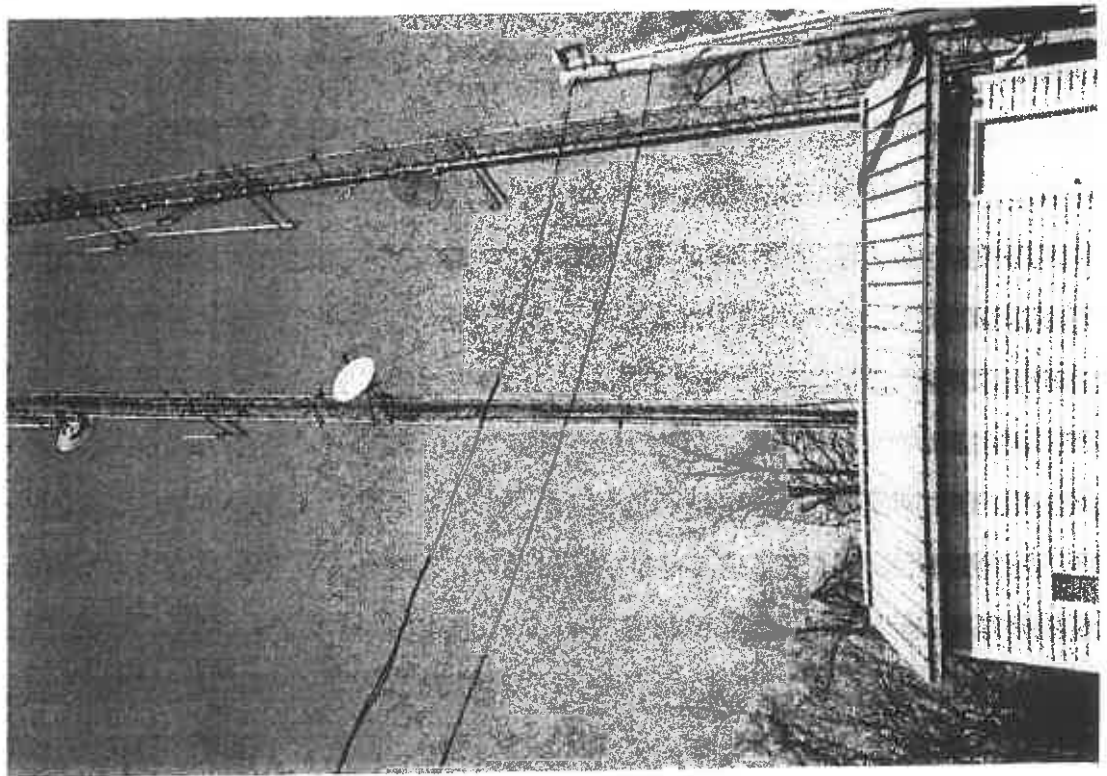
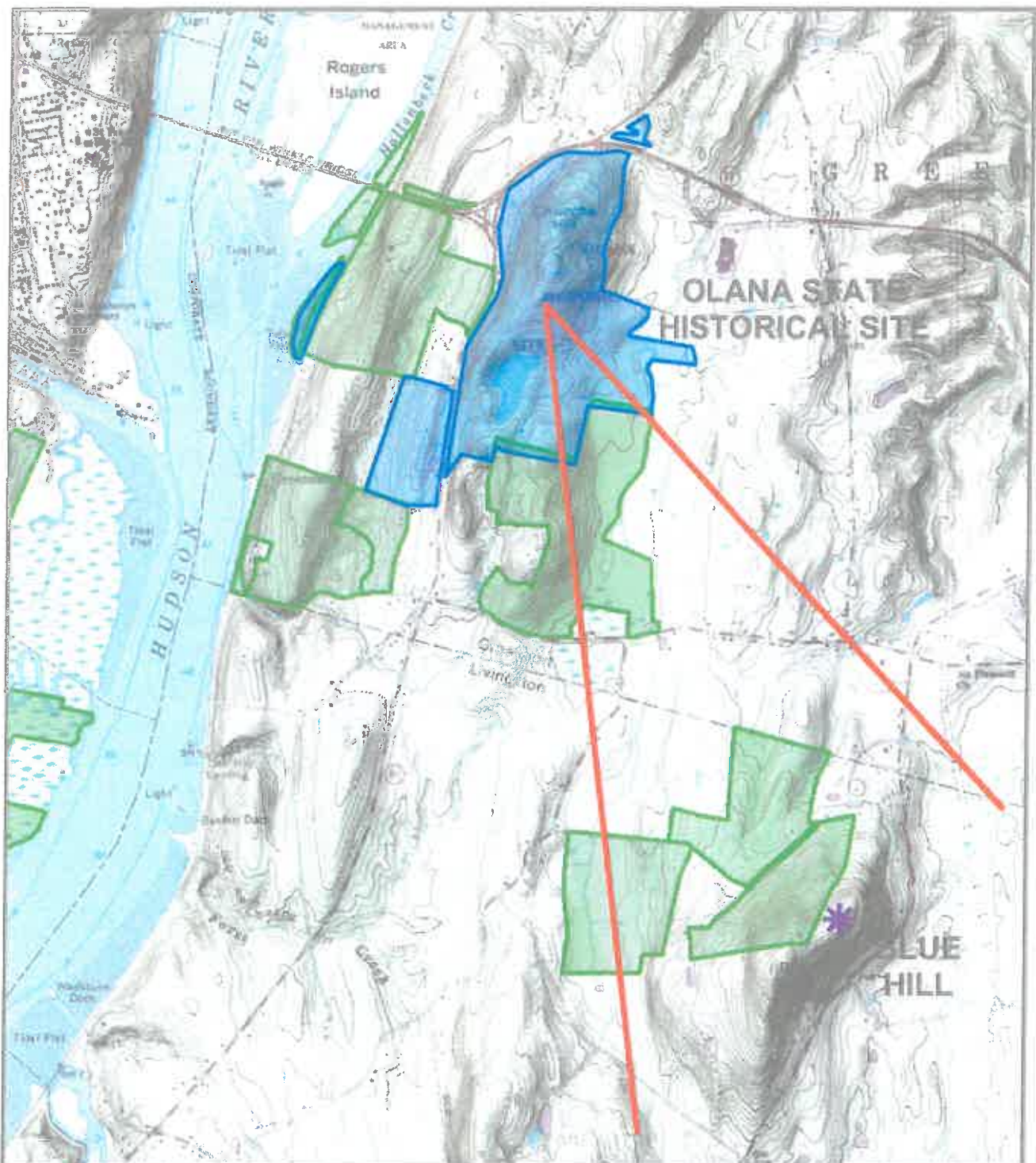


EXHIBIT “E”



EXHIBIT “F”



Proposed Telecommunications Tower, Olana, and Scenic Hudson Protected Property

Town of Livingston, Columbia County

Sources:

Topographic maps from United States Geological Survey, 7.5 minute series, Hudson South quadrangle

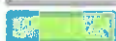
Tax parcel data from Columbia County Department of Real Property Tax, 1998



0 0.25 0.5 1 Miles



Created by: M. Wildonger, 4/26/07



Scenic Hudson Protected Property



Proposed Telecommunications Tower Location



Olana State Historical Site

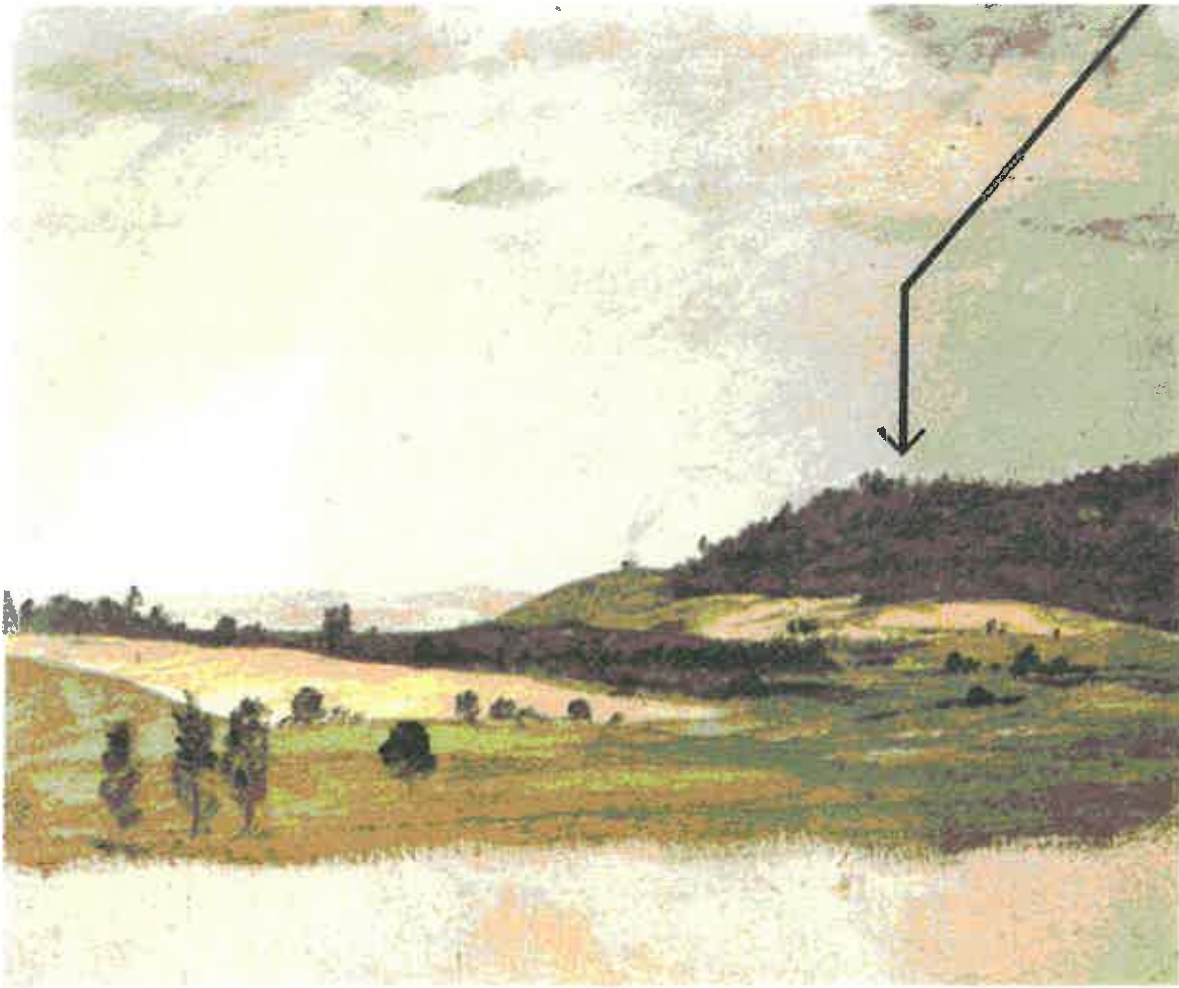


Approximate viewshed toward Blue Hill

EXHIBIT “G”



Winter Landscape with Blue Hill at Sunset - Hudson, New York



Blue Hill from Cosy Cottage



Storm Over Hudson Valley



Landscape, Hudson Valley



Sunrise Over Blue Hill, from Olana

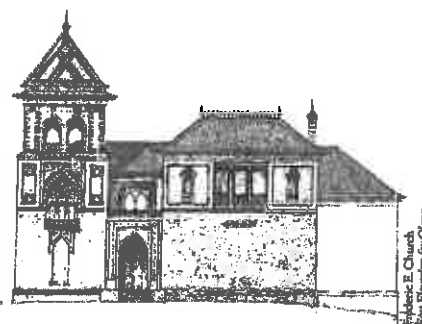


Hudson Valley, New York, near Olana

EXHIBIT “H”

August 31, 2010

Planning Board
Town of Livingston
County Route 19
Livingston, NY 13440



The Olana Partnership

Re: Application of Eger Communications, Town of Livingston, Columbia County

I am writing on behalf of The Olana Partnership in connection with the above-referenced application to the Town of Livingston Planning Board for site plan approval for construction of a lattice communications tower on Blue Hill. The Olana Partnership is the non-profit support arm of Olana State Historic Site, home, studio and designed landscape of one of America's most famous landscape painters, Frederic Edwin Church. As much as we support the town's need for appropriate telecommunications facilities, we are concerned about the significant adverse visual impacts on the Olana viewshed that would occur if the project, as proposed, were to be constructed.

The two applications for towers on Blue Hill must be looked at together as part of a "cumulative review" process under SEQRA.

As long as the 2007 application to build an additional communications tower on Blue Hill is in process, it must be assumed the tower will be built and that in the end there will be two lattice towers. This need for a cumulative review of the two applications is based on substantial case law which holds that when two applications are pending close to one another, in the SEQRA review of each project, the reviewing agencies must consider the cumulative impact of the two projects coming on line at the same time.

This is just one of the deficiencies of the visual analysis conducted by Philip Massaro & Sons. The analysis also understates the visual impact of the proposed tower and fails to take into consideration the significant landscape restoration projects underway at Olana which will open up more views towards Blue Hill.

The proposed "replacement tower" is actually far larger in mass than the current twin guyed towers

Even considered in isolation, the "replacement" is not a substitution of the same type of tower for another, but a change in the type of tower with a larger visual impact. Physically, the proposed lattice tower would be substantially more significant in mass. The width of each triangular side of each guyed tower in place now is 2'2", whereas the new tower would show a visible profile (viewed obliquely from Olana) that is about 13 feet wide at the tree line, or more than six times as wide as the profile of the existing tower. In addition, the proposed tower is designed to carry up to eighteen individual flat panel antennae that are 12" wide and 72" tall. The new tower will also accommodate multiple microwave dishes that in some cases are 8' in diameter. Additional appurtenances include mounts to accommodate whip antennas that can be 20' or more in height, and increase the mass by 4-6' in either direction where installed.

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The Massaro visual analysis understates the visual impact of the proposed tower.

The visual analysis included just six vantage points from which to determine whether or not one could see the tower: from Cosy Cottage, from the exit road, from the front door of the main house, from the approach road to the main house and two perspectives from the barns at Cosy Cottage. The conclusion was that the tower can be seen from only a couple of the "key" vantage points, and even those have problems with them.

While each of the photographs is commented on in an attachment, the general concern is that the analysis ignores the fact that the tower would be seen by the vast majority of visitors for a considerable amount of time, since it would be visible on the main road as visitors leave the property. The argument that people should not look around them as they drive is faulty, as drivers, going at the speed limit of 15 miles an hour, frequently find themselves viewing the magnificent scenery, often stopping to admire the views. In addition, most visitors come in groups and the passengers of cars or busses would have full view of the towers. Finally, the road is frequented by walkers who enjoy a much more leisurely walk up and down the road, including viewing the scenery in all directions.

In addition, it is extremely difficult to choose any six vantage points from which to see Olana's landscape, as it is meant to be seen from points throughout the 250 acre property – Frederic Church intended the main roads and 5 miles of carriage drives as platforms from which to see various aspects of the property, so one could easily find hundreds of other points where the tower will be very visible.

As Franklin Kelly, deputy director of the National Gallery, put it, "(it) is important to understand that there was never a single prime view from the property, but rather, the possibility of multiple views..."

Attached for your review is another five photographs that show a variety of places from which you can see the tower. The images are printed in 11 – 17 inch format so that the scale of the printed page held at arms length will match the scale of the landscape when viewed from the actual photo location. This should show that the visual analysis conducted by Philip Massaro & Sons did not accurately convey the magnitude of the impact.

One viewpoint that was noticeably missing is that from the studio site. This is a site from which Church painted some of his finest paintings, *The Afterglow*, 1867, *Scene in the Andes (or Bridge at San Luis Rey)*, 1867, *Catskill Mountains from the Home of the Artist*, 1871. It is also the spot about which he wrote "I am appalled when I look at the magnificent scenery which encircles my clumsy studio, and then glance at the painted oil-cloth on my easel" In addition, he painted many sketches of Blue Hill from this general vicinity, including the following:

1. Winter Landscape with Blue Hill at Sunset, Hudson NY
2. Blue Hill from Cosy Cottage
3. Storm over Hudson Valley
4. Landscape, Hudson Valley
5. sunrise Over Blue Hill, from Olana
6. Hudson Valley, New York, near Olana.

Copies are attached to this letter. TOP believes there may be a number of other images of Blue Hill that have just not been uncovered yet. Clearly, the view of Blue Hill is a view that Church treasured.

The Olana landscape is undergoing major restoration, which will affect the use of and views from Olana

In accordance with a Landscape Restoration Plan and a Comprehensive Plan for Olana State Historic Site, approved in 2002, Olana is in the midst of a phased restoration effort. Now that the restoration of the main house is substantially complete, the focus of efforts is now on the landscape. In 2009, most of the carriage drives were restored and new views opened to the north and west. Still ahead are planned projects to restore views to the east and restore the orchards behind the barns. In addition, we plan to restore the main barn in order to provide additional educational and community space. Once that is accomplished, we envision many more people visiting the site and enjoying areas that are currently overgrown and underutilized.

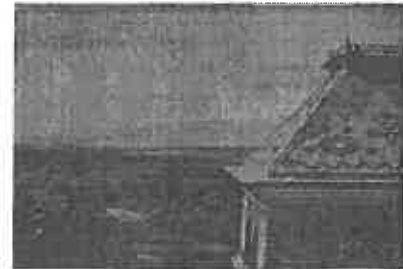
In addition, part of Olana's long term plan is to have what is now the "down" road turn into the road for both arriving and departing visitors. Given that the road gives a significant view to the tower, this will become an even greater impact than it is currently.

Why Olana's views are important

Olana is a National Historic Landmark, the importance of which has been recognized by State and federal governments. The importance of this landmark is not only the main house, but the full 250 acre Picturesque landscape designed by Frederic Church, the farm complex and Cosy Cottage, the five miles of carefully designed carriage drives, the man-made lake, as well as the 360 degree views surrounding the property.

Frederic Church created Olana as a 3-dimensional work of art, with a foreground (the house environs), middle ground (the rolling fields and forest), and background (the Hudson River, Catskill Mountains and Taconic Range). By keeping the views intact, the public is able to understand Church's genius as a painter in a way that would not otherwise be available to the public.

This was recognized in the Comprehensive Plan for Olana State Historic Site, which called for the need to "eliminate, reduce or mitigate threats" to the viewshed.



The New York State Department of State (DOS) has recognized the importance of Olana's viewshed through the creation of the Catskill-Olana Scenic Area of Statewide Significance (SASS). In the descriptive language about the SASS, it recognizes the importance of the surrounding views from Olana, not just the property itself. "Olana's viewsheds are some of the most dramatic and famous in the Hudson River Valley."

Why those views matter today

Today, Olana is one of the most visited historic sites in the Hudson Valley, with 130,000 visitors, only 21,000 of whom take tours of the house. The rest explore the grounds, hike the 5 miles of carriage drives, picnic at various spots throughout the property and otherwise enjoy the 250 acres available to them.

A study of our visitors showed that of the attributes visitors enjoyed most, the landscape, with its iconic views, came in second, behind only the house. These visitors go on to enjoy the restaurants in surrounding areas, stay at B & Bs and buy vegetables at the local farm stands. A recent economic

impact study was conducted which showed that Olana has an economic impact of \$7.9 million and supports 267 jobs.

In conclusion, we would like to reiterate that we fully support the need by the Town of Livingston for high quality telecommunications services. We would like to encourage the Town to find the means to do so in a way that works for the entire community, including Olana.

Yours truly,

A handwritten signature in black ink, appearing to read 'Sara J. Griffen', with a long horizontal line extending to the right.

Sara J. Griffen
President
The Olana Partnership

cc. Theodor Hilscher
Kevin McDonald
Jack Schroeder
Roy Brown

Attachments:

Images of Blue Hill painted by Frederic Church
Photographs of Blue Hill from various vantage points.

Appendix: Review of each photograph showing the tower from Olana

Photo 1 and 1A : The photo was taken from a spot near Cosy Cottage that indeed is not used a great deal today. However, our plans for the future of the farm complex are to restore the orchards and the main barn. At that point, there will be many more people in the area. As a consequence, they will see the tower with much greater frequency. Hopefully we will replicate the experience that the Churches had; from Mrs. Carnes' Diary, dated Monday May 22, 1882 we read that the "Livingston children spent day here....We took a long drive & got lost in the great orchard."

Photo 2 and 2 A. The photo was taken from the road that leads visitors from the main house to the exit. The visual analysis concludes that even though the tower is visible for a number of minutes as you descend the hill, if you kept your eyes on the road, you wouldn't see the tower. This conclusion omits the facts that the road is constantly frequented by walkers who enjoy a much more leisurely walk down the road, including viewing the scenery in all directions, that there are passengers in the cars and busses who would enjoy the view, and that even drivers, at the speed limit of 15 miles an hour, frequently find themselves viewing the magnificent scenery, often stopping to admire the views.

Photo 6. The photo from the front door of main house does show that one cannot see the tower from that vantage point. While it is understandable that this would be sought as a prime vantage point, it must be reiterated that Olana is much more than a view from the main house.

Photo 7: The view from the approach drive is an important vantage point, and the visual analyst does affirm that you can see the tower, though it is not visible in the picture. We would stress that while many views are difficult to see via a camera, it is a well known phenomenon that one can see much more with the naked eye than via camera. The fact is that you can see this tower from one of the prime vantage points on the property.

Photo 8 and photo 9: The views from these particular vantage points of the barns do not show the tower. However, there are other vantage points from the farm complex, once restored, that will show views of the tower.

SARATOGA ASSOCIATES

Landscape Architects, Architects,
Engineers, and Planners, P.C.

September 1, 2010

Jeffrey Anzevino, AICP
Scenic Hudson, Inc.
One Civic Center Plaza, Suite 200
Poughkeepsie, NY 12601

Re: Eger Communications Tower 3rd Party Review
Project #:

Dear Mr. Anzevino:

At your request we have completed our review of the applicant's visual assessment of the of the proposed Eger Communications tower on Blue Hill in the Town of Livingston, Columbia County New York. Based upon our review we find the applicant's submission significantly deficient in many ways. The following summarizes errors, omissions and inaccurate conclusions contained in the application.

1. **Failure to comply with requirements of the NYSDEC Visual Assessment Policy** - The application does not address key issues required under the New York State Department of Environmental Conservation (NYSDEC) Program Policy on Assessing and Mitigating Visual Impact (DEP-00-2) ("DEC Visual Policy"). Compliance with this policy is necessary for the application to be deemed complete under the State Environmental Quality Review Act (SEQRA). The DEC Visual Policy requires:
 - > Inventory and Analysis of Aesthetic Resources of Statewide Significance - The application makes no reference to several visual resources of statewide significance likely to be affected by the project including: the Hudson River (a National Heritage River), the Rip Van Winkle Bridge (a designated Scenic Byway), and the Catskill-Olana Scenic Area of Statewide Significance (as designated by the NYS Coastal Management Program). The application does provide a very limited assessment of project visibility from the Olana State Historic Site, however, this assessment does not adequately disclose the extent of project visibility from the Olana grounds, the number of affected visitors at this popular cultural resource, or the sensitivity of affected viewers to incongruent features on the visible landscape. Importantly, the application fails to acknowledge that project would be

SARATOGA ASSOCIATES

Mr. Jeffrey Anzevino, AICP

September 1, 2010

Page 2 of 6

located within the Olana's renowned southerly viewshed. In order for the application to be complete each of these issues must be addressed.

- > **Visual Assessment** - The DEC Visual Policy states, "[i]n all visual assessments, significant resources must be identified along with any potential adverse effects on those resources...At a minimum a line-of-sight profile, or, depending upon the scope and potential significance of the activity, a digital viewshed may be used to determine if a significant property is within the potential viewshed of the proposed project". The application includes no line-of-sight-profiles, viewshed mapping or any other technique identifying potential visual impact on inventoried resources.
- > **Consideration of Mitigation Strategies** - The DEC Visual Policy requires a visual assessment report address mitigation strategies to avoid, reduce or minimize visual impact. The application fails to discuss mitigation opportunities such as alternative siting, downsizing, monopole construction, or other feasible options.

The application must address the basic requirements of the NYSDEC Visual Policy in order to be deemed complete under SEQRA.

2. **Incomplete/inaccurate information reported on Appendix B - State Environmental Quality Review Visual EAF Addendum** - The EAF Addendum is inaccurate or incomplete in several places.

- > The Visual Addendum identifies the Olana State Historic Site as the only site or structure listed on the National Register of Historic Places within five miles of the project site. According to the National Park Service, more than 40 National Register sites are within five miles of the tower site.¹
- > The Visual Addendum states that the annual number of viewers likely to observe the proposed project is 9,750. This number is based on the average annual daily traffic volume (AADT) provided by the NYSDOT. However, the application fails to consider direct project visibility from the Olana State Historic Site that is visited by more than 130,000² visitors each year.
- > The Visual Addendum indicates that the frequency of visual impact for many viewer groups would be weekly. Obviously the impact on individuals engaged in travel to and from work, routine local travel by residents, or at a work site would be daily. The

¹ http://nrhp.focus.nps.gov/natreg/docs/Google_Earth_Layers.html

² Annual visitation provided by the Olana Partnership

SARATOGA ASSOCIATES

Mr. Jeffrey Anzevino, AICP

September 1, 2010

Page 3 of 6

application lists the frequency for views at a residence as seasonal. This should be daily. The application lists seasonal views under the category of "other" activity types, but fails to identify what is meant by "other".

3. **Substandard Photo Simulations** - The application includes a "Photographic Visual Aid Report," prepared by Phillip P. Massaro & Son, Professional Land Surveyors, dated July 2010. The report contains 14 photographs of the project site taken from a variety of local vantage points. The report purports to "accurately depict, upon existing photographs, the location and general appearance of the newly proposed lattice tower".
- > **Inaccurate Baseline Photography** - This report states that photographs were taken using a Panasonic DMC-LS80 8.1 mega pixel digital camera, with the zoom level set at 1x. The camera used is consumer grade "a point and shoot" model with a 33-100 mm film equivalent focal length zoom (or 3x zoom ratio). Standard visual assessment practice requires a lens setting of approximately 50 mm film equivalent focal length to approximate normal human eyesight relative to scale. The stated zoom setting of 1x is a meaningless measure in determining the degree of zoom relative to standard practice. However, if we assume the 1x zoom setting represents the camera's lowest zoom setting (i.e., 33 mm), the snapshots included in the "Photographic Visual Aid Report" are at a wide angle setting, thus making the existing tower and simulated proposed tower appear farther in the distance than would be actually viewed by the human eye.
- > **Lack of Viewing Instructions for Photo Simulations** - Photo simulations are printed at an 8.5" x 11" page format. The application does not instruct the reader on how to accurately view the photo simulations. Typically a 50mm single frame simulation will be printed on an 11" x 17" page format. At this image size, the page should be held at approximately arms length so that the scene will appear at the correct scale. Viewing the image closer would make the scene appear too large and viewing the image from greater distance would make the scene appear too small compared to what an observer would actually see in the field. Without viewing instructions it is likely that review agencies and the general public will misinterpret project visibility.
- > **Inappropriate Photo Simulation Technique** - This report states that the photo simulations were created in MS Paint software by "drafting" the proposed tower into the existing conditions photographs using the height of the two existing towers as a scale reference. This methodology is several decades outdated and requires the draftsman's best judgment of scale and artistic skill to render important elements of visual character, such as color, texture, shading and shadowing and haze. Contemporary photo simulation software is readily

Mr. Jeffrey Anzevino, AICP

September 1, 2010

Page 4 of 6

available and routinely used by visual analysts to accurately merge a digital 3D model of the proposed project into an existing condition photograph. 3D modeling for photo simulation allows for highly accurate rendering of intricate details, as well as shading, shadowing and atmospheric hazing to precisely match the conditions of the baseline photograph. Contemporary photo simulation techniques are commonly available, cost effective and should be used.

- > Quality of Photographic Output - The photo simulations we reviewed by our office were illegible black and white photocopies of color prints. It is necessary that first quality digital images or first generation hardcopy color reproductions be provided to decision makers, stakeholders and the interested public for accurate interpretation of the scene.

4. **Unsupported Conclusions** - The application contains several conclusions that are not substantiated or supported by the facts.

- > Increased Visual Impact - The application asserts that the new single tower will "decrease visual impact" (EAF page 16). However, no discussion identifying how this subjective conclusion is reached. This conclusion is possibly derived where the application states "[t]he existing view from Olana shows one of the two existing towers because the existing two towers line up to appear as one. The two of the three legs of the proposed tower will also line up to appear as one, but will be less visible because of their reduced size". (Tower Site Diagram)

This statement is inaccurate because, when aligned, the existing tower presents visible profile that is just 2'-2" wide as viewed from the Olana State Historic Site. If constructed, the new lattice frame tower will present a visible profile (viewed obliquely from Olana) that is roughly 13 feet wide at the tree line; or more than six (6) times as wide as the visible profile of the existing towers. The tower tapers to nearly 4 feet wide; a bit less than twice the visible profile (viewed obliquely from Olana) of the existing towers. The application figure titled "Tower Site Diagram" illustrates the lattice frame connectors of the existing towers, it fails to provide similar illustration of the substantially wider cross bracing of the lattice frame connecting the proposed tower legs.

Due to its wider profile, the proposed tower will actually increase visual impact as viewed from the Olana State Historic Site, as well as other local vantage points.

- > Towers are Highly Visible from Olana Roads - In reference to view of the Tower from the driveway at Olana (Photo 2 and Photo 2A) the application (July 2, 2010 letter) states "If you keep your eyes on the road, you will not see the tower at all." In the concluding

SARATOGA ASSOCIATES

Mr. Jeffrey Anzevino, AICP

September 1, 2010

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paragraph, this letter states, " It can be seen from the driveway leaving the property, but if the driver is watching the road, he will see the meadow, the pond and not the tower."

While it is certainly true that a driver must focus principal attention on the road ahead, this is less true for passengers; particularly considering the slow speeds and scenic nature of the Olana driveway. It is also not true for bicyclists, walkers, runners or cross-country skiers who use the roads and trails of the Historic Site for scenic enjoyment of foreground and distant vistas. This statement disregards the fact that the scenic quality of the landscape is the principal reason more than 130,000 people visit the Olana State Historic Site annually.

5. **The 1992 OPRHP letter should be reconsidered based on the current application** - The application includes a letter from the New York State Department of Parks Recreation and Historic Preservation dated September 28, 1992 stating OPRHP finds that the project will have no impact upon cultural resources in or eligible for inclusion in the State and National Register of Historic Places. With regard to the Olana State Historic Site, the July 2, 2010 letter contained in the application concludes OPRHP's 1992 opinion "remains true today." "Eighteen years of tree growth has obscured this view even more."

- > Letter Outdated - This letter was issued 18 years ago and predates the DEC Visual Policy. Given this notable change in public policy, the applicant should request a new review of the 2010 project by OPRHP to ascertain the Agency's current opinion.

Additionally, the nature of the project reviewed by OPRHP in 1992 is ambiguous. In the approval letter dated September 9, 1992 from the Town of Livingston Zoning Board of Appeals to Mr. Mark Eger, the project is referenced as a "190 foot communications tower". However, later in that same letter there is reference to "[t]he new tower would be 40 feet lower than the old tower and would replace three existing towers". With this information, the nature of the project reviewed by OPRHP in 1992 is unclear.

- > Conclusions do not Consider Olana's Restoration Plan - The applicant's conclusion that 18 years worth of tree growth further blocks views beyond conditions that existing in 1992 fails to consider Olana's Landscape Restoration Plan and Comprehensive Plan which recommend selective clearing or thinning of portions of the site to restore views originally designed by Frederick Church in the late 1800's.
- > Qualifications of Analysts - This report does not include the credentials of the analysts who prepared the visual assessment. The preparers should provide their credentials demonstrating

SARATOGA ASSOCIATES

Mr. Jeffrey Anzevino, AICP

September 1, 2010

Page 6 of 6

past experience preparing visual impact assessments and/or photographic simulations. My qualifications are attached.

This completes my evaluation of this project. Please feel free to give me a call if you have any questions.

Very truly yours,

SARATOGA ASSOCIATES

Landscape Architects, Architects, Engineers, and Planners, P.C.

A handwritten signature in black ink, appearing to read 'M. Allen', followed by a long horizontal line extending to the right.

Matthew W. Allen, RLA

Principal

Enclosure Qualifications

cc:

Scenic Hudson, Inc.
One Civic Center Plaza, Suite 200
Poughkeepsie, NY 12601-3157
Tel: 845 473 4440
Fax: 845 473 2648
email: info@scenichudson.org
www.scenichudson.org



**Statement of
Jeffrey Anzevino, AICP
Director of Land Use Advocacy**

**Town of Livingston
Planning Board
Public Hearing**

**Eger Communications Tower
September 1, 2010**

My name is Jeffrey Anzevino, Director of Land Use Advocacy for Scenic Hudson. Scenic Hudson is dedicated to protecting and restoring the Hudson River, its riverfront and majestic vistas and working farms as an irreplaceable national treasure for America and a vital resource for residents and visitors.

We submit these comments on behalf of our members residing in Livingston and surrounding communities that would be affected by the proposed tower on Blue Hill. Many of our members appreciate the contribution that heritage tourism--particularly from sites such as the Olana State Historic Site--has on our local economy.

Scenic Hudson has a longstanding interest in the protection of views from the Olana. Since 1986 we have invested approximately \$4.9 million to protect 1,145 acres under easement or by outright purchase. About 250 of these protected acres lie on the side of the foot of Blue Hill between Olana and the proposed telecommunications tower. Further, the proposed tower site is just 135 feet from a conservation easement held by Scenic Hudson.

Both tower applications require single SEQRA Review

In addition to Eger Communications' outstanding 2006 application to the Town Zoning Board of Appeals (ZBA) for a new 190-foot lattice telecommunications facility on the eastern summit of Blue Hill, an application has recently been submitted to the Planning Board and is under consideration tonight for a new replacement tower at the site of the existing twin guyed tower on the western summit.

According to our legal counsel, both towers should be reviewed as part of a single SEQRA review. Based on the criteria laid out in the New York State Department of Environmental Conservation SEQRA Handbook, Chapter 2.D, §§ 1, 2, 3, & 6, separate applications for these two towers should clearly be considered as a single project. To review them separately would be constitute segmentation and not permitted under SEQRA¹. Conducting a single coordinated SEQRA review of both applications is the only way to assess the total impact of both towers and identify alternatives that minimize environmental and visual impacts.

The applicant's visual assessment is deficient

The visual assessment prepared by Phillip J. Massaro & Son and submitted on behalf of the applicant is significantly deficient, containing errors, omissions, and inaccurate conclusions. We are submitting into the record a third party review of this assessment. The review was prepared by Saratoga Associates, a consulting firm experienced in the production of visual analyses. In short, according to the visual analysis submitted in support of this application it:

- Fails to comply with the requirements of the New York State Department of Environmental Conservation's Visual Assessment Policy;
- Includes incomplete and inaccurate information on Appendix B of the State Environmental Quality Review Visual EAF Addendum;
- Is based on substandard photo simulations; and it
- Offers unsupported conclusions.

Finally, the applicant's visual assessment asserts that the opinion in the 1992 letter from the State Historic Preservation Office (SHPO) "remains true today." However, this letter predates the DEC's Visual Policy and does not take into account Olana's landscape restoration plan. Further, we are submitting into the record a more recent May 30, 2007 letter from SHPO expressing concern over Eger Communications' application in 2006 to the ZBA for a 190-foot tower about 900 feet away from the existing tower. This letter requested that the Area of Potential Effect (APE) for this project be expanded to include the viewshed from Olana and voiced concern over cumulative impacts resulting from the proposed tower still before the ZBA and the existing twin guyed tower—and that tower is now proposed to be replaced by a larger and more visible lattice tower.

"Replacement" tower would create additional visual impact

Even without the tower under ZBA review, the proposed replacement lattice tower under consideration tonight would increase the visual impact over the existing twin towers supported by guy wires. The above referenced letter from Saratoga Associates indicates that the "replacement" tower is about six times as wide at the treeline as the existing tower and "due to its wider profile, the proposed tower will actually increase visual impact as viewed from the Olana State Historic Site, as well as other local vantage points."

Conclusion

Scenic Hudson does not oppose wireless telecommunication, nor do we oppose the antennas that enable the technology. We are concerned, however, with the manner in which the antennas are mounted -- in this case on a massive tower that would have an adverse visual impact on the view from a National Historic Landmark and State Historic Site, which is listed on the State and National Registers of Historic Places and located in the Hudson River Valley National Heritage Area.

A proper SEQRA Review must be conducted to assess the visual impacts of both facilities proposed by the same applicant on commonly owned land. Therefore we urge the Planning Board to deny the permit for this particular application and require a review of both this and the previous application made in 2006 to the ZBA in a single SEQRA review.

In addition, Scenic Hudson is submitting to the applicant a letter requesting Consulting Party Status under the National Historic Preservation Act Section 106, pursuant to the "Nationwide Programmatic Agreement for Review of Effects on Historic Properties For Certain Undertakings Approved by the Federal Communications Commission."

Thank you for this opportunity to comment tonight.

Scenic Hudson, Inc.
One Civic Center Plaza, Suite 200
Poughkeepsie, NY 12601-3156
Tel: 845 473 4440
Fax: 845 473 0740
email: info@scenichudson.org
www.scenichudson.org



November 2, 2010

BY FAX: 518-851-2466

Mr. Lawrence Hermance, Chairman
Town of Livingston Planning Board
PO Box 65
Livingston, NY 12541

RE: Eger Communications
Application 06-01 submitted 06-02-10 for a 190' self-supporting communications tower

Dear Mr. Hermance:

A prior commitment prevents me from attending the November 3rd Planning Board meeting at which Eger Communications' telecommunications tower will be the subject at a continued public hearing on the above-referenced application.

Scenic Hudson respectfully requests that this letter, as well as the two attached letters from 1) the New York State Office of Emergency Management (NYSOEM) and 2) the United States Department of the Interior National Parks Service (NPS) be read into the record at the November 3rd public hearing.

Contained in the application for the telecommunications tower is a June 28, 2010 letter from Eger Communications to the Town of Livingston Planning Board. This letter, on page 6, contains a statement that requires clarification:

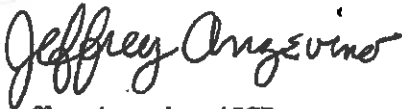
"In 2004 New York State Office of Emergency Management sought to place two 6' solid microwave dishes and one 8' solid microwave dishes (sic). Existing towers would not support it (sic). Proposed tower can accommodate them."

However, according to the attached letter dated October 27, 2010 from the NYSOEM, there is no longer a need to site the three solid microwave dishes (two 6' and one 8' diameter) on Blue Hill. The letter indicates that NYSOEM has determined that the cost of building and maintaining the proposed (in 2004) system was prohibitively expensive and, as a result, fiber optic cable was laid as an alternative to the large microwave dishes that were once sought to be sited on Eger Communications' tower on Blue Hill.

The second letter we are attaching is from the United Department of the Interior, National Park Service to Eger Communications. The letter indicates that Olana has since 2004 been listed on the National Parks Service's "Watch List of Threatened and Endangered National Historic Landmarks." The letter also requests that the National Park Service participate in the Section 106 consultation process for review of impacts on historic sites. The letter was copied to the federal Communications Commission, New York State Historic Preservation Office, and others, but we thought that the Town Planning Board, as lead agency in the SEQRA review, should also be aware of this information and this request.

Scenic Hudson has previously requested Consulting Party Status and looks forward to participating in this review. If you have any questions, please do not hesitate to call me at (845) 473-4440 x221.

Sincerely,



Jeffrey Anzevino, AICP
Director of Land Use Advocacy

Attachments: October 19, 2010 letter from United States Department of the Interior
October 27, 2010 letter from New York State office of Emergency Management

Cc Stephen DelSordo, Federal Communications Commission
John Bonafide, New York State Historic Preservation Office
Sara Griffen, The Olana Partnership
John Caffry, Esq.



**New York State Office of Emergency Management
1220 Washington Avenue
Building 22, Suite 101
Albany, NY 12226-2251**



David A. Paterson, Governor

Andrew X. Feeney, Director

October 27, 2010

**Jeffrey Anzevino, AICP
Director of Land Use Advocacy
Scenic Hudson, Inc.
One Civic Center Plaza, Suite 200
Poughkeepsie, NY 12601**

RE: NYSOEM Proposed Use of Tower on Blue Hill

Dear Mr. Anzevino,

I am writing in response to your request for information related to the use of a radio tower on Blue Hill by the New York State Office of Emergency Management (NYSOEM). During 2004, NYSOEM (formerly known as SEMO), hired a consultant for the purpose of providing a proposed communication solution, that would give NYSOEM communication redundancy between headquarters in Albany and offices in the lower Hudson Valley. The proposed solution included the placement of a 6' and an 8' microwave dish on the existing tower located on Blue Hill. However, because of the size of the dishes, the plan included strengthening the existing tower so that it could withstand the additional load. Building a second, stronger tower on the site was never part of the plan.

After carefully reviewing the proposal for the redundant system, NYSOEM determined that the cost of building and maintaining the proposed system was prohibitively expensive. As a result, NYSOEM sought other options and ultimately decided to lay fiber optic cable in order to ensure redundant communications capabilities between its offices. Because of this dedicated fiber network, NYSOEM no longer has any need to place microwave dishes on the tower on Blue Hill. The fiber network is a long term, cost effective solution that obviates any need for use of the radio tower.

If you have any additional questions or concerns regarding this issue, please do not hesitate to contact me at the number below.

Sincerely


**Kristine Hoffman
Counsel**



United States Department of the Interior

NATIONAL PARK SERVICE
Northeast Region
U.S. Custom House
200 Chestnut Street
Philadelphia, PA 19106-2878

IN REPLY REFER TO:

H30(4506)

OCT 19 2010

Mark Eger
Eger Communications
33 Eger Road
Hudson, NY 12534

Dear Mr. Eger:

The National Park Service (NPS) is writing to request to participate in the Section 106 consultation process for the Federal Communications Commission (FCC) permit for a communication tower at Blue Hill, Columbia County, NY. NPS will represent the Secretary of the Interior in the Section 106 consultation process. This proposed tower would be in the viewshed of the Frederic E. Church House (Olana), a National Historic Landmark (NHL) in Columbia County, NY. The NHL is owned by the State of New York as Olana State Historic Site. Olana was designated an NHL by the Secretary of the Interior on June 22, 1965.

We have listed Olana on our Watch List of Threatened and Endangered National Historic Landmarks since 2004. We hope the resolution of this project will reduce threats to Olana.

If you have any questions or have material for us to review, please contact Bill Brookover, Historical Architect, at 215-597-1774 or by e-mail at bill_brookover@nps.gov.

Sincerely,

Maryanne Gerbauckas
Associate Regional Director
Heritage Preservation, Planning & Compliance

cc:

Stephen DelSordo, Federal Communications Commission
John Bonafide, New York State Historic Preservation Office
Jeffrey Anzevino, Scenic Hudson
Sara J. Griffen, The Olana Partnership
Sara Olson, Superintendent, Roosevelt Vanderbilt National Historic Site

EXHIBIT “I”



NEW YORK STATE
OFFICE OF PARKS, RECREATION AND HISTORIC PRESERVATION

Andy Beers
Acting Commissioner

David A. Paterson
Governor

December 2, 2010

Mr. Kevin McDonald, Supervisor
Mr. Lawrence Hermance, Chair
Planning Board
Town of Livingston
PO Box 65
Livingston, NY 12541

Re: Proposed Communication Tower
Blue Hill
Livingston, Columbia County

Dear Supervisor McDonald and Chairman Hermance:

The Office of Parks, Recreation and Historic Preservation (OPRHP) has received several communications regarding the construction of a proposed 190' lattice communication tower on Blue Hill in the Town of Livingston. The tower would replace two existing 190' guyed towers currently at this location.

OPRHP oversees the operation of the National Historic Landmark Frederic Church home known as Olana State Historic Site. Olana is situated roughly two miles northwest of the project site in the Town of Greenport.

It is our understanding that a new application is before the Town of Livingston's Planning Board. This new plan would remove the two existing guyed 190 foot towers and replace them with a single free-standing 190 foot lattice tower. This would be the same structure as proposed in 2007 at a site near this location.

Based on the materials submitted for the 2007 plan, the newly proposed replacement unit would be significantly more visible in the historic viewshed. This observation is based on the visual simulations included in the March, 2008 reports submitted to OPRHP by Vanasse Hangen Brustlin, Inc. The density of the proposed 190 foot free-standing tower is demonstrably more visible in the landscape than the exiting guyed units which are viewed one behind the other from Olana.

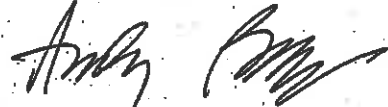
According to the Department of Environmental Conservation's SEQR Handbook, the term substantially contiguous "is intended to cover situations where a proposed activity is not directly adjacent to a sensitive resource, but is in close enough proximity that it could potentially have an impact." As noted in our comments concerning the previous tower project, it is our belief that a new tower, albeit a replacement structure, in the southern viewshed of this National Historic Landmark property should be considered substantially contiguous and therefore a Type I action under SEQR. As such, we recommend that you include OPRHP as an interested party in your SEQR review for this discretionary action on the part of your Town.

The viewshed from Olana has long been established as a significant component of the landmark character of the site. Furthermore, the significance of the views from this property and their well known influence on Church and his role as one of America's most influential landscape painters of the Hudson River School is undisputable. There are at least six known works by this American master that capture this specific vista. It is our position that this viewshed and the impact that the new communication tower will have on this legendary landscape must be afforded a "hard look" as part of the environmental review for this project. It is the responsibility of the Lead Agency to insure that the full spectrum of environmental impacts is assessed as part of this process.

As with the previous project, this undertaking will be subject to the review and approval of the Federal Communication Commission and will be subject to federal review pursuant to Section 106 of the National Historic Preservation Act. The State Historic Preservation Office within OPRHP views this new proposal as having a potential Adverse Effect on a historic resource. The National Parks Service has also requested consulting party status for the federal review.

OPRHP certainly understands the needs of the community with regard to emergency communications. However, we would strongly recommend that other more reasonable alternatives be explored including utilizing stealth technology. If you have any questions regarding our position, please do not hesitate to contact Ruth Pierpont, our Acting Deputy Commissioner for Historic Preservation, at 518-237-8643.

Sincerely,



Andy Beers
Acting Commissioner

cc: Ruth Pierpont, Acting Deputy Commissioner for Historic Preservation
Karen Kaufmann, Chief Counsel, OPRHP
Linda McLean, Site Manager, Olana
Sara Griffen, Executive Director, The Olana Partnership
Infinergy

EXHIBIT “J”



**New York State Office of Parks,
Recreation and Historic Preservation**

Historic Preservation Field Services Bureau • Peebles Island, PO Box 189, Waterford, New York 12188-0189

518-237-8643

www.nysparks.com

Elliot Spitzer
Governor

Carol Ash
Commissioner

April 30, 2007

Philip Williams
Supervisor
Town of Livingston
PO Box 65
Livingston, NY 12541

Re: Proposed Communication Tower
Blue Hill
Livingston, Columbia County

Dear Supervisor Williams:

We have received several communications regarding the construction of a proposed 190' communication tower on Blue Hill in the town of Livingston.

As you may be aware, our agency oversees the operation of National Historic Landmark Frederic Church home known as Olana. Olana is situated roughly two miles northwest of the project site in the town of Greenport.

It is our belief that the construction of another tower in the southern view shed of this landmark property meets the spirit of the definition of substantially contiguous under the New York State Environmental Quality Review Act (SEQRA). As such, we recommend that you include this agency as an interested party in your SEQRA review for this discretionary action on the part of your town. The view shed from Olana has long been established as a significant component of the landmark character of the site. Furthermore, the significance of the views from this property and their well known influence on Church and his role as one of America's most influential landscape painters and luminary of the Hudson River School is undisputable. It is our belief that this view shed and the impact the construction of a second 190' communication tower will have on this legendary view be afforded a "hard look" as part of the environmental review for this project. It is the responsibility of the Lead Agency to insure that the full spectrum of environmental impacts is assessed as part of this process.

At this point we must also note that while the construction of a municipal emergency communication tower does not require the approval of the Federal Communication Commission, any cellular company that may seek to lease space on this tower will be subject to federal review pursuant to Section 106 of the National Historic Preservation Act. Although your documentation indicates that no such leases are anticipated, we feel it is important to make it clear that this agency will view any such addition to the proposed municipal tower as an Adverse Effect and seek the involvement of the President's Advisory Council on Historic Preservation.

This agency certainly understands the needs of the community with regard to emergency communications; however, we would strongly recommend that the existing tower be retrofitted or reconstructed, preferably utilizing stealth technology, to meet these needs. To assist the local Lead Agency in their assessment of potential visual impacts generated by this project, I have included a copy of the New York State Department of Environmental Conservation's guidance on visual assessment. If you should have any questions regarding our position, please do not hesitate to contact me at 518-237-8643.

Sincerely



Ruth L. Pierpont
Director
Historic Preservation Field Services

Cc: Glen Bruening, Chief Counsel, OPRHP
Linda McLéan, Site Manager, Olana
Sara Griffen, Executive Director, The Olana Partnership ✓
Infinergy

Enc.



New York State Office of Parks, Recreation and Historic Preservation

Historic Preservation Field Services Bureau • Peebles Island, PO Box 189, Waterford, New York 12188-0189

518-237-8643

www.nysparks.com

Elliot Spitzer
Governor

Carol Ash
Commissioner

May 30, 2007

Mr. Mark Eger
Eger Communications
33 Eger Road
Hudson, NY 12534

Re: 190' Self Supporting Tower
Blue Hill, Livingston, Columbia County
07PR02325

Dear Mr. Eger:

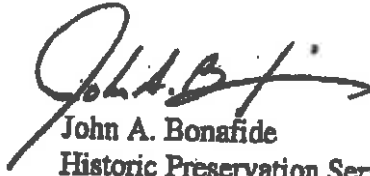
As you may be aware, our office has received several calls and letters regarding concerns over the proposed construction of a second communication tower on Blue Hill in the town of Livingston, Columbia County.

A review of the various materials provided to this office, which include the FEAF prepared for the town's SEQR process indicates that only local *Site Plan Review* and a ZBA *Special Permit* will be required for the project. This raises a concern with this office as we were also provided with a letter dated February 8, 2007 from Nicole Dentamaro of Vanasse Hangen Brustlin. The letter notes that "The new facility is necessary for emergency services within Columbia County and to improve cellular coverage within the Town of Livingston." The letter goes on to state, "Based on current plans, New York Communication Co. Omni antennae will be attached to the tower...". Based a recent conversation with Federal Communication Commission (FCC) these proposed uses would be subject to license/review by the FCC and as a result would be subject to review under the National Historic Preservation Act of 1966 (Section 106).

Under the guidelines of the current Programmatic Agreement developed by the FCC with the Advisory Council on Historic Preservation this office formally requests that the Area of Potential Effect (APE) for this project be expanded to include the viewshed from Olana, the National Historic Landmark home of American landscape painter, Frederick Church. The preeminent importance of the vistas from this home and their direct association on the work of this renowned American artist is undisputable. The primary concern that will be clearly noted by this office includes not only the construction of this new tower but also the cumulative impact the new structure will create in conjunction with the existing tower. It is our expectation that these issues will be addressed in the FCC Form 620 that will be prepared for this project.

If you should have any questions regarding the information contained in the letter I can be contacted at 518-237-8643, ext.3263.

Sincerely,



John A. Bonafide
Historic Preservation Services
Coordinator

Enc: Dentamaro Letter/2-8-07
Pierpont Letter/4-30-07

Cc: Philip Williams, Supervisor
Stephen G. DelSordo, FCC
Jeffrey Anzevino, Scenic Hudson



New York State Office of Parks, Recreation and Historic Preservation

Historic Preservation Field Services Bureau • Peabees Island, PO Box 189, Waterford, New York 12188-0189

518-237-8643

www.nysparks.com

August 15, 2007

Zoning Board of Appeals
John Schroeder, Chairman
119 County Route 19
Livingston, NY 12541

Dear Mr. Schroeder:

Re: SEQRA/FCC
190' Tower
Blue Hill, Livingston, Columbia Co.
07PR02325

The New York State Historic Preservation Field Services Bureau (FSB) has received the Town of Livingston Zoning Board of Appeals Notice to Serve as Lead Agency under SEQRA for the 190' telecommunications tower proposed for Blue Hill. As you will see from the attached May 30, 2007 letter from John Bonafide of our office to Mark Eger of Eger Communications, we are also involved in reviewing this project in our role as the State Historic Preservation Office (SHPO) under the provisions of Section 106 of the National Historic Preservation Act of 1966. This is due to the fact that the uses of the tower are subject to review and license by the Federal Communications Commission.

Mr. Bonafide's May 30 letter requested that the Area of Potential Effect (APE) for considering impacts/effects to historic resources be extended to include Olana. Although that letter dealt with the upcoming FCC review, we also recommend that approach for the SEQRA process as well. Olana is a National Historic Landmark which includes the viewshed as part of its historic significance. Rather than restate Mr. Bonafide's letter, I would simply direct you to read it carefully and call me if you have any questions.

I can be reached at (518) 237-8643, ext. 3271.

Sincerely,

Julian W. Adams
Sr. Historic Sites Restoration Coordinator

COPY

Enc: Bonafide letter, 5-30-07

CC: Philip Williams, Supervisor, Town of Livingston



New York State Office of Parks, Recreation and Historic Preservation

Historic Preservation Field Services Bureau • Peebles Island, PO Box 189, Waterford, New York 12188-0189

518-237-8643

www.nysparks.com

David A. Paterson
Governor

Carol Ash
Commissioner

May 30, 2008

Nicole Dentamaro
Environmental/GIS Analyst
Vanasse, Hangen, Brustlin, Inc.
64 Tuttle Place
Middletown, Connecticut 06457-1847

Re: FCC
WCT 190' tower (Blue Hill)
Livingston, Columbia County
07PR02325

Dear Ms. Dentamaro:

Thank you for requesting the comment of the State Historic Preservation Office (SHPO). We have had an opportunity to initiate the review of the proposed tower in accordance with Section 106 of the National Historic Preservation Act of 1966 and relevant implementing regulations.

Based upon our review, that includes the most recently submitted visual simulations, it is difficult for the SHPO to offer a positive opinion of this particular tower because of the history of Frederick Church's home, the National Historic Landmark Olana, and the pre-eminent importance of the surviving landscape features. Due to their relationship and contribution to the Hudson River School of American landscape art, it has been argued that the views from the Olana property are among the most important in the entire state. Although the proposed tower site is nearly two miles from the former Church property, the tower will be visible from the area of 'Cosy Cottage' where the artist first lived on the property and executed a work featuring the view toward Blue Hill. As indicated in the information submitted by your office, the landscape is currently not pristine as other towers have been constructed over time within this watershed. However, our office was not involved with the review of most of what is currently found in this landscape but when we have had the opportunity, we have always tried to recover lost features and to minimize any visual intrusions.


Before our office can issue our opinion, we request that visual simulations be prepared for our review that depict a monopole and a guyed tower at the site that include a complete 'build-out' of possible cell panels that could be located on the towers. Our office is especially interested in the views from the Olana property. Once these simulations are forwarded, we will offer an expedited review and opinion of what our office considers the least discordant tower.

FCC
WCT 190' tower (Blue Hill)
Livingston, Columbia County
07PR02325

The SHPO does not have concerns regarding archeology and the proposed project:
additional survey for the site is not warranted.

Please forward the requested simulations if the sponsor remains interested in the project
so that we can complete our review and offer our formal opinion under Section 106. If you have
any questions regarding this letter, please feel free to contact me at your convenience. Ext.
3273.

Sincerely,



Kenneth Markunas
Historic Sites
Restoration Coordinator

Cc: Sara J. Griffen, Olana Partnership
Jeffery Anzevino, Scenic Hudson Inc.
Bonnie Devine, NYS Department of State
Stephen G. DeSordo, FCC



NEW YORK STATE
OFFICE OF PARKS, RECREATION AND HISTORIC PRESERVATION

CAROL ASH
Commissioner

DAVID A. PATERSON
Governor

February 23, 2009

Nicole Dentamaro
Vanasse Hangen Brustlin, Inc.
54 Tuttle Place
Middletown, CT 06457

Re: FCC
WCT 190' Tower (Blue Hill)
Livingston, Columbia County
07PR02325

Dear Ms. Dentamaro:

As the State Historic Preservation Officer for New York State, I have directed my staff to review the proposed construction of a 190-foot communication tower on Blue Hill in the town of Livingston, Columbia County. The review of this undertaking was completed in accordance with the 2004 Programmatic Agreement executed by the Federal Communications Commission (FCC), the Advisory Council for Historic Preservation (ACHP), and the National Conference of State Historic Preservation Officers (NCSHPO). This agreement replaced the traditional review process under Section 106 of the National Historic Preservation Act.

Since April 2007, the State Historic Preservation Office (SHPO) has been involved in the review of this proposed tower project and the assessment of its specific effects upon *Olana*, the National Historic Landmark designated home of the preeminent 19th century American artist Frederic Church. Based upon our review of the submitted materials, and in consideration of ACHP CFR 800.5.A (2) Assessment of Adverse Effects, we cannot concur with the No Adverse Effect finding that was recommended by Vanasse Hangen Brustlin, Inc. (VHB) in the letter of March 20, 2008. It is our opinion that this undertaking *will* have an Adverse Effect upon *Olana*.

This determination is based on the extraordinary importance associated with the setting and landscape of this National Historic Landmark. It is well established that Church used this view in several of his works and, in fact, sited his magnificent home to take full advantage of the sweeping vistas in all directions. In the letter referenced above, VHB consultant Nicole Dentamaro states that the proposed tower would not result in a "significant visual impact upon the Olana State Historic Site" due to the pre-existence of the current Eger Communications tower and nearby AM radio towers. It is our belief that this determination is not defensible. The pre-existence of intrusions in the landscape

cannot serve as a rationale for additional intrusions. In this regard, it is also important to note that this office has not had the opportunity to comment on many of the existing elements now in the viewshed. In addition, each element added to the viewshed of Olana has its own unique and indelible impact upon the setting and character of this landmark property. Furthermore, based on the simulations provided by VHB, it is readily apparent that the massing of this tower is significantly more robust than other intrusions in the landscape.

As you know, an Adverse Effect determination requires an exploration of alternatives to avoid, minimize or mitigate the impact of the project. I hope that you will work with my staff in ensuring that all feasible alternatives are considered in protecting this nationally significant resource.

Sincerely,

A handwritten signature in cursive script, appearing to read "Carol Ash".

Carol Ash
Commissioner

c: Stephen G. DeSordo, FCC
Kathy Harris, ACHP

Robert J. Gagen
Attorney At Law
424 Warren Street
Hudson, New York 12534
Phone: 518-828-5554

Fax: 518-828-2685
Email: bgagen@yahoo.com
(Service By Fax Not Accepted)

Kevin B. Thiemann,
Of Counsel *
*Admitted in NY, CT

August 29, 2011

Via U.S. Mail & E-Mail: Dan.Abeyta@fcc.gov

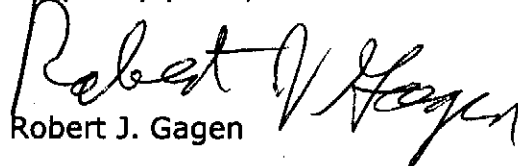
Daniel Abeyta, Assistant Chief
Spectrum & Competition Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
1445 12th Street SW
Washington, DC 20554

Re: Opposition to Complaint by Scenic Hudson, Inc. Regarding
Eger Communications **REPLACEMENT** Tower at Blue Hill,
Town of Livingston, Columbia County, New York

Dear Mr. Abeyta:

Attached hereto is my client's answer to the "informal complaint" which is the name you have given to the letter of Caffry & Flower dated April 5, 2011. Please note that my client's "answer" has three attachments and an affidavit of service by mail of a copy upon Caffry & Flower. It is my understanding that pursuant to your direction, they have until September 15, 2011 to serve any reply.

Very truly yours,


Robert J. Gagen

RJG:mbh

Encls.

cc M. Eger
J. Murray

Re: Opposition to Complaint by Scenic Hudson, Inc. Regarding Eger
Communications REPLACEMENT Tower at Blue Hill, Town of Livingston,
Columbia County, New York

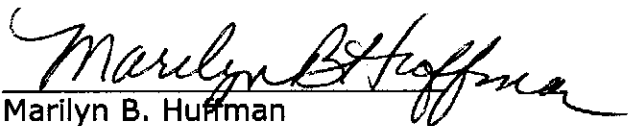
STATE OF NEW YORK)
) ss.:
COUNTY OF COLUMBIA)

Marilyn B. Huffman, being duly sworn, deposes and says that:

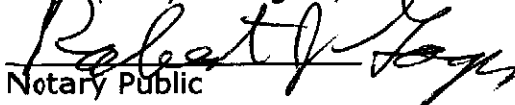
1. I am over the age of 18 years, not a party to this action, and reside in
Valatie, New York.

2. On the 29th day of August, 2011, I served the within conformed copy of the
Opposition to Complaint with enclosures dated the same date in the above matter by
depositing a true copy in a post-paid wrapper in an Official Depository maintained and
exclusively controlled by the U. S. Postal Service with New York State, by ordinary
mail, directed to said person at respective said addresses mentioned below, that being
the address within the state designated for that purposed upon the place where the
below then kept offices according to the best information which can be conveniently
obtained:

John W. Caffry, Esq.
Caffry & Flower
100 Bay Street
Glens Falls, NY 12801


Marilyn B. Huffman

Sworn to before me this
29th day of August, 2011


Notary Public

ROBERT J. GAGEN
Notary Public, State of New York
Qualified in Columbia County #4642075
My Commission Expires October 31, 2014

Robert J. Gagen
Attorney At Law
424 Warren Street
Hudson, New York 12534
Phone: 518-828-5554

Fax: 518-828-2685
Email: bgagen@yahoo.com
(Service By Fax Not Accepted)

Kevin B. Thiemann,
Of Counsel *
*Admitted in NY, CT

August 29, 2011

Via U.S. Mail & E-Mail: Dan.Abeyta@fcc.gov

Daniel Abeyta, Assistant Chief
Spectrum & Competition Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
1445 12th Street SW
Washington, DC 20554

Re: Opposition to Complaint by Scenic Hudson, Inc. Regarding
Eger Communications **REPLACEMENT** Tower at Blue Hill,
Town of Livingston, Columbia County, New York

Dear Mr. Abeyta:

We represent Eger Communications ("Eger") in respect to its proposed tower replacement project in the Town of Livingston, Columbia County, New York. We are in receipt of the informal complaint by Scenic Hudson, Inc. and the Olana Partnership ("Complainants").

For the reasons set forth below, the FCC must dismiss the "informal" complaint in its entirety for the following reasons:

(A) the Complainants seek relief that is properly the focus of a rulemaking proceeding that would result in new or amended regulations, rather than an informal complaint;

(B) the Complainant's lack standing;

(C) policy considerations should persuade this Commission to reject the complaint;

(D) the relief sought is being fulfilled by the local planning board SEQRA process;

(E) the matter is not ripe for review ; and

(F) the Complaint substantively lacks any merit whatsoever based upon the clear exclusion from Section 106 review afforded to replacement towers, such as the one proposed by Eger, under Section III. B. of the Nationwide Programmatic Agreement ("NPA").

A. The FCC Should Dismiss the "Informal Complaint" Because It Seeks Relief That Can Only Be Obtained In A Rulemaking Proceeding And/Or By Amendment Of The NPA And The Regulations Authorizing The NPA

By letter dated April 5, 2011 and served by Complainants upon Eger on or about July 28, 2011, the Complainants specifically requested the following relief from the FCC:

On their [Complainants] behalf, I am writing to request that the Federal Communications Commission do whatever is necessary, within its jurisdiction, **to require Eger Communications ("Eger") to begin the National Historic Preservation Act ("NHPA") Section 106 consultation process for its proposed new tower project.** (see Caffry & Flowers letter dated April 5, 2011, page 1 [emphasis added])

Preliminarily, it must be noted that a gross misstatement of fact in the above request for relief has been intentionally repeated throughout the informal complaint. The proposed project is simply not for a "new tower" but, rather, it is for the replacement of an existing tower that was constructed prior to March 16, 2001. The proposed replacement tower is less than 30 feet from the existing tower and will neither expand the property boundaries, nor require any excavation.

The ostensible reason why the Complainants seek to mislead this Commission is that it is fatal to their substantive claims and renders the relief that they request of the FCC unavailable, absent a change in current FCC regulations. Pursuant to Section III (B) of the Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission (the "NPA"), the project is an undertaking excluded from the NHPA Section 106 review process because it consists of construction of a replacement tower that meets the criteria set forth in NPA Section III (B).

Insofar as the Eger tower replacement project is excluded from Section 106 review as a matter of law, Eger is not required to participate in the Section 106 process for this project as a matter of law (see Gagen letter of 04/08/11 to Dept. Of Interior, copy to FCC, attached). As such, the relief requested by the Complainants is unavailable unless and until the FCC adopts new rules, amends current FCC's environmental rules set forth in 47 CFR §§1.1301-1.1319, and/or the NPA is amended by the FCC and the Advisory Council on Historic Preservation ("Council"). The Council would also have to amend its regulations codified at 36 CFR Part 800.

Accordingly, the Complainants' informal complaint must be dismissed because the relief sought can only be obtained via a rulemaking proceeding and/or amendment of the NPA and the regulations pursuant to which the NPA was entered into by the FCC and the Council (see Matter of Friends of Earth Inc. et ano., DA 02-05 [Jan. 4, 2002] [in support of the FCC's dismissal of an informal complaint, noting that the complainants' arguments were properly the focus of a rulemaking

proceeding, rather than objections to an application because such arguments were not directed at the environmental review under existing FCC rules, but rather at the rules themselves.] [Pg 5]).

B. The FCC Should Reject The Informal Complaint Because The Replacement Tower Project Is Excluded From Section 106 Review Pursuant To NPA Section III (B)

As explained above, the Eger project is for replacement of an existing 190-foot tower constructed prior to March 16, 2001. Insofar as the replacement tower is the same height as the proposed tower, is less than 30 feet from the existing tower and will neither expand the property boundaries, nor require any excavation, the project meets all of the criteria for exclusion from Section 106 review under NPA Section III (B). Accordingly, the FCC should reject on the merits the relief requested in the informal complaint because the Eger tower replacement project is excluded from Section 106 review as a matter of law.

Moreover, and to the extent relevant in light of the above exclusion, please find enclosed a determination by the New York State Office of Parks Recreation and Historic Preservation ("NY SHPO") dated September 28, 1992 that the existing 190-foot tower proposed to be replaced with a new 190-foot tower at the very same site "will have No Impact upon cultural resources in or eligible for inclusion in the State and National Registers of Historic Places."¹ Notably, the NY SHPO's determination was based on an in-field assessment for potential visual impacts on the 190-foot tower by the SHPO's Field Services Bureau. In contrast, the NY SHPO letters cited in the informal complaint relate to an application for a tower proposed at a different site on the Eger parcel, and are not based upon an in-field assessment. As such, the Complainants' claim that such letters are "equally valid" in respect to the tower replacement project is disingenuous and quite simply incorrect.

Consistent with the NY SHPO's determination, also enclosed are Viewshed Maps prepared by an independent professional engineering firm licensed in the State of New York documenting that the two (2) existing 190-foot towers at the replacement tower site are not visible from significant portions of Olana based upon both topography and vegetation.

The NY SHPO's No Impact determination based upon an in-field investigation, and the Viewshed Maps objectively refute the Complainants' general, speculative claims that the tower replacement project would potentially impact the Olana viewshed. In this regard, an independent ground for rejecting the informal complaint is that its substantive claims lack merit.

¹ Olana was listed in the National Register in 1965 and, thus, at the time of the NY SHPO's determination and well before the two (2) existing 190-foot towers were reviewed, approved and constructed.

C. As a matter of policy, the FCC should reject the Informal Complaint

If the plain meaning of the exclusionary language of section 106 III (B) is to be honored, it is a waste of administrative resources to entertain "complaints" such as this, even informally. Doing so would create a forum susceptible to abuse by opponents of existing towers that require replacement and are excluded from Section 106 review. Where, as here, an attempt is made to review the "size and shape" of a replacement tower or its collocated equipment and there is no increase in height, entertaining such a request would unnecessarily "open the floodgates" for complaints about tower replacements and equipment collocations that are otherwise clearly excluded from Section 106 review under the NPA, and that simply do not give rise to any new and legitimate environmental impact.

We further note that tower replacement projects such as this actually protect existing environmental conditions by obviating the need for construction of an entirely new tower in an area where an existing tower can simply be replaced to structurally support antenna collocations.

D. The Replacement Tower Project Will Undergo
Environmental Review Under New York State Law

New York State law requires the Planning Board of the Town of Livingston before whom the tower replacement project application is pending, to review and take a "hard look" at potential environmental impacts, including those claimed in the informal complaint, pursuant to New York State Environmental Quality Review Act, codified at 6 NYCRR 617.1 et seq. Accordingly, the Planning Board will perform that careful review of the application, including any comments raised by the Complainants. (See Gagen letter dated 04/08/11, attached)

E. The FCC Should Dismiss The Informal Complaint
For Lack Of Ripeness

By letter dated April 8, 2011, Eger notified that FCC and the Complainants that it is in the process of modifying its Application for local approvals for this tower replacement project. Until the modified Application is filed with the Town of Livingston, we submit that the informal complaint is not ripe for review. Nevertheless, we note that the pending modifications will not alter any detail of the project that render it excluded from Section 106 review under the NPA. The replacement tower will continue to be the same height as the existing towers, and will neither expand the property boundaries, nor require any excavation.

F. The FCC Should Dismiss The Informal Complaint
Because The Complainants Lack Standing

The informal complaint fails to allege, much less establish, any facts demonstrating that the Complainants will somehow incur a direct injury if the requested relief – which is unavailable as a matter of law – is not granted. It is

well-settled that in order to establish standing, a party challenging an application must allege sufficient facts to demonstrate that (i) granting the application would cause the challenging party to incur a direct injury, and (ii) the injury would be prevented by the relief requested (see Matter of Los Angeles Cellular Tel. Co., 13 FCC Rcd. 4601, 4604 [WTB/CWD, 1998]). Here, Complainant Scenic Hudson, Inc. has not alleged any facts related to its interest in the Olana State Historic Site, and the only interest of Complainant Olana Partnership in the informal complaint is that it is among numerous organizations that "have contributed large amounts of money to the restoration, maintenance and improvement of Olana." Neither Complainant owns Olana, and neither Complainant has alleged any facts whatsoever as to how their organizations will be injured by the Eger tower replacement which, notably, is approximately two (2) miles from Olana. Indeed, to the extent that Complainant Olana Partnership claims that it is one of many donors of "large amounts of money" for Olana, replacing an existing tower some two (2) miles away will in no way impair its ability to continue to make such donations or to restore, maintain or improve Olana. For these reasons alone, the Complainants have failed to establish standing and the informal complaint should be dismissed.

Furthermore, and to the extent relevant in light of the above, the Complainants have submitted nothing more than generalized and speculative claims that replacement of the existing Eger tower will result in an impact to the viewshed. First, it must be noted that the viewshed already contains two (2) existing 190-foot towers at the proposed replacement tower site, and proposed replacement tower will be the same height and in the same location as the existing towers. Therefore, the Complainants are left with having to argue that there is some difference in the "size and shape" but not height of the replacement tower that results in "greater visual impact". The Complainants fail to provide any objective data to support this unusual and untenable claim and, instead rely solely upon unsworn and unsupported statements of opinion and photographs by interested parties. These contentions border on the frivolous. Moreover, there is simply no regulatory basis for excepting a tower replacement project from the clear exclusion from Section 106 review afforded under the NPA due to "size and shape" where, as here, there is no increase in height.

In contrast, Eger submits the enclosed Viewshed Map prepared by an independent professional engineering firm licensed by the State of New York that objectively demonstrates the two (2) existing 190-foot towers at the replacement tower site are **not visible** at all from substantial portions of Olana based upon both topography and vegetation, and directly refutes Complainants' unsubstantiated claims.

To the extent this Commission determines that it has jurisdiction to address the merits of this "complaint", the Complainants have failed to allege facts sufficient to demonstrate they would incur any injury, much less a direct one. In contrast, Eger has submitted objective data demonstrating No Impact to Olana. The FCC must dismiss the informal complaint because the Complainants lack standing.

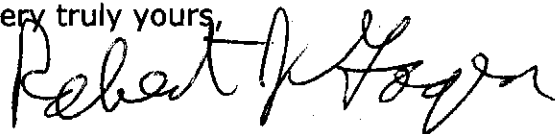
Conclusion

For the foregoing reasons, Eger Communications respectfully requests that the FCC dismiss the informal complaint in its entirety for lack of jurisdiction. The relief requested by the Complainants is unavailable because this tower replacement project meets all of the criteria for exclusion from the NHPA Section 106 review process. Failing that, it should be dismissed on substantive grounds.

In the event that the Complainants attempt to assert new facts or data not already contained in the informal complaint, we respectfully request an opportunity to surreply.

Thank you for your consideration of this matter and please do not hesitate to contact me if you require any further information about this tower replacement project.

Very truly yours,

A handwritten signature in black ink, appearing to read "Robert J. Gagen", written in a cursive style.

Robert J. Gagen

and

The Murray Law Firm, PLLC
Jacqueline Phillips Murray
jpm@themurraylawfirm.com

RJG/mbh

Encls. (Larger, colorized maps by mail only)

cc John W. Caffry/Caffry & Flower
M. Eger

Caffry & Flower

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October 7, 2011

VIA E-MAIL & MAIL

Daniel Abeyta
Assistant Chief
Spectrum & Competition Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
1445 12th St. SW
Washington, DC 20554

Re: Complaint Regarding Eger Communications Tower Project
Blue Hill, Town of Livingston, Columbia County, New York

Dear Mr. Abeyta:

This letter is submitted as the Reply of Scenic Hudson, Inc. ("Scenic Hudson") and The Olana Partnership ("TOP") (collectively the "Complainants") regarding the above-referenced matter. Specifically, we are replying to the answer to our informal complaint dated April 5, 2011 (the "Complaint"), as set forth in the letter to you from Robert J. Gagen, Esq., dated August 29, 2011 (the "Answer"), on behalf of Eger Communications ("Eger").

As set forth in the Complaint, we request that the Federal Communications Commission ("FCC") do whatever is necessary, within its jurisdiction, to require Eger to begin the National Historic Preservation Act ("NHPA") Section 106 consultation process for its proposed new tower project at Blue Hill. The arguments contained in the Answer provide no legal basis for the denial of that request. Points A to F of the Answer are rebutted below.

A. The Complaint Does Not Seek
Legislative or Rulemaking Relief

The Complaint is based on existing laws and regulations. It does not seek legislative or rulemaking relief and we do not seek to have the FCC and the Advisory Council on Historic Preservation ("ACHP") amend the Nationwide Programmatic Agreement ("NPA").

The case cited in the Answer in support of this argument is not on point. In Matter of Friends of the Earth, FCC No. DA 02-05, January 4, 2002, the petition was dismissed, in part, because many of the petitioners' arguments were directed at the rules themselves, and not at the merits of the decisions that had been made by the FCC. For instance, the petitioners therein argued that the FCC's existing rules did not comply with NEPA. The Complainants herein make no such arguments.

A.1 The Answer Makes False
Allegations Against the Complainants

Page 2 of the Answer contains at least two false allegations against the Complainants and the Complaint. While neither one is particularly germane to the merits of the Complaint, we wish to correct the record on these two questions.

Point A of the Answer alleges that the Complaint contains "a gross misstatement of fact" that is "intentionally repeated throughout", and that "the complainants seek to mislead this Commission". The alleged misstatement is that the tower is a "new" tower and not a "replacement" tower.

This allegation is false. The question of whether or not the tower should be labeled as "new" or as a "replacement" is a legal question, pursuant to the NPA, and is not a "fact". In addition, the Complaint clearly discusses on its second page that the one proposed tower in question is being built to take the place of two existing towers. As shown at Point B.2 below, the tower is not a "replacement" tower. While the parties may disagree about whether or not the tower is a "replacement", there is nothing "misleading" about the Complaint.

We request that the FCC ignore the Answer's attempt to impugn the good faith of the Complainants, and that this matter be decided on its merits instead.

Also, page 2 of the Answer incorrectly implies that the Complaint was not served on Eger until July 28, 2011, almost four months after it was first filed. In fact, it was served on both Mr. Eger and his attorney at the same time that it was filed with the FCC. See Complaint p. 11. Not only that, but Eger's attorney refers to the Complaint in his April 8, 2011 letter to the National Park Service, a copy of which is attached to the

Answer. The second service of the Complaint on Eger's attorney on July 28, 2011 was undertaken at the request Donald Johnson, Esq. of the FCC staff, pursuant to an e-mailed request sent on July 26, 2011.

B. The Proposed Tower is Not Excluded
From Section 106 Review by the NPA

The proposed tower is subject to Section 106 review and it will have an Adverse Effect on Olana. Therefore, FCC and the applicant must engage in the consultation process.

B.1 The Project Is Not Exempt

The Answer shows that the applicant (Eger) does not understand the jurisdictional basis upon which the Complainants are requesting that the consultation process be carried out. The Complaint (p. 3) states:

FCC Jurisdiction Over the Project

If and when the new tower is approved by the Town, Eger will seek to relocate the existing antennas to the new tower. It also appears that Eger may seek to locate new antennas owned by current or new customers on the new tower. It is our understanding that either of these actions would trigger FCC's statutory jurisdiction over the project.

The FCC is required to consider these actions under the National Environmental Policy Act and the National Historic Preservation Act. It would be far more efficacious if these reviews were to occur before construction begins on the tower, rather than after it is built, so that any required alterations to the project and mitigation measures could be incorporated into the tower beforehand, rather than requiring it to be altered or demolished after the fact.

It is our understanding that the FCC will not have jurisdiction over the tower *per se*, but that once Eger seeks to locate customers' antennas and other devices on the tower, that the FCC will have jurisdiction over those actions, which will constitute

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"undertakings" under Section 106. When that occurs, the FCC's Section 106 review and the related consultation process would cover both the tower and the antennas. If the FCC requires Eger to modify the tower pursuant to either the NHPA or NEPA, then the tower would have to be modified retroactively. The Complainants seek to have the inevitable Section 106 consultation process begin sooner, rather than later, to allow the review of the tower's effects to inform the final design of the project, and avoid the need for retroactive modifications. Doing this would benefit all parties, including Eger.

Under § III.A.2 of the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, Attachment 1 to the NPA (the "Collocation NPA"), the collocation of an antenna on a pre-2001 existing tower is not exempt from the Section 106 consultation process if the tower has been determined to have an Adverse Effect on a historic property. As discussed below, the proposed tower will have an Adverse Effect on Olana. Thus, if a so-called "replacement" tower falls under this section of the Collocation NPA, then the consultation process is required.

Under § IV.A.3 of the Collocation NPA, the collocation of an antenna on a post-2001 tower is not exempt if tower has been determined to have an Adverse Effect on a historic property. Again, as set forth below, the Eger tower will have an Adverse Effect on Olana. Thus, if a so-called "replacement" tower falls under this section of the Collocation NPA, instead of § III.A.2, then the consultation process is required.

Likewise, under § III.A.4 and § IV.A.4 of the Collocation NPA, if there is a public complaint about an Adverse Effect on a historic property, then the collocation application is not exempt from Section 106 review. Obviously, in this case, there is already a public complaint.

When the NPA was adopted, the FCC explained that collocations on existing towers are excluded from review only "absent evidence of an adverse effect from either the proposed collocation or the underlying tower." Fed Reg. Vol. 70, No. 2, p. 558, ¶20 (emphasis added). In this case, the Adverse Effect is well documented.

Therefore, the FCC must review both the proposed tower and its antennas and they are not exempt from Section 106 review.

B.2 The Tower is Not an Exempt Replacement Tower

The proposed tower is not a "replacement" tower that is exempt from Section 106 review under the NPA. Neither the NPA or the applicable FCC and ACHP regulations regarding Section 106 define a "replacement" tower.

As described in Complaint Exhibits A and H, this tower would not be a mere in-kind "replacement" of one of the two existing towers on the site. First, it will be a stand-alone lattice tower, that will be much more visible. Id. The existing towers are slender guyed towers. Also, because it would hold the equipment from the two existing towers, its visibility will be increased. Id. It is also quite likely that a larger tower will support larger antennas and other large equipment, so that it is not exempt under the criteria § I.C of the Collocation NPA. In addition, Eger is proposing to build not just one, but two new towers on Blue Hill. Id. Thus, the entire tower complex is not a "replacement", as that term is used in the NPA.

It is also worth noting that the New York State Office of Parks, Recreation and Historic Preservation ("OPRHP"), which is New York's State Historic Preservation Office ("SHPO"), has determined in Complaint Exhibit I that the project is subject to Section 106 review. Likewise, the National Park Service shares this opinion. See Complaint Exhibit B.

B.3 The Project Will Have an Adverse Effect on Olana

The Answer argues at pages 3 and 6 that the project will not affect Olana, based on a 1992 letter from the SHPO. That letter addressed the impacts of the current tower, and not the proposed tower.

This argument is specious and is refuted by the Complaint and the exhibits thereto. It is also definitively refuted by the SHPO:

- "... the newly proposed replacement unit would be significantly more visible in the historic viewshed" of Olana.
- "The density of the proposed 190 foot free-standing tower is demonstrably more visible in the landscape than the existing

guyed units which are viewed one behind the other from Olana."

- "... this undertaking ... will be subject to federal review pursuant to Section 106 of the National Historic Preservation Act."
- "The State Historic Preservation Office within the OPRHP views this new proposal as having a potential Adverse Effect on a historic resource "

Letter from Andy Beers, Acting Commissioner, OPRHP, to Town of Livingston, December 2, 2010; Exhibit I to the Complaint.

The Answer includes two viewshed maps that show that the project will be visible from much of the Olana State Historic Site, including from the House, the Farm Complex, the Education Center, and Cosy Cottage (which houses TOP's offices). It will also be visible from most of the open lawn and field areas on the site. In fact, comparing the Answer's "Topographic Viewshed" and the "Vegetative Viewshed" shows that the project will be visible from most of the open areas of the Olana site.

This argument also ignores the fact that the Olana Comprehensive Plan, the Olana Historic Landscape Report, and the Olana Landscape Restoration Plan (as cited in the Complaint) will lead to the removal of some of the existing vegetation on the site, to restore the original views created by Frederic Church at Olana. This will open up more views of the project from Olana. A copy of the Reconstruction Plan map from the Olana Landscape Restoration Plan is attached hereto. See also Comprehensive Plan at pages 49-52, figures 1 & 7.¹

The speciousness of this argument is also demonstrated by the 6 paintings or sketches of Blue Hill that were created by Frederic Church from Olana (Complaint Exhibit G). If the project site was not visible from Olana, Church could not have created these works.

¹The Plan is available at the TOP website at docs.google.com/viewer?a=v&pid=explorer&chrome=true&srcid=0BxkUL3nX-HrNMTYwNGY1YzMtNTg5Ny00YTFiLWFkZWQtYmY3YTA5ZDVlZjRi&hl=en&authkey=CJTO4bgK

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Finally, it should be noted that the Answer's discussion of the viewshed maps is very carefully worded. It says that the existing towers "are not visible from significant portions of Olana" (p. 3) (emphasis in original) and "are **not visible** at all from substantial portions of Olana" (p. 5) (emphasis in original). Thus, the Answer indirectly concedes that the project site is also visible from the remainder of Olana, and the two viewshed maps actually support the Complainants' position and contradict Eger's position.

C. The Complaint Should Not Be
Rejected "As a Matter of Policy"

The informal complaint process for questions like this one provides a way to resolve procedural issues in the FCC's administrative process as simply as possible and in a timely manner. See NPA § X, § XI; see also 47 C.F.R. § 1.41. It is neither a waste of the Commission staff's time, or bad policy, for the FCC to entertain the Complaint and resolve the question of the applicability of Section 106 at this juncture.

D. The Pending New York Environmental
Review is Irrelevant to the Question
of the Applicability of Section 106

The fact that the local planning board will review the project under New York's State Environmental Quality Review Act and its local ordinances is irrelevant to this appeal. Nothing in Section 106, FCC regulations, or the NPA, provides an exclusion from the Section 106 process merely because projects are subject to state or local review, and the Answer does not cite to any such alleged exemption.

In addition, as described in the Complaint (pp. 3-9), Olana and its viewshed are of national importance. This is confirmed by the October 19, 2010 letter from the National Park Service ("NPS") to Mr. Eger, a copy of which is attached to the Complaint. That letter states that Olana has been a National Historic Landmark since 1965 and has been on NPS's Watch List of Threatened and Endangered National Historic Landmarks since 2004. Thus, it is clear that environmental review of the Eger tower under federal law is both appropriate and necessary, regardless of what state and local review may occur.

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We also note that the SHPO, in a letter to the Town of Livingston which discussed the state and local review processes (Complaint Exhibit I), also stated that "... this undertaking ... will be subject to federal review pursuant to Section 106 of the National Historic Preservation Act."

E. The Complaint is Not Unripe

Eger's objection that the Complaint is unripe for review because the applicant is in the process of redesigning the project demonstrates a lack of understanding of the Section 106 process. The Section 106 process should begin "at the early stages of project planning". 36 C.F.R. § 800.1(a).

The Agency Official shall ensure that the section 106 process is initiated early in the undertaking's planning, so that a broad range of alternatives may be considered during the planning process for the undertaking.

36 C.F.R. § 800.1(c). FCC is not required to wait for the completion of the local review process to declare that the project is subject to Section 106 review and perhaps even to commence the Section 106 review. See 36 C.F.R. § 800.1(a). Indeed, the local officials with jurisdiction over a project should be part of the consultation process. 36 C.F.R. § 800.2(c) (4).

Moreover, since the Section 106 process is intended to ensure that "that a broad range of alternatives may be considered during the planning process for the undertaking" (36 C.F.R. § 800.1(c)), it makes complete sense to commence it as early as possible, even before the applicant completes its design work and/or local approval is obtained, so as to achieve that goal. Commencing the Section 106 process before the project's design is finalized would actually make it easier for the Section 106 process to be meaningful, and to "assess [the project's] effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties", as intended. 36 C.F.R. § 800.1(a).

Finally, the Answer gives no citations to any regulations or other legal authority that the judicial concept of ripeness is applicable in either the FCC's informal complaint process, or in the Section 106 review process.

F. The Complainants Have
Standing to File the Complaint

The Answer alleges that the Complainants lack standing to file the Complaint. This contention is wrong on several counts: (1) the rules for standing, as applied by courts, do not apply to this matter; (2) the decision cited in the Answer comes from an entirely different FCC process and does not apply herein; (3) the Complainants clearly qualify for Section 106 consulting party status; and (4) even if the judicial or FCC rules of standing did apply, the Complainants would satisfy their requirements.

F.1 Judicial Standing Rules Are Inapplicable Herein

The judicial rules of standing do not apply to the administrative proceedings of the FCC. Friends of the Earth, supra, at 5. However, if those rules did apply, the Complainants would have standing. See Tyler v. Cuomo, 236 F.3d 1124, 1133, 1135 (9th Cir. 2000) (holding that intended third-party beneficiaries of an agreement entered into under Section 106 have standing to enforce it).

F.2 The FCC's Standing Rules Are Inapplicable Herein

While the FCC has adopted its own standards for standing to file formal petitions challenging applications pending before it (Friends of the Earth, supra, at 3), those rules do not apply to a party seeking consulting party status under Section 106. See Mid States Coalition for Progress v. Surface Transportation Board, 345 F.3d 520, 553 (8th Cir. 2003) (construing rules applicable to consulting party status without regard to the concept of standing). The two types of proceedings arise under entirely different sets of statutes and regulations. Even if, for the sake of discussion, the Complainants lacked standing to formally challenge an application, that does not affect their right to have consulting party status under NHPA § 106.

F.3 The Complainants Meet the NHPA
Standards for Consulting Party Status

Under the NPA, the Complainants should be given consulting party status:

An Applicant shall consider all written requests of other individuals and organizations to participate as consulting parties and determine which should be consulting parties. An Applicant is encouraged to grant such status to individuals or organizations with a demonstrated legal or economic interest in the Undertaking, or demonstrated expertise or standing as a representative of local or public interest in historic or cultural resources preservation. Any such individual or organization denied consulting party status may petition the Commission for review of such denial.

NPA, § V.F. This is consistent with the Section 106 regulations:

Additional consulting parties. Certain individuals and organizations with a demonstrated interest in the undertaking may participate as consulting parties due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties.

36 C.F.R. § 800.2(c)(6). In carrying out this process, a federal agency "shall identify any other parties entitled to be consulting parties and invite them to participate as such in the section 106 process." 36 C.F.R. § 800.3(f)). It is the role of the federal agency to "determine which should be consulting parties." 36 C.F.R. § 800.3(f)(3). See Mid-States Coalition, supra; Neighborhood Ass'n of the Back Bay v. Federal Transit Administration, 407 F.Supp.2d 323, 334 (D. Mass. 2005).

As set forth in Exhibit A to the Complaint, Scenic Hudson is a tax-exempt not-for-profit organization founded to protect and restore the Hudson River and its landscape. See Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F.2d 608 (2d Cir. 1965). Since 1986 it has protected over 1,000 acres in the Olana viewshed, primarily through conservation easements that it holds.² The lands on which Scenic Hudson owns conservation easements are shown on Exhibit F to the Complaint. One of these easement parcels directly adjoins the project site. As set forth

² See Looking Out for the View at Olana, Frederic Church's Hudson Home, New York Times, April 14, 2011 (copy attached). www.nytimes.com/2011/04/14/garden/14olana.html?pagewanted=all

in Complaint Exhibit A, the proposed Eger tower would adversely affect Scenic Hudson's investment in those lands.

As set forth in Complaint Exhibit A, TOP is a tax-exempt not-for-profit organization that works cooperatively with the State to operate Olana. Its offices are located on the Olana property, in one of the historic buildings there, known as "Cosy Cottage". It was directly involved in preparing, and funded in whole or in part, the key planning documents for the protection of the Olana viewshed, that are cited in the Complaint, including the Olana Comprehensive Plan, the Olana Historic Landscape Report, and the Olana Landscape Restoration Plan. In addition, TOP has raised hundreds of thousands of dollars for the restoration of the Olana house and grounds. This investment would be threatened by the proposed tower project. See New York Times, supra.

Both organizations have "demonstrated expertise" in the issues at hand. For instance, they were full parties to the New York State administrative processes for the proposed Athens Generating project in the Olana viewshed. See State of New York Board on Electric Generation Siting and the Environment, No. 97-F-1563.³ They were also parties to the proceedings on the now-abandoned proposal for the St. Lawrence Cement Company plant, also in the viewshed. See New York State Department of Environmental Conservation, Initial Ruling, December 7, 2001;⁴ New York State Department of State Ruling on Coastal Zone Consistency, No. F-2004-0863, April 19, 2005.⁵ Currently, as shown by the exhibits to the Complaint, both organizations have been deeply involved in the state and local review of the Eger tower project.

In addition, both of the Complainants have members who reside near the tower site and would be affected by the project. For instance, Mark Prezorski is a member of the Board of Trustees

³ This decision is available on the DOS website at: documents.dps.state.ny.us/public/Common/ViewDoc.aspx?DocRefId={7942F556-43FE-45C7-BC89-4811742EA18A}

⁴ www.dec.ny.gov/hearings/11871.html

⁵ www.nyswaterfronts.com/downloads/pdfs/consistency/F-2004-0863.pdf

of TOP⁶ and a supporter of Scenic Hudson.⁷ Mr. Prezorski owns land and resides adjoining the project site on Blue Hill, which is in the Olana viewshed. See New York Times, supra.

The Complainants meet all of the criteria for consulting party status under both the NPA and 36 C.F.R. § 800.2(c)(6). As parties entitled to apply for consulting party status, they have standing to apply to enforce the NPA. Tyler, supra, at 1133, 1135 (finding that plaintiffs, as members of the public, had standing to enforce agreement regarding Section 106 consultation process).

Thus, both Complainants have an economic interest in the matter, both have demonstrated expertise, and both are "representative of local or public interest in historic or cultural resources preservation". NPA, § V.F.

F.4 The Complainants Also Meet the Standing Tests

Although they are not required to do so, the Complainants do meet the FCC's standing test for administrative procedures, as set forth at Friends of the Earth, supra, and the judicial standing test, as set forth at Tyler, supra. Both organizations would be directly injured by the construction of the proposed tower, Scenic Hudson as the holder of conservation easements on nearby properties, and TOP as the co-operator of the Olana State Historic Site. Both have members, such as Mr. Prezorski, who would be directly affected. The potential injury to these parties could possibly be prevented through the Section 106 consultation process. See Tyler, supra, at 1134. Therefore, they meet any imaginable test for standing. See Tyler, supra; Friends of the Earth, supra.

Therefore, since the Complainants are entitled to be consulting parties in the Section 106 process for this project, they also have the right to file an informal complaint with the FCC regarding that process.

⁶ See TOP website: olana.org/Board%20of%20Trustee%20List%20%202011%20for%20website.pdf

⁷ Scenic Hudson 2009 Annual Report (p. 21):
www.scenichudson.org/files/u2/ar2009.pdf

Daniel Abeyta
Re: Eger Communications Tower Project

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October 7, 2011

Conclusion

The FCC should make a determination that the NHPA § 106 consultation process does apply to the Eger tower project, that the Complainants have the right to be consulting parties in that process, and then duly commence that process.

Sincerely,

/s/ *John W. Caffry*

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jcaffry@caffrylawoffice.com

JWC/ljs
enc.

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Kevin B. Thiemann,
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October 24, 2011

Via U.S. Mail & E-Mail: Dan.Abeyta@fcc.gov

Daniel Abeyta, Assistant Chief
Spectrum & Competition Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
1445 12th Street SW
Washington, DC 20554

**Re: Sur-reply in further Opposition to Complaint by Scenic Hudson, Inc.
Regarding Eger Communications REPLACEMENT TOWER at Blue Hill,
Town of Livingston, Columbia County, New York**

Dear Mr. Abeyta:

We represent Eger Communications, Inc. ("Eger") in respect to its proposed tower replacement project in the Town of Livingston, Columbia County, New York. We are in receipt of the Reply by Scenic Hudson, Inc. and the Olana Partnership ("Complainants") to Eger's opposition to the above-referenced informal complaint. Insofar as the Complainants' Reply raises new facts and claims that were not previously asserted in the informal complaint, the FCC granted our request to file a Sur-reply for the purposes of addressing such new facts and claims. We, therefore, respectfully submit this Sur-reply in further opposition to the informal complaint and the new facts and claims alleged by the Complainants for the first time in their Reply papers.

**I. The Proposed Project Is For "Construction Of A Replacement For An Existing Tower"
As Expressly Defined Under NPA Section III (B)**

The Complainants make several new and conflicting arguments in an attempt to circumvent the plain language of Nationwide Programmatic Agreement ("NPA") Section III (B), which expressly excludes from Section 106 review the "construction of a replacement for an existing tower," and which is precisely what Eger has proposed.

First, Complainants make the erroneous claim that the NPA does not define a "replacement" tower (Complainants' Reply at pg. 5). NPA Section III (B) expressly defines what constitutes "construction of a replacement for an existing tower" as follows:

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 (see Attachment 1 to this Agreement, Stipulation 1.c.1-3) and that 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 or outside any existing access or utility easement related to the site.

The proposed replacement tower meets all of the criteria of the above definition, a definition Complainants contend does not exist. This is further evidence of their bad faith in making the complaint (¶B, Gagen/Murray letter 08/29/11).

Second, Complainants state that “whether or not the tower should be labeled as ‘new’ or as a ‘replacement’ is a **legal question pursuant to the NPA, and is not a ‘fact’**” (Complainants’ Reply at pg. 2 [emphasis added]). The Complainants then proceed to contradict that position by offering a litany of **factual** claims about how the replacement tower will not be as “slender” as the existing tower it is proposed to replace, and **factual** speculation that the size of antennas that might be installed on it the replacement tower are “quite likely” to be “larger.” None of these factual claims are relevant given that the NPA clearly defines “replacement” tower and the Eger project falls squarely within the definition.

Third, the Complainants also resort to offering a new, albeit false, fact: that Eger is proposing to build a “tower complex” (*Id.* at pg. 5). This blatant falsehood is based upon a separate and distinct application by Eger in 2006 to install a new tower at an entirely different site on Eger’s 129-acre property. As Complainants are well aware, the 2006 application has been dormant since 2008, with no municipal review since 2009.¹ In any event, whether another tower was proposed elsewhere in the area simply does not negate that the proposed replacement tower meets the criteria of NPA §III (B) to warrant exclusion from Section 106 review.

II. The Nationwide Collocation Programmatic Agreement Is Inapplicable To Replacement Towers

The Complainants for the first time in their Reply also claim that the Nationwide Collocation Programmatic Agreement (“Collocation NPA”) requires Section 106 review of the proposed replacement tower. Collocation NPA Section II (A), entitled “Applicability”, clarifies the scope of this section made clear by the use of the term “Collocation” in its title:

¹ To the extent relevant given the dormant nature of the 2006 application, it should be noted that Eger submitted to Section 106 review in respect to the 2006 new tower application because, unlike the replacement tower at issue here, the 2006 application was for a new tower at a totally different site where there was no existing tower that it was proposed to replace.

The Nationwide Collocation Programmatic Agreement **applies only to the collocation of antennas** as defined in Stipulation I.A, above.

(Collocation NPA §II [A] [emphasis added]).

Insofar as the Collocation NPA clearly states that it is “only” applicable to collocations, it is inapplicable to the subject replacement tower and its exclusion from Section 106 review. For this reason alone, the Complainants’ reliance on the Collocation NPA must be rejected, without more.

Notwithstanding the inapplicability of the Collocation NPA to this matter, we must note that the Complainants submit a misreading of the Collocation NPA that, at best, is reckless, as well as another new factual misrepresentation in an attempt to somehow support their misplaced reliance on the Collocation NPA. Specifically, the Complainants claim that Collocation NPA §§ III.A.2. and IV.A.3. state that collocation of antenna on an existing tower “is not exempt from the Section 106 consultation process if the tower has been determined to have an Adverse Effect on a historic property” (Complainants’ Reply at pg. 4). Complainants conveniently fail to include the language of Collocation NPA §§ III.A.2. and IV.A.3. that specifies *who* must make such a determination. It is not the Complainants. Each section contains identical language clearly stating that collocations on an existing tower are exempt from the Section 106 process unless:

The tower has been determined **by the FCC** to have an effect on one or more historic properties...

(Collocation NPA §§ III.A.2. and IV.A.3. [emphasis added]).

Here, the FCC never made such a determination in respect to the existing tower that is proposed to be replaced.

The Complainants’ proceed to try to avail themselves of the above inapplicable provisions of the Collocation NPA by misrepresenting that the existing tower proposed to be replaced was previously determined to have an “adverse effect.” NY SHPO’s No Effect determination letter dated September 28, 1992 in respect to the existing tower, a copy of which is enclosed, shows this claim to be false. Amazingly, the Complainants’ attempt to impugn the significance of the NY SHPO’s 1992 No Effect determination by claiming that it is refuted by their own Complaint and a 2010 NY SHPO letter, both of which ignore that this proposal is for replacement of an existing tower that has already been officially determined by the NY SHPO to have No Effect on historic resources. In this regard, it should be noted that the 2010 NY SHPO letter (1) was not issued in the context of a Section 106 review process, (2) unlike the 1992 No Effect determination, does not constitute an official determination, and (3) was made without the benefit of a new field inspection (see pg 3 “B” Gagen/Murray letter 08/29/11).



New York State Office of Parks, Recreation and Historic Preservation
The Governor Nelson A. Rockefeller Empire State Plaza
Agency Building 1, Albany, New York 12238-0001

September 28, 1992

Mr. Mark Eger
Mark Eger & Bros., Inc.
RD 2, Box 11A
Hudson, New York 12534

Dear Mr. Eger:

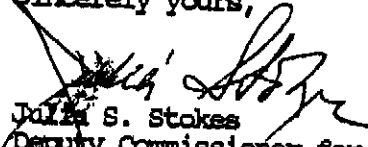
Re: SEORA
190' Communication Tower on Blue Hill
Greenport, Columbia County
92PR1602

The Office of Parks, Recreation and Historic Preservation (OPRHP) has received the documentation you provided on your project. As the state agency responsible for the coordination of the State's historic preservation programs, including the encouragement and assistance of local preservation programs, we offer the following comments.

Recently, staff from our Field Services Bureau visited the area of the proposed communication tower to assess the potential visual impact of the project. Based upon this review, it is the OPRHP's opinion that this project will have No Impact upon cultural resources in or eligible for inclusion in the State and National Registers of Historic Places.

If you have any questions, please call our Project Review Unit at (518) 474-0479.

Sincerely yours,


Julia S. Stokes
Deputy Commissioner for
Historic Preservation

JSS/RDK:tr

III. The Viewshed Maps Illustrate Visibility Of The Existing Towers That Have Already Been Determined To Have No Effect On Historic Resources By The NY SHPO

Insofar as the Complainants have failed to submit any objective data in respect to their claims about the visibility of the proposed replacement tower, they attempt to try to pass off their personal opinions about the viewshed maps submitted by Eger as supportive of their position. Oddly, the Complainants' personal opinions are about whether the portions of Olana from which the existing towers are not visible are substantial, or not. As noted above, the NY SHPO already issued a No Effect letter in 1992 in respect to these existing towers. This cannot be negated by the Complainants' personal opinions almost 2 decades later. The viewshed maps simply document the visibility of the existing 190' tower that Eger proposes to replace, which is already present in the viewshed, and has already been officially determined by the NY SHPO in 1992 to have No Effect on historic resources in the area.

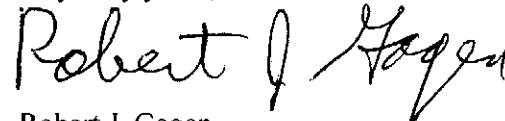
IV. Consulting Party Status Is Unavailable To The Complainants

Complainants' request for "consulting party status" amounts to nothing more than yet another attempt to circumvent the exclusion from the Section 106 process afforded a replacement tower pursuant to NPA §III (B). Again, pursuant to NPA §III (B), the proposed replacement tower is an undertaking excluded from the Section 106 review process because it consists of construction of a replacement tower that meets the criteria set forth in NPA Section III (B). Pursuant to NPA Section V, "consulting party status" may be requested in respect to projects subject to Section 106 review. Insofar as this tower replacement project is expressly excluded from Section 106 review, participation as a "consulting party" is unavailable.

Conclusion

For the foregoing reasons, Eger Communications respectfully renews its request that the FCC dismiss the informal complaint in its entirety, or reject it on substantive grounds. The relief requested by the Complainants is unavailable because this tower replacement project meets all of the criteria for exclusion from the NHPA Section 106 review process.

Very truly yours,



Robert J. Gagen

-and-

The Murray Law Firm, PLLC
Jacqueline Phillips Murray, Of Counsel

JPM/lb
Enclosure
00064/surreply

cc: John W. Caffrey/Caffrey&Flower
M. Eger

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**VISUAL IMPACT ASSESSMENT REPORT
FOR THE PROPOSED
EGER COMMUNICATIONS
REPLACEMENT TELECOMMUNICATIONS FACILITY**

**170 EGER ROAD, HUDSON,
COLUMBIA COUNTY, NEW YORK**

PREPARED FOR:

**EGER COMMUNICATIONS
33 EGER ROAD
HUDSON, NEW YORK 12534**

PREPARED BY:

**TECTONIC ENGINEERING & SURVEYING CONSULTANTS P.C.
70 PLEASANT HILL ROAD
MOUNTAINVILLE, NEW YORK 10953**

November 28, 2012

TECTONIC

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**VISUAL IMPACT ASSESSMENT REPORT
FOR THE PROPOSED EGER COMMUNICATIONS
REPLACEMENT TELECOMMUNICATIONS FACILITY
170 EGER ROAD, HUDSON,
COLUMBIA COUNTY, NEW YORK**

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1.0 INTRODUCTION

Tectonic Engineering & Surveying Consultants, P.C. (Tectonic) was retained by Eger Communications to prepare a Visual Impact Assessment (VIA) of the proposed replacement of an existing 190-foot telecommunications facility consisting of two (2) guyed lattice structures (the "Existing Facility") with a new 190-foot telecommunications facility consisting of a self-supporting lattice structure (the "Replacement Facility") at 170 Eger Road in Hudson, Columbia County, New York. The purpose of this VIA is to assess the potential visibility and visual impact of the proposed replacement tower on the existing viewshed in accordance with the New York State Department of Environmental Conservation (NYSDEC) Program Policy on Assessing and Mitigating Visual Impact (DEP-00-2). The existing viewshed currently includes the two (2) existing 190-foot high guyed lattice structures and the antennas that they support at the project location, as well as other existing tower structures within the surrounding five (5) mile study radius.

2.0 PROJECT DESCRIPTION

The proposed project calls for the replacement of the Existing Facility, consisting of two (2) 190-foot high guyed lattice structures with antennas, cables and related ground equipment, at the above referenced location with the Replacement Facility, consisting of a new 190-foot high self-supporting lattice structure, with relocated antennas, the addition of new antennas and a related equipment shelter. The project area is limited to the location of the Existing Facility on the 129-acre parcel of land. Due to the lack of structural capacity of the Existing Facility structures, the Existing Facility's guyed lattice structures need to be replaced by the proposed 190-foot high self-supporting lattice tower.

The proposed replacement tower will be located approximately five (5) feet east of the Existing Facility guyed lattice structures. Following construction of the proposed replacement tower, the Existing Facility guyed lattice structures will be removed and the existing telecommunication antennas will be relocated to the proposed Replacement Facility lattice tower. New antennas will also be collocated on the Replacement Facility lattice tower.

The Existing Facility guyed lattice structures currently support fourteen (14) whip/dipole antennas, three (3) 2.5 foot microwave dishes, and three (3) panel antennas. With the exception of one (1) existing whip antenna, all of these antennas will be relocated to the Replacement Facility lattice tower. In addition, eight (8) new whip antennas will be added to the Replacement Facility lattice tower to support County and local public safety radio communications in the area (Appendix A).

3.0 EXISTING VISUAL CHARACTER

The proposed project area, herein referred to as the subject site, is located at 170 Eger Road in Hudson, Columbia County, New York on a 129-acre parcel of land. This parcel of land is currently characterized by a residential house, several barns and agricultural fields, the Existing Facility which is comprised of two (2) 190-foot guyed lattice structures, and areas of undeveloped woodlands. According to the Town of Livingston Zoning Map, the property is zoned a Low Density Residential District (LDR-2).

Within the parent parcel, the subject site consists of the Existing Facility which is comprised of two (2) 190-foot high guyed lattice structures with antennas at an elevation of approximately 630 feet

Above Mean Sea Level (AMSL). At the base of the Existing Facility are two (2) existing equipment buildings that are situated approximately 20 feet apart. The site, which is immediately surrounded by mature forest growth, is accessed via an existing driveway and is served by existing utilities.

3.1 Physiographic/Visual Setting

3.1.1 Landform and Vegetation

The Town of Livingston is located in the Hudson Valley, within the Hudson-Mohawk Lowland. The soft sedimentary rocks and overlying glacial deposits of the Hudson-Mohawk Lowland region have been eroded, resulting in a variety of terrain. Within this region, the Hudson Valley forms a 10 to 20 mile wide lowland between the Helderberg Escarpment and the Catskills on the west, and the Taconics on the east. South of Albany, the valley narrows and contains a complex of hills and terraces underlain with highly folded sedimentary rocks.

The subject site is situated within a landscape predominately characterized by rural agricultural development. The Town of Livingston is located along the Hudson River in the central portion of Columbia County. The surface of the town can generally be described as relatively flat to rolling. The highest summit in the vicinity, reaching approximately 660 feet AMSL, is Blue Hill on which the subject site is situated.

Located at an elevation of approximately 630 feet AMSL on the north/northeast facing sloping of Blue Hill, the subject site is immediately surrounded by mature forest growth. Beyond, the surrounding landscape is primarily characterized by rolling agricultural fields, areas of undeveloped woodlands and rural residential development. Vegetation in the region is dominated by this development, and includes various agricultural plants and mixed hardwood forest species.

3.1.2 Land Use

Land use within five (5) miles of the proposed replacement tower is primarily characterized by rural agricultural development. Human development is generally sparse within the immediate vicinity of the subject site, consisting of scattered residences, farms, transportation routes and utility transmission lines. Denser village settings, including Catskill and Hudson, are located at background distances from the subject site.

3.1.3 Water Features

The subject site is located approximately two (2) miles east of the Hudson River, outside of the State Coastal Area boundary. Other hydrologic features within five (5) miles of the subject site include various tributaries, ponds and wetlands.

3.2 Landscape Similarity Zone (LSZ)

The Landscape Similarity Zone (LSZ) of the project area is generally Rural Agriculture. This LSZ is characterized by open or mixed vegetation and landforms that range from level to hilly. Development is characterized by low density/scattered rural residences and farms. Major water features (rivers and lakes) may be present but are not typical.

For this project, the landscape of the five (5) mile study radius is further characterized by three (3) existing radio towers at the intersection of Route 9G and County Route 14, and the Existing Facility which is comprised of two (2) existing 190-foot high guyed lattice structures at the subject site. The two (2) existing 190-foot high guyed lattice structures at the subject site will be replaced by a single 190-foot high self-supporting lattice structure.

3.3 Viewer/User Group

Viewer groups that are currently subject to the Existing Facility at the subject site and would be subject to the proposed Replacement Facility include local residents, through travels/commuters, recreational users and tourists.

3.4 Visually Sensitive Resources

The following inventory of visually sensitive resources is based on the NYSDEC Program Policy: Assessing and Mitigating Visual Impacts, DEP-00-2. Table 1 and its corresponding Figure 1 summarize the inventory of aesthetic resources within 5 miles of the subject site that were identified and reviewed.

With respect to determining the radius of the impact area to be analyzed, the general guideline for large actions suggests it is usually "safe" to use 5 miles. The 5 mile distance likely owes its origins to the U.S. Forest Service "distance zones" set forth in their landscape management journal written in 1973 (5 miles is still largely considered "background" i.e. distances at which most activities are not a point of interest to the casual observer).

TABLE 1. INVENTORY OF AESTHETIC RESOURCES			
VISUAL RESOURCES IDENTIFIED WITHIN 5 MILES OF THE SUBJECT SITE		YES	NO
1.	A property on or eligible for inclusion in the National or State Register of Historic Places [16 U.S.C. § 470a et seq., Parks, Recreation and Historic Preservation Law Section 14.07 1. Livingston Memorial Church and Burial Grounds (90NR00238), CR 10 and Wire Road, Linlithgo 2. Oak Hill (90NR00236), North of Linlithgo on Oak Hill Road, Linlithgo 3. Olana (90NR00232), Church Hill, East end of Rip Van Winkle Bridge, Church Hill 4. William Lampman House (91NR03337), 147 Grandview Avenue, Catskill 5. Hop-O-Nose Knitting Mill (91NR03333), 130 West Main Street, Catskill 6. Joseph Hallock House (91NR03332), 241 West Main Street, Catskill 7. West Bridge Street, Commercial Building at 32 (91NR03339), 32 West Bridge Street, Catskill 8. Wiley Hose Company Building (91NR03338), 30 West Bridge Street, Catskill 9. David Van Gelder Octagon House ("Spring Side") (97NR01264), 47 Division Street, Catskill 10. Benjamin Dubois House (91NR03341), 347 West Main Street, Catskill 11. Stone House (91NR03342), 347 West Main Street, Catskill 12. US Post Office – Catskill (90NR00550), 270 Main Street, Catskill 13. Susquehanna Turnpike (90NR00552), Beginning at Catskill, follows the Mohican Trail (NY 145) and CR 20 and 22 NW to the Schoharie County line 14. Thomas Cole House (90NR00549), 218 Spring Street, Catskill 15. East Side Historic District (90NR00548), Roughly bounded by Catskill Creek, Hudson River, River, Harrison, Day and Gardner Streets, Catskill	<input checked="" type="checkbox"/>	<input type="checkbox"/>

TABLE 1. INVENTORY OF AESTHETIC RESOURCES

VISUAL RESOURCES IDENTIFIED WITHIN 5 MILES OF THE SUBJECT SITE		YES	NO
	16. Moore-Howland Estate (10NR06129), 4 NY 385, Catskill 17. District School No. 11 (95NR00843), Jefferson Heights 18. German Reformed Sanctity Church Parsonage (90NR00230), Maple Avenue, Germantown 19. Simeon Rockefeller House (08NR05955), 524 Columbia CR 8, Germantown 20. Peter Dick House (08NR05885), 641 County Route 8, Germantown 21. Richmond Hill (90NR00237), CR 31, Livingston 22. Forth House (10NR06101), 2751 Route 9, Livingston 23. Linlithgo Reformed Church (05NR05474), 447 Burch Road, Livingston 24. Henry W. Livingston House (90NR00235), North of Bell's Pond, Livingston 25. Coyn-Van Rensselaer House (90NR05989), 644 Spook Rock Road CR 29, Claverack 26. Harmon Miller House (97NR01196), 6109 NY 9H/23, Claverack 27. Double-Span Whipple Bowstring Truss Bridge (90NR00215), Van Wyck Lane, Claverack 28. Jacob P. Mesick House, 68 Van Wyck Lane, Claverack 29. Rev. Dr. Elbert Porter House ("Oakledge") (97NR01233), 6163 NY 23/9H, Claverack 30. Claverack Free Library (97NR01261), 621 NY 23B, Claverack 31. Trinity Episcopal Church (97NR01234), 601 NY 23B, Claverack 32. Cornelius S. Muller House (97NR01198), 602 NY 23B, Claverack 33. Stephen Hogeboom House (97NR01235), 562 NY 23B, Claverack 34. First Columbia Courthouse (97NR01260), 549 NY 23B, Claverack 35. William Henry Ludlow House (97NR01197), 465 NY 23B, Claverack 36. Ludlow-Van Rensselaer House (97NR01242), 495 NY23B, Claverack 37. Harriet Phillips Bungalow (97NR01241), 430 NY 23B, Claverack 38. Columbia Turnpike, West Tollgate House (00NR01579), NY23B, south site, West of Spook Rock Road, Greenport Center 39. Henry A. and Evalina DuBois House (04NR05257), 105 Ten Broeck Lane, Hudson Vicinity 40. Rossman-Prospect Avenue Historic District (90NR00254), Prospect and Rossman Avenues, Hudson 41. Dr. Oliver Bronson House and Stables (90NR00247), South of Hudson off of US 9, Hudson 42. Hudson Almshouse (08NR05886), 400 State Street, Hudson 43. Hudson Historic District (90NR00252), Roughly bounded by Warren and State Streets, Eighth and Seventh Streets, E. Allen and Allen Streets, and Penn Central Railroad, Hudson 44. US Post Office – Hudson (90NR00256), 402 Union Street, Hudson 45. Cornelius H. Evans House (90NR00255), 414-416 Warren Street, Hudson 46. North Fifth Street, Houses at 37-47 (03NR05071), 37-47 North Fifth Street, Hudson 47. Oliver Wiswall House (90NR00231), West of Hudson, Hudson		
2.	State Parks [Parks, Recreation and Historic Preservation Law Section 3.09] 48. Olana State Historic Site	<input checked="" type="checkbox"/>	<input type="checkbox"/>
3.	Urban Cultural Parks [Parks, Recreation and Historic Preservation Law Section 35.15]	<input type="checkbox"/>	<input checked="" type="checkbox"/>
4.	The State Forest Preserve [NYS Constitution Article XIV]; Adirondack and Catskill Parks	<input type="checkbox"/>	<input checked="" type="checkbox"/>
5.	National Wildlife Refuges [16 U.S.C. 668dd], State Game Refuges and State Wildlife Management Areas [ECL 11-2105] 49. Rogers Island State Wildlife Management Area	<input checked="" type="checkbox"/>	<input type="checkbox"/>
6.	National Natural Landmarks [36CFR Part 62]	<input type="checkbox"/>	<input checked="" type="checkbox"/>

TABLE 1. INVENTORY OF AESTHETIC RESOURCES

VISUAL RESOURCES IDENTIFIED WITHIN 5 MILES OF THE SUBJECT SITE		YES	NO
7.	The National Park System, Recreation Areas, Seashores, Forests [16 U.S.C. 1c]	<input type="checkbox"/>	<input checked="" type="checkbox"/>
8.	Rivers designated as National or State Wild, Scenic or Recreational [16 U.S.C. Chapter 28, ECL 15-2701 et seq.]	<input type="checkbox"/>	<input checked="" type="checkbox"/>
9.	A site, area, lake, reservoir or highway designated or eligible for designation as scenic [ECL Article 49 or DOT equivalent and APA Designated State Highway Roadside]	<input type="checkbox"/>	<input checked="" type="checkbox"/>
10.	Scenic Areas of Statewide Significance [of Article 42 of Executive Law] 50. Catskill-Olana Scenic Area of Statewide Significance	<input checked="" type="checkbox"/>	<input type="checkbox"/>
11.	A state or federally designated trail, or one proposed for designation [16 U.S.C. Chapter 27 or equivalent]	<input type="checkbox"/>	<input checked="" type="checkbox"/>
12.	Adirondack Park Scenic Vistas [Adirondack Park Land Use and Development Map]	<input type="checkbox"/>	<input checked="" type="checkbox"/>
13.	State Nature and Historic Preserve Areas [Section 4 of Article XIV of the State Constitution]	<input type="checkbox"/>	<input checked="" type="checkbox"/>
14.	Palisades Park [Palisades Interstate Park Commission]	<input type="checkbox"/>	<input checked="" type="checkbox"/>
15.	Bond Act Properties purchased under Exceptional Scenic Beauty or Open Space Category	<input type="checkbox"/>	<input checked="" type="checkbox"/>
16.	Water Access – The Water Access category included projects to obtain public access to water resources such as lakes, streams, beaches and ocean fronts. Both DEC and OPRHP are involved in developing water access sites. DEC's primary focus is on fishing, while OPRHP directs its efforts at the full range of recreational boating and water recreation. The Department of State also promoted access to coastlines within the coastal zone through its coastal access policies and Waterfront Revitalization program. 51. Front Street, Hudson 52. Anchorage Road, Germantown 53. Dutchmen's Landing, Catskill	<input checked="" type="checkbox"/>	<input type="checkbox"/>
17.	Additional State, County and Local Visual Resources 54. Livingston State Forest 55. Ramshorn-Livingston Sanctuary 56. Rip Van Winkle Bridge 57. Hudson River 58. US Route 9 59. Livingston Recreational Park 60. Mt. Pleasant Church and Cemetery 61. Nativity Chapel and Cemetery 62. Palatine Park	<input checked="" type="checkbox"/>	<input type="checkbox"/>

According to the Visual Resource Map, Figure 1, there are no identified aesthetic resources located within one (1) mile of the subject site. The majority of the resources, including a vast number of the historic sites, are located more than three (3) miles from the subject site. In these areas, they tend to be clustered in and around village centers. These centers include Claverack, Greenport Center, Hudson and Catskill.

4.0 POTENTIAL VISUAL IMPACTS

To assess the potential visibility and impacts of the proposed replacement tower within a five (5) mile study radius, Tectonic performed a viewshed analysis of the proposed undertaking by assessing topographic and vegetative viewshed maps, performing a field reconnaissance and preparing photographic simulations of the installation.

4.1 Project Visibility

4.1.2 Viewshed Analysis

Insofar as the proposed project is limited to replacement of the two (2) existing 190-foot high guyed lattice structures with a single 190-foot high self-supporting lattice structure at a location just five (5) feet east of the existing structures, the existing guyed lattice structures demonstrate the actual zone of visibility of the proposed replacement structure within the surrounding viewshed as both the existing and replacement structures are the same height. A viewshed analysis, utilizing a topographic viewshed map, was nevertheless conducted to document the potential visibility of the subject site. Also known as defining the zone of visual influence, viewshed mapping identifies the geographic area within which there is a relatively high probability that some portion of the proposed improvements at a subject site would be visible.

To calculate the maximum range of potential visibility, the highest point of the existing and replacement structures (190 feet) was used as the study point. The resulting viewshed identifies the geographic area within the five (5) mile study radius where some portion of the proposed project is theoretically visible while defining the area within which there would be no visibility due to the screening effect caused by intervening topography. This treeless condition analysis is used to identify the maximum potential geographic area within which further investigation is appropriate. Of course, the actual range of visibility of the existing and replacement structures is demonstrated by the presence of the Existing Facility guyed lattice structures in the viewshed.

In reviewing the topographic viewshed map, it is worth noting that untrained reviewers often misinterpret treeless condition viewshed maps to represent wintertime, or leafless condition visibility. In fact, deciduous woodlands provide a substantial visual barrier in all seasons. Treeless condition analysis is provided only to assist experienced visual analysts with identifying the maximum potential geographic area within which further investigation is appropriate. Such topography-only viewshed maps are not generally intended or appropriate for public interpretation or presentation. Furthermore, as the primary purpose of the map is to assist in determining the potential visibility of the proposed project from the identified visual resources within five (5) miles, it does not imply the magnitude of visibility in regards to the viewer's distance from the tower or the aesthetic character of what may be seen.

In this evaluation, ArcGIS 10.0 software was used to generate viewshed areas based on publicly available digital topographic data sets. Viewshed overlays were created by first importing a digital elevation model (DEM) of the study area. This DEM, obtained through the United States Geologic Survey (USGS) from its National Elevation Dataset, is based on the best available digital elevation data including the 1:24,000-scale USGS topographic maps (10-foot contour intervals) and is accurate to a 10-meter grid cell resolution. The computer then scanned 360 degrees across this DEM from each control point, distinguishing between grid cells that would be hidden from view and those that would be visible based solely on topography. Areas of the surrounding landscape with a view to each control point were identified; areas in shadow show no visibility.

The resulting viewshed map indicates the locations within the surrounding landscape from which the proposed replacement tower might be visible, presented as a theoretical visibility of the tower above intervening landforms. As noted above, the presence of the existing 190-foot high guyed lattice structures at the subject site, which will be replaced by the single self-supporting lattice

structure of the same height at a location just five (5) feet away from the existing structures, demonstrates the actual visibility of the proposed replacement tower in the surrounding viewshed.

Figure 2 illustrates the results of the topographic viewshed analysis.

4.1.2 Viewshed Analysis with Vegetative Screening

As the topographic viewshed analysis suggests visibility from a number of the inventoried aesthetic resources, an additional viewshed analysis was conducted taking into consideration the screening effects of vegetation. This vegetated condition viewshed, although not considered absolutely definitive, acceptably identifies the geographic area within which one would expect to be substantially screened by intervening forest vegetation.

In order to create a vegetative screening viewshed map, utilizing the topographic screening viewshed map, vegetation data was extracted from the National Oceanographic and Atmospheric Administration (NOAA) Coastal Services Coastal Change Analysis Program (C-CAP). The C-CAP dataset, produced by the NOAA Coastal Services Center, was developed from Landsat 7 Thematic Mapper (TM) imagery (2006) and is accurate to a 30-meter grid cell resolution. The screening effect of vegetation was then incorporated by adding 40 feet in height to DEM grid cells that are completely forested (according to C-CAP dataset) and repeating the calculation procedure. Based on field observation, most trees in forested portions of the study area are significantly taller than 40 feet. This height thus represents a conservative estimate of the effect of vegetative screening.

It is important to note that the C-CAP dataset is based on the interpretation of forested areas that are clearly distinguishable from multi-spectral satellite imagery. While the resulting viewshed map includes the screening value of existing vegetation that is equally representative of both leaf-on and leaf-off seasons, the potential screening value of site-specific vegetative cover, such as small hedgerows, individual trees and other areas of non-forest tree cover, may not be represented. Furthermore, the C-CAP dataset does not include the screening value of existing structures. This is a particularly important distinction in populated areas, including cities, villages and other commercial and residential areas, where existing structures are likely to provide significant screening of distant views. With these conditions, the viewshed map conservatively overestimates the potential project visibility in areas where the project may be substantially screened from view.

Figure 3 illustrates the results of the vegetative viewshed map. By indicating the locations within the surrounding landscape from which the proposed replacement tower might be visible, the results are presented as a theoretical visibility of the proposed project above intervening landforms and vegetation. Furthermore, the actual visibility of the proposed project is demonstrated by the presence of the existing guyed lattice structures of the same height at the subject site.

4.1.3 Field Verification

According to a review of the viewshed maps, topography will have a minor influence on the visibility of the proposed replacement tower due to the location of the subject site atop Blue Hill. Vegetation does, however, help limit the potential visibility of the proposed replacement structure from certain areas throughout the 5 mile study radius, to the same extent that it limits the actual visibility of the existing guyed lattice structures to be replaced.

A field verification survey was conducted on November 22, 2011 and December 1, 2011 in order to assess the existing viewshed of the subject site and 5 mile study radius. Photographs were taken from various locations within the 5 mile study radius toward the subject site using a Canon EOS Rebel XT SLR digital camera. These photographs, as presented in Appendix B, showcase the existing viewshed from a representative profile of resource types and locations within the 5 mile study radius (Table 2).

TABLE 2. FIELD VERIFICATION

Photo No.	Resource	Distance from Tower	Visibility of Existing Tower
1	Blue Valley Road	1,600 feet SE	Visible
2	Blue Valley Road	3,150 feet E/SE	Visible
3	Woodchuck Road	4,305 feet W	Visible
4	Cold Spring Road	4,710 feet S	Visible
5	Howe Road	5,180 feet NW	Visible
6	Mount Pleasant Church and Cemetery	1.05 miles NE	Visible
7	Oak Hill	1.61 miles NW	Visible
8	Olana Historic Site - Crown Hill Road	1.79 miles N/NW	Not Visible
9	Livingston Memorial Church	1.96 miles SW	Not Visible
10	Nativity Chapel and Cemetery	1.94 miles S/SW	Visible
11	Olana Historic Site - Barns	2.06 miles N/NW	Not Visible
12	Olana Historic Site - Cozy Cottage	2.07 miles N/NW	Visible
13	Olana Historic Site - Road overlooking Cozy Cottage and Barns	2.16 miles N/NW	Visible
14	Olana Historic Site - Studio Site	2.23 miles N/NW	Visible
15	Olana Historic Site - House	2.30 miles N/NW	Visible
16	Fingar Road	2.67 miles NE	Visible
17	Route 9 (near Animal Hospital)	2.69 miles NE	Visible
18	Dutchmen's Landing	2.77 miles NW	Visible
19	Police Barracks along Orchard Road	2.91 miles E/SE	Visible
20	Ramshorn-Livingston Sanctuary	2.95 miles NW	Not Visible
21	Wire Road	3.10 miles S/SW	Visible
22	Hover Road near Route 9G	3.22 miles SW	Visible
23	Coyne-Van Rensselaer House	3.27 miles NE	Not Visible
24	Henry W. Livingston House at "The Hill" Marker along Bells Pond Road	3.40 miles E/SE	Not Visible
25	Rip Van Winkle Bridge	3.40 miles NW	Visible
26	Linlithgo Reformed Church	3.52 miles SE	Not Visible
27	Intersection of Route 19 and Route 10	3.54 miles SE	Visible
28	Commercial Building at 32 West Bridge Street	3.59 miles NW	Not Visible
29	Thomas Cole House	3.68 miles NW	Not Visible
30	Richmond Hill	3.71 miles S	Visible
31	Dr. Oliver Bronson House and Stables	4.14 miles NE	Not Visible
32	Ludlow-Van Rensselaer House	4.43 miles NE	Not Visible
33	Peter Dick House	4.53 miles SW	Not Visible
34	County Route 27	4.61 miles NE	Not Visible
35	Route 23	4.78 miles NW	Not Visible
36	Harmon Miller House	4.81 miles NE	Not Visible
37	Front Street Boat Launch	4.84 miles N/NE	Not Visible
38	Palatine Park	4.95 miles SW	Not Visible
39	Keil Equipment Company	4.95 miles S/SE	Not Visible

The above referenced resources and field locations were chosen to represent a profile of potentially sensitive receptors that include areas of human settlement, institutions, historic resources, public corridors and recreational destinations throughout the five (5) mile study radius. In areas of clustered resources, or in the case of large area receptors, a specific photograph location was chosen based on the greatest potential visibility as dependent on distance, intervening structures, vegetation and topography. In other areas, where there was a lack of identified aesthetic resources, photographs were taken from area roadways.

During the field verification, the potential visibility of the proposed replacement structure was based on the actual visibility of the existing 190-foot high guyed lattice structures which are located just 5 feet away from the proposed Replacement Facility location. Additional existing tower structures within the viewshed of the five (5) mile study radius include overhead utility corridors and three (3) radio towers located approximately 1.5 miles northwest of the subject site. These radio towers are marked and lighted in accordance with FAA regulations. From many of the visually sensitive resources located west of the subject site, these radio towers are seen in the same viewshed as the subject site. For example, the radio towers can be seen from the house and adjacent lawn at the Olana Historic Site, as well as Dutchman's Landing opposite the Hudson River.

According to the results of the field verification, intervening vegetation will reduce the potential visibility of the proposed replacement structure from certain locations within foreground (<1 mile) and midground (1-3 miles) distances to the same extent that it limits the actual visibility of the existing guyed lattice structures to be replaced. In general, these locations of reduced visibility are themselves characterized by areas of mature undeveloped woodlands. For example, just like the existing 190-foot high guyed lattice structures to be replaced, the proposed replacement structure will not be visible from Crown Hill Road at the Olana Historic Site due to the forest nature of the trail within a state park. Beyond, intervening vegetation, topography, human development and distance will work together to limit the potential visibility of the proposed project from background distances (3-5 miles) to the same extent that such features limit the actual visibility of the existing guyed lattice structures to be replaced.

In sum, given that the proposed project is limited to the replacement of two (2) existing 190-foot high guyed lattice structures with a single self-supporting lattice structure of the same height at a location just five (5) feet east of the existing structures, the Existing Facility demonstrates the actual visibility of the proposed Replacement Facility in the surrounding viewshed. In this regard, the purpose and usefulness of the above-referenced viewshed maps is limited to documenting the scope of the geographic viewshed and the theoretical visibility of the proposed project based solely on topography and vegetation. The field verification, on the other hand, assessed the existing viewshed of the surrounding five (5) mile study radius and the screening effects of topography, vegetation and intervening development in the field based on the actual visibility of the existing and proposed replacement structures.

4.2 Project Visual Impact

4.2.1 Viewpoint Selection

According to a review of the topographic and vegetative viewshed analysis, as well as the field verification, the potential visibility of the proposed Replacement Facility is largely limited to

resources located within 3 miles of the subject site, being the same range of visibility as the Existing Facility structures that will be replaced. Within this 3 mile radius is the Olana Historic Site.

Based on the viewshed analysis and field verification, five (5) locations within 3 miles of the subject site were chosen for further review, including two (2) from the Olana Historic Site. The remaining three (3) locations within 3 miles were chosen to represent the nearest worse-case scenario and other representative viewsheds based on distance and direction. A sixth location was chosen to represent the viewshed from background distances.

4.2.2 Photographic Renderings

Photographs were taken using a Canon EOS Rebel XT Digital SLR digital camera with an 18 to 55 millimeter zoom lens. Unless otherwise noted, the zoom lens was set to approximately 31mm to achieve a field-of-view comparable to a 50mm lens on a full frame 35mm camera, thereby approximating the normal human eyesight relative to scale. Using a handheld GPS unit, the coordinates and orientation of each photograph location were taken.

As noted above, photographs were taken on November 22, 2011 and December 1, 2011. On November 22, 2011, photographs were taken between the hours of 10 a.m. and 3 p.m. during mostly cloudy to overcast conditions. On December 1, 2011, photographs were taken between the hours of 10 a.m. and 1 p.m. during mostly sunny conditions.

Photographic simulations of the proposed replacement tower were developed by superimposing a rendering of a three-dimensional computer model over the existing conditions photograph. This three-dimension computer model was developed in Google SketchUp 8 using the profile drawing of the proposed installation, and included both the proposed single replacement lattice structure and the two (2) existing guyed lattice structures.

Simulated perspectives (camera views) were matched to the corresponding base photograph for each simulated view by replicating the precise coordinates of the camera location, as recorded in the field. With the existing conditions photograph displayed as a background image, minor camera adjustments were made (i.e. horizontal and vertical positioning) to align the horizon in the background photograph with the corresponding features of the 3D model.

The resulting images of the matched 3D model were then imported into Adobe Photoshop CS5 (64 bit). Surface materials representing the typical color and texture of similar installations were then added. To the extent practicable, design details of the proposed replacement lattice tower were built into the 3D model and incorporated into the photographic rendering.

The rendered model was then imposed over the simulated perspective on the existing conditions photograph using Adobe Photoshop CS5 (64 bit) for post-production editing (i.e. airbrushing out portions of the tower that fell below foreground topography and vegetation, or other intervening objects). This included airbrushing the Existing Facility structures out of the simulations as they will be removed from the subject site following the installation of the proposed replacement tower.

The photographic renderings were printed and assessed on an 11"x17" page format. At this image size, the page should be held at approximately 38" from the eye so that the scene will appear at the correct scale. Viewing the image closer would make the scene appear too large while viewing

the image from greater distances would make the scene appear too small compared to what an observer would actually see in the field. For viewing photo renderings at other page sizes (i.e. computer monitor, projected image or other hard copy output) the viewing distance to page width ratio is approximately 1.5 to 1.

Photographic renderings of the proposed installation are presented in Appendix C. As paired with photographs of the existing conditions, these renderings illustrate the potential view of the proposed replacement tower structure.

1. Sensitive Receptor/Location: Blue Valley Road
Simulation No.: #1
Tower Location: Foreground

Due to the lack of aesthetic resources identified within one (1) mile of the subject site, this location was chosen to represent a worse-case scenario from a nearby public roadway. The existing viewshed from the Blue Valley Road includes both of the two (2) existing guyed lattice structures, set approximately 20 feet apart, and associated antennas at the subject site.

From this location, the proposed single 190-foot high self-supporting replacement lattice structure and associated antennas will be seen. However, as both of the two (2) existing 190-foot guyed lattice structures will be removed from the subject site following the proposed installation, the number of visible tower structures will be reduced by the proposed project. As such, the proposed project will not have a significant adverse effect on the existing viewshed.

2. Sensitive Receptor/Location: Olana Historic Site
Simulation No.: #2 and #3
Tower Location: Midground

According to the field verification, the Existing Facility's two (2) 190-foot high guyed lattice structures are visible from certain locations within the Olana Historic Site. From other locations, however, the subject site is visually screened by existing vegetation and mature growth trees. These screened locations include the existing barns and Crown Hill Road trail.

Adjacent to the barns, at the Cozy Cottage, the Existing Facility's two (2) 190-foot high guyed lattice structures at the subject site can be seen from certain vantage points between the existing mature growth trees that surround the area. From these vantage points, the Existing Facility's guyed lattice structures are seen in line with one another. The proposed project will not, however, increase the profile of the Existing Facility at the subject site because it consists of two (2) guyed lattice structures, while the Replacement Facility will consist of only a single self-supporting lattice structure. In addition, as depicted in Simulation 2, the proposed replacement structure will be located within approximately five (5) feet of the Existing Facility structures and will be the same height. As such, the proposed project will not have a significant adverse effect on the existing viewshed.

Northeast of the barns and Cozy Cottage, the historic property gains elevation and has been partially cleared. This has resulted in more open views towards the subject site from the paved roadway, house and studio site. From these areas, the subject site is located two (2) plus miles southeast of Olana.

While providing more open views towards the subject site, the predominant line-of-sight from the house and adjacent lawn is south and southwest along the Hudson River. These views are expansive and continue for miles. Within this viewshed are three (3) existing radio towers that are marked and lighted in accordance with FAA regulations. These existing towers are located approximately 1.1 miles south/southwest of the studio site and are part of the existing, visible landscape along the Hudson River from Olana (see Appendix B; Photographs 14A, 14B and 15A).

As mentioned above, both the Existing Facility's guyed lattice structures at the subject site and the existing radio towers located approximately 1.1 miles southwest of Olana can be seen from the studio site. Within the direct line-of-sight from the studio location to the subject site, the viewshed currently includes several residential homes, farms and associated structures, and the Existing Facility's two (2) 190-foot lattice structures atop Blue Hill. The proposed project will, however, reduce the number of lattice structures seen within this viewshed from two (2) existing guyed lattice structures to one (1) lattice structure of the same height.

According to a review of the photographic simulation (Simulation #3) and field verification, the proposed replacement tower will not have a significant adverse effect on the existing viewshed from the studio site due to the current visibility of the Existing Facility's two (2) guyed lattice structures at the subject site and the three (3) nearby radio towers; the nature of the proposed project, which is limited to the removal and replacement of the Existing Facility's two (2) guyed lattice structures with one (1) lattice structure of the same height at a location just five (5) feet away; and the intervening distance.

3. Sensitive Receptor/Location: Dutchman's Landing
Simulation No.: #4
Location: Midground

From Dutchman's Landing, west of the Hudson River, the existing viewshed towards the subject site consists of the Hudson River, a marina, several existing utility poles, the three (3) existing radio towers located approximately 1.5 miles northwest of the subject site, and the Existing Facility's two (2) guyed lattice structures at the subject site.

From this location, the proposed 190-foot high replacement lattice structure and associated antennas will be seen. However, as both of the Existing Facility's two (2) guyed lattice structures will be removed from the subject site following the proposed installation, the number of visible tower structures will be reduced by the proposed project. Given the quality of the existing viewshed, the nature of the proposed project, which is limited to the removal and replacement of the two (2) existing guyed lattice structures that comprise the Existing Facility with one (1) self-supporting lattice structure of the same height at a location just five (5) feet away, and the intervening distance, the proposed project will not significantly alter the existing viewshed from Dutchman's Landing.

4. Sensitive Receptor/Location: Police Barracks along Orchard Road
Simulation No.: #5
Location: Midground

This location was chosen to represent views of the proposed project from areas east of the subject site as the two (2) existing guyed lattice structures are visually screened by intervening vegetation from the nearby Henry W. Livingston House along Bells Pond Road. The existing viewshed from this chosen location, adjacent to the Police Barracks along Orchard Road, consists of a rural agricultural landscape with forested hills in the backdrop. Atop these hills, the Existing Facility's two (2) guyed lattice structures at the subject site can be seen.

According to a review of the photographic rendering, the proposed replacement structure will be seen. However, as both of the Existing Facility's two (2) guyed lattice structures will be removed from the subject site following the proposed installation, the number of visible tower structures will be reduced by the proposed project. Furthermore, as depicted in Simulation 5, the viewpoint from which the proposed replacement structure will be seen is a distance of almost three (3) miles away at this location. Given the nature of the proposed project and the intervening distance, the proposed replacement tower will not significantly alter the existing viewshed from the Police Barracks.

5. Sensitive Receptor/Location: Richmond Hill
Simulation No.: #6
Tower Location: Background

This location, at the historic Richmond Hill site, was chosen to represent background distances. From this location, the existing viewshed is characterized by a relatively flat agricultural landscape with the forested Blue Hill seen in the backdrop. Atop Blue Hill, the Existing Facility's two (2) guyed lattice structures can be seen in line with one another.

According to a review of the photographic simulation from this location, the proposed 190-foot high replacement structure and associated antennas will be seen atop Blue Hill. The proposed project will not, however, increase the profile of the Existing Facility at the subject site because it consists of two (2) guyed lattice structures, while the Replacement Facility will consist of only a single self-supporting lattice structure. The proposed replacement lattice structure, which will be viewed from over 3.5 miles away at this location, will be the same height as the Existing Facility's two (2) guyed lattice structures and will be located just five (5) feet east of the existing structures. As such, the proposed project will not have a significant adverse effect on the existing viewshed.

4.2.3 Mitigation

Through the use of the mitigation strategies explained below, the proposed tower replacement project will not have a significant adverse effect on the overall visual/aesthetic character or quality of the surrounding landscape as documented in the enclosed visual analysis. Mitigation strategies included a review of project alternatives. These alternatives would, however, result in introducing an additional tower with antennas into the viewshed. The proposed project currently calls for a 190-foot high self-supporting telecommunications lattice tower to be located directly adjacent to the Existing Facility's two (2) guyed lattice structures, both of which will be removed following the

installation. The Replacement Facility will alleviate the lack of structural capacity of the Existing Facility, in lieu of building another tower at the subject site, or elsewhere on the parent parcel, thereby mitigating the need for new towers in the area. In this regard, the proposed project mitigates the potential for visual impact to the greatest extent practicable.

Alternate tower designs were also reviewed for the proposed Replacement Facility at the subject site. However, due to the topography of the project area and the existing visual surroundings, the proposed lattice design is most consistent with the existing visual setting which includes the Existing Facility's two (2) guyed lattice structures of the same height. Furthermore, as a lattice tower, the replacement structure will offer greater transparency than other design options and will provide the structural support necessary to host the existing public safety and public service antennas currently collocated on the Existing Facility, as well as future collocations. In addition, the height of the proposed telecommunications lattice tower will be limited to the height of the Existing Facility, thereby maintaining the same range of visibility and eliminating the potentially greater range of visibility of a new additional tower or a taller tower located at the site or elsewhere.

To further assess potential mitigation strategies, alternate antenna designs were reviewed. Antenna designs were limited due to technological requirements of the public safety and public service users of the Existing Facility and the Replacement Facility. According to the proposed site plans, the antennas to be collocated on the Replacement Facility will be largely relocated from the Existing Facility. As such, the antennas will not significantly increase the visibility of the existing subject site.

The proposed project also employs decommissioning to mitigate the potential for visual impact. Specifically, the project includes the removal of both of the Existing Facility's 190-foot high guyed lattice structures at the subject site. Through employing the foregoing mitigation strategies, the proposed replacement project mitigates the potential for visual impact to the greatest extent practicable.

5.0 ASSESSMENT OF THE POTENTIAL SIGNIFICANCE OF THE IMPACT

The proposed project is limited to the replacement of the Existing Facility's two (2) 190-foot high guyed lattice structures with one (1) 190-foot high self-supporting telecommunications lattice structure. The Existing Facility's guyed lattice structures will be removed following the installation of the Replacement Facility, thereby reducing the number of structures comprising the facility at the subject site and resulting in the least possible visual impact while providing collocation opportunities to a variety of public safety and public service entities.

Based on this visual impact analysis, the proposed Replacement Facility will be located at midground and background distances from the inventoried aesthetic resources listed in Table 1. None were located within one (1) mile of the subject site. During the field verification survey of these resources, in addition to the Existing Facility's two (2) guyed lattice structures at the subject site, several additional existing tower structures were observed within the 5 mile study radius. These structures included a variety of overhead utility corridors and three (3) existing radio towers located approximately 1.5 miles northwest of the subject site. The marked and lighted radio towers can be seen from many of the aesthetic resources located west of the subject site, including the Olana Historic Site and Dutchman's Landing.

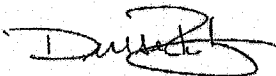
According to the field verification survey and a review of the photographic renderings from five (5) locations within 3 miles of the subject site, the proposed project will not impair the existing character or quality of the inventoried aesthetic resources due to the current visibility of the Existing Facility at the subject site and other nearby tower structures, the nature of the proposed project, and intervening distances. Rather, the proposed Replacement Facility will reduce the number of existing structures that comprise the Existing Facility, without increasing the height of the Existing Facility at the subject site. Beyond 3 miles, the proposed Replacement Facility will be significantly screened by intervening vegetation, topography, human development and distance.

6.0 CONCLUSIONS

Based on the Visual Impact Assessment of the proposed replacement of the Existing Facility's two (2) 190-foot high guyed lattice structures with one (1) 190-foot high self-supporting telecommunications lattice structure at 170 Eger Road in Hudson, Columbia County, New York, it is Tectonic's opinion that the proposed project will not cause a significant adverse effect on the overall visual/aesthetic character or quality of the surrounding 5 mile study radius.

Sincerely,

TECTONIC ENGINEERING & SURVEYING CONSULTANTS, P.C.



Denise Pantzer
Senior Environmental Scientist

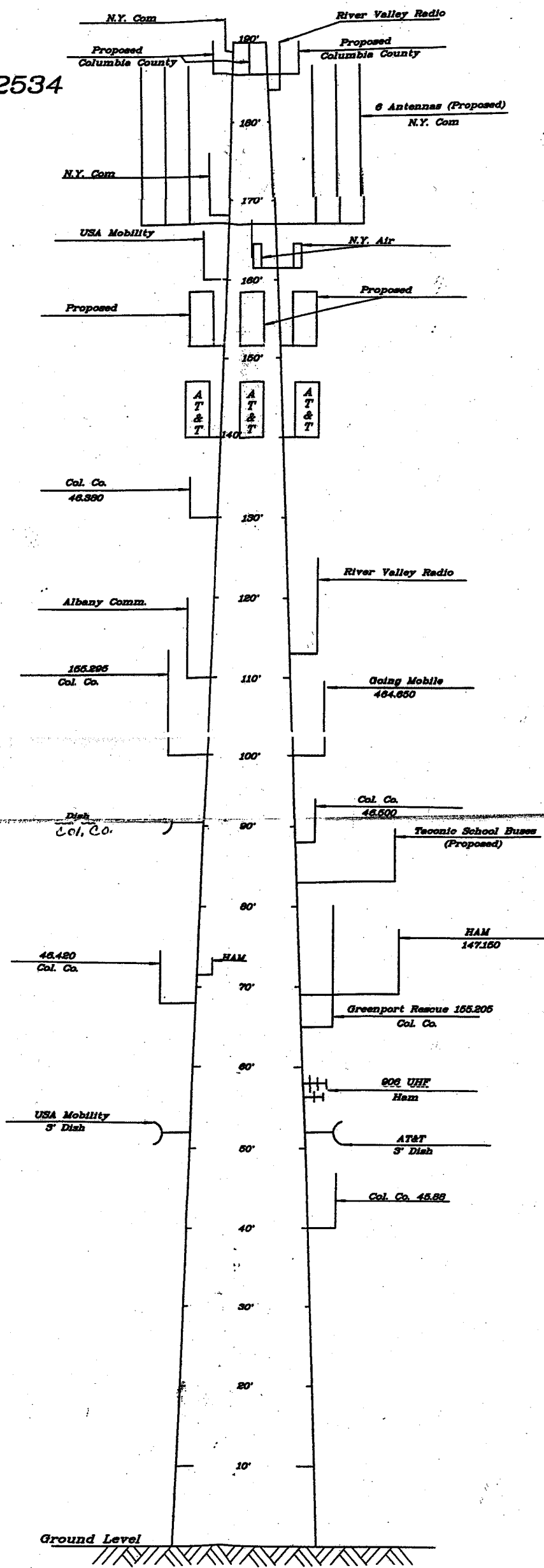
TOWER APPURTENANCES

EGER COMMUNICATIONS

General Partnership

170 Eger Road

Hudson, New York 12534



SITE PLAN OF PROPERTY OF
BLUE HILL FRUIT FARMS, INC.
TOWN OF LIVINGSTON, COLUMBIA COUNTY, NEW YORK

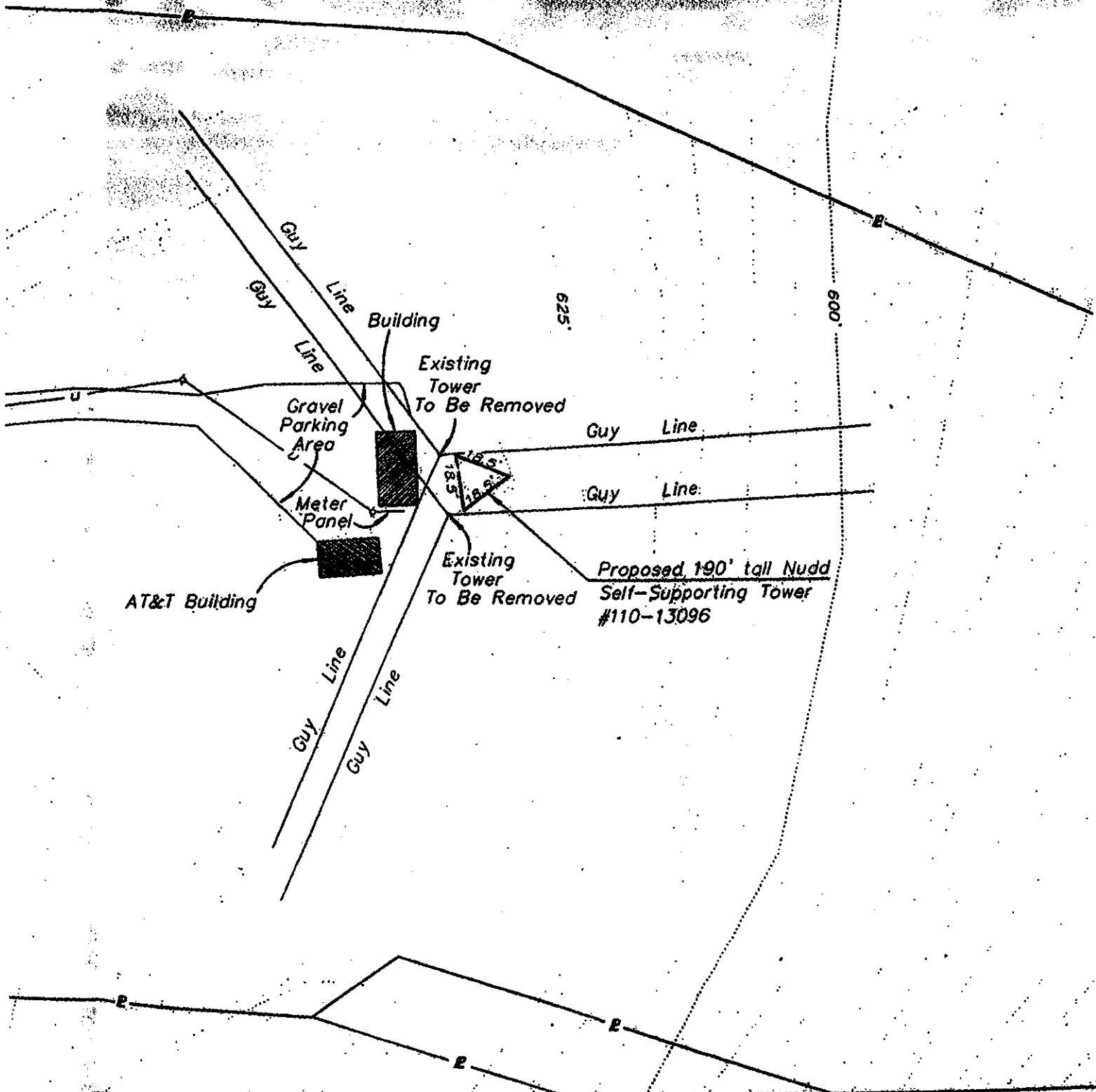
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30 DECEMBER 2010

SCALE: 1"=200'







Livingston Fire District
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Livingston Fire District
Chief Paul Jahns
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Daniel Abeyta, Assistant Chief
Spectrum & Competition Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
1445 12th Street SW
Washington, DC 20554

December 27, 2011

Dear Mr. Abeyta:

I am writing you regarding the "Edgar Communications REPLACEMENT tower located on Blue Hill in the town of Livingston/County of Columbia in the state of New York.

The Livingston Fire District and myself are writing you in support of the replacement tower. This tower has been there over 40 years where our emergency attenas for fire, ems and police agencies have been located on this tower.

Now it is time to replace this tower and two special interest groups scenic Hudson and Olana Society are objecting to this replacement with no merit. This will not affect the environment or community but will affect communications for emergency responders because this is a prime communication site in columbia county. Moving the entire site would decrease our communications abilities.

This tower is located in our town of Livingston.

The town and the county would appreciate your speedy assistance on approving this communication replacement site.

Sincerely,

Chief Paul Jahns

Chief Paul Jahns
Livingston Fire District



County of Columbia - Emergency Medical Services

85 Industrial Tract ~ Hudson, New York 12534

(518) 822-8610 Fax: (518) 828-2790

email: info@ccemscoordinator.com

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EMS Coordinator

P. J. Keeler

Deputy EMS Coordinators

Kevin Johnson

Sue VanEgghen

JoAnn Sheehy

John Silvernail

Brian Gagne

December 2, 2011

Mr. Daniel Abeyta, Assistant Chief
Spectrum & Competition Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
1445 12th Street SW
Washington, DC 20554

Dear Mr. Abeyta,

I write in support of the Eger Communications Blue Hill replacement tower located in the town of Livingston (Columbia County, NY). This replacement tower is an absolute essential part of the Columbia County public safety radio network and it is imperative the project move forward without delay.

The Blue Hill site currently consists of two 190' towers that have been used by Columbia County emergency service agencies for decades. This tower is an ideal site that provides critical communication capability to many of our fire, EMS and police agencies. Unfortunately, we have reached a point where additional build-out on this tower is not possible due to loading issues. Columbia County 911 conducted its own independent structural analysis which confirmed this. The proposed replacement tower would replace one of the two existing towers at the site with a heavy duty 190' tower that is capable of supporting additional load.

Without this replacement tower Columbia County is unable to move forward with our countywide public safety radio infrastructure upgrade project that began back in 2005. This upgrade project includes replacement of our aging microwave system and the addition of simulcasting ability to help resolve critical gaps in coverage around the county. This is a much needed and long awaited upgrade to our public safety radio network. Unfortunately, it is all on hold until the Eger Communications replacement tower is erected.

I urge you to ensure this replacement project is moved along without delay. Columbia County's emergency services agencies, and the residents they serve, are depending on this.

Sincerely,

P. J. Keeler
EMS Coordinator

"Serving the Emergency Medical Needs of Columbia County"

Chatham Rescue Squad • Community Rescue Squad • Greenport Rescue Squad • NDP EMS • Valatie Rescue Squad

COLUMBIA COUNTY

OFFICE OF FIRE COORDINATOR

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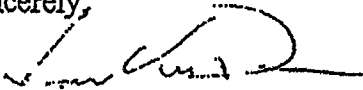
Dec. 6, 2011

Daniel Abeyta, Assistant Chief
Spectrum & Competition Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
1445 12th Street SW
Washington, DC 20554

Re: Eger Communications REPLACEMENT tower

The Eger Communication tower located on Blue Hill in the town of Livingston, Columbia County, State of New York is the main tower for our Fire and EMS communications in our county. It has been for years. We can't lose this location. They only want to replace a tower. This office fully supports this endeavor.

Sincerely,



James VanDeusen,
Columbia Co. Fire Coordinator



P.O. Box 672 • Rhinebeck, NY 12572

(845) 876-0338 • (800) 580-2909 • Fax (845) 876-7071 • www.ncpems.com

December 14, 2011

Mr. Daniel Abeyta, Assistant Chief
Spectrum & Competition Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
1445 12th Street SW
Washington, DC 20554

Dear Mr. Abeyta,

I write in support of the Eger Communications Blue Hill replacement tower located in the town of Livingston (Columbia County, NY). This replacement tower is an absolutely essential part of the Columbia County's public safety radio network and it is imperative the project move forward without delay.

The Blue Hill site currently consists of two 190' towers that have been used by Columbia County emergency service agencies for decades. This tower is an ideal site that provides critical communication capability to many of our fire, EMS and police agencies including ours. Unfortunately, the point has been reached where additional build-out on this tower is not possible due to loading issues. Columbia County 911 conducted its own independent structural analysis which confirmed this. The proposed replacement tower would replace one of the two existing towers at the site with a heavy duty 190' tower that is capable of supporting additional load.

Without this replacement tower Columbia County is unable to move forward with their countywide public safety radio infrastructure upgrade project that began back in 2005. This upgrade project includes replacement of an aging microwave system and the addition of simulcasting ability to help resolve critical gaps in coverage around the county. This is a much needed and long awaited upgrade to the public safety radio network. Unfortunately, it is all on hold until the Eger Communications replacement tower is erected.

Proper communications capabilities are imperative for the timely provision of emergency medical services, and other essential emergency service to the residents of our service area. I urge you to ensure that the replacement project is moved along without delay to ensure the safety and security of the residents of Columbia County.

Sincerely,

Mark Browne
Vice President - Operations

Lebanon Valley Protective Association, Inc.

BOX 162, NEW LEBANON, NEW YORK 12125

December 26, 2011

Daniel Abeyta, Assistant Chief
Spectrum & Competition Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
1445 12th Street SW
Washington, DC 20554


Asst. Chief Abeyta,

As the Chief of the Lebanon Valley Protective Association, Inc., I am sending you this letter in support of the Eger Communications REPLACEMENT tower located on Blue Hill in the Town of Livingston, Columbia County, State of New York.

Columbia County has completed Phase I of planned upgrades to the emergency communications system in this county and is in the process of completing Phase II. These upgrades are now at a standstill as they are awaiting approval of the replacement tower. Our current low band system is a functional but antiquated system that will not support additional upgrades to stay in compliance with future FCC regulations. The system is also running on parts that are obsolete and non-repairable should we have a malfunction of some of our main transmission components. This radio tower needs to be replaced so that the necessary upgrades to our communication system can be completed. As a member of the communications community, I do not need to tell you the pending ramifications of a failed radio system in this county should these upgrades not be completed prior to failure of our current system.

I and the rest of my department and emergency response community appreciate your time in reading this letter. We also hope that you will see that this replacement tower project continues so that we may have uninterrupted emergency communications in Columbia County.

Sincerely,



Benjamin A. Wheeler Chief



Greenport Rescue Squad, Inc.

3 Newman Road • P. O. Box 275 • Hudson, New York 12534
Office (518) 822-8511 • Fax (518) 822-0047 • Operations (518) 828-5175

December 29, 2011

Mr. Daniel Abeyta, Assistant Chief
Spectrum & Competition Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
1445 12th Street SW
Washington, DC 20554

Dear Assistant Chief Abeyta:

I write on behalf of the Greenport Rescue Squad, Inc. in support of the Blue Hill replacement tower located in the State of New York, County of Columbia, Town of Livingston. This replacement tower is an indispensable part of the Columbia County, NY public safety radio network and it is imperative that the project move forward without delay.

The Blue Hill Tower site is currently comprised of two (2) one hundred ninety feet (190') towers that have been used by emergency service agencies within the County for decades. This tower site provides mission-critical communications. Due to loading limitations, additional build-out on this tower is not possible. Columbia County's independent structural analysis confirmed this. The proposed replacement tower would replace one of the two existing towers and is a heavy duty tower of the same height that is capable of supporting additional load.

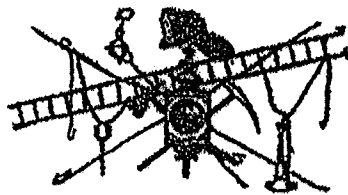
Without this replacement tower Columbia County is unable to complete the County-wide public safety radio infrastructure upgrade project that was initiated in 2005. This upgrade project will help resolve critical gaps in radio communications around the County. This entire project is at a standstill and cannot be resumed and completed until the Eger Communications replacement tower is erected.

I urge you to ensure that this replacement tower project is moved forward without delay. Columbia County's emergency services and the residents they serve are depending on this.

Very truly yours,

Michael Cozzolino
Secretary
Board of Directors

HILLSDALE FIRE COMPANY No. 1



9387 STATE ROUTE 22
HILLSDALE, NEW YORK 12529

1/1/12

Fred R. Miller, Chief HFC
16 Deerfield Circle
Copake, NY 12516

Daniel Abeyta, Assistant Chief
Spectrum & Competition Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
1445 12th Street SW
Washington, DC 20554

Dear Chief Abeyta,

As a member and Chief of the Hillsdale Fire Company, I am writing this letter on behalf of our membership. Hillsdale is located at the Eastern edge of Columbia County in the state of New York. Because of Hillsdale's geographic layout our county, emergency radio communications can be intermittent in various locations. We strongly support the Eger Communications REPLACEMENT Tower, which is located in the town of Livingston, NY in Columbia County on Blue Hill. This REPLACEMENT tower would help to maintain and improve much needed communications during emergency responses. Clear, precise communications saves lives of the residents, as well as, the emergency responders of this, and neighboring counties. We respond wherever needed, in times of such emergencies and disasters, 24/7/365 and we believe in and support this tower REPLACEMENT to help protect lives and property.

Thank you for your consideration in this important matter.

Firematically,

A handwritten signature in black ink that reads "Fred R. Miller". The signature is written in a cursive style with a large, stylized "F" and "M".

Fred R. Miller
Chief Hillsdale Fire Company
(518) 965-3159

Columbia County 911

EMERGENCY COMMUNICATIONS DEPARTMENT

85 Industrial Tract
Hudson, New York 12534

Robert C. Lopez
Director

Office: 518-828-1263
Fax: 518-828-9088

November 30, 2011

Mr. Daniel Abeyta, Assistant Chief
Spectrum & Competition Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
1445 12th Street SW
Washington, DC 20554

Re: Letter of support for the Eger Communications REPLACEMENT tower – located on Blue Hill in the Town of Livingston, County of Columbia, State of New York.

Dear Mr. Abeyta,

I am writing to express, from a public safety standpoint, my strong support for the Eger Communications replacement tower project.

The topography in Columbia County makes radio communications difficult. The 634 square miles encompassing Columbia County are bordered to the west by the Hudson River and to the east by the Berkshire Mountains, with the Taconic Mountain range extending through the center of the county. We are a county of rolling hills and deep valleys, making effective communications a challenge. As the primary public safety answering point in Columbia County, we dispatch for 31 fire departments, 5 ambulance services, 9 police departments, and many other support agencies. Critical to all of these agencies, and the public safety response system in general, is the ability to effectively communicate. Responders depend on this vital link to receive dispatch information via pager and to communicate with the dispatch center while operating on emergency incidents.

For the past six plus years, with the help of professional radio consultants, we have evaluated our radio communications network and identified areas that require attention. Most critical are areas of poor pager, portable radio, and mobile radio coverage across the public safety spectrums we utilize. We also need to address interoperability issues. To mitigate these issues we formulated a 3-phase upgrade plan centered on a simulcast solution. As part of the upgrade project we had an independent structural analysis performed at each of our tower sites. The structural analysis at Eger's Blue Hill tower revealed that the twin guyed towers could not accept any additional loading beyond replacing our point to point infrastructure. The inability to expand our capability at this tower site jeopardizes the entire upgrade project – which jeopardizes public safety. It's important to note that the Blue Hill tower site offers excellent coverage throughout the County. It is without question one of our best sites. Without this site we would have to add, minimally, two to three additional sites to achieve the same coverage.

We recently completed phase one of our project which included replacement of our 45 year old legacy microwave system (including replacement of equipment at Eger's Blue Hill tower). We are now at a standstill, waiting for Eger Communications to install a replacement tower that can support our equipment needs. In order to complete our build-out, which is long overdue, and to be consistent with the National Emergency Communications Plan, we need the replacement tower installed. The current tower is just not capable of handling the additional loading.



63 West Cedar Street
Poughkeepsie, NY 12601
845-471-5520
845-471-5593 (fax)
kelly33@nycomco.com

March 3, 2011

Eger Communications
33 Eger Road
Hudson, NY 12534
(518)822-0726 (fax)

Dear Mr. Eger,

New York Communications Company is anxiously awaiting the construction of your new tower to implement our new mid tier Public Safety System. The new system features digital, narrowbanded FDMA technology which meets all of the current and new requirements of the Federal Communications Commission.

This system will feature customers such as large County Dept. of Public Works, Regional Transportation departments, school districts, oil companies and many other Agencies who are an essential part of servicing our local communities. We would like to implement this new technology as quickly as possible and if there is anything else you require from our cooperation, please do not hesitate to call upon me.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Richard M. Lacouette". The signature is fluid and cursive, with a large, stylized "R" at the beginning.

Richard M. Lacouette
President

Columbia County 911

EMERGENCY COMMUNICATIONS DEPARTMENT

85 Industrial Tract
Hudson, New York 12534

Robert C. Lopez
Director

Office: 518-828-1263
Fax: 518-828-9088

November 19, 2010

Mark Eger
Eger Communications
33 Eger Rd
Hudson, NY 12534

Mr. Eger,

As you are aware that your site "Blue Hill Tower" is a vital transmission site for Public Safety in Columbia County. It offers great coverage in our county for a cost of \$1000.00 per year.

Your site in its current configuration which was validated by a structural analysis is not able to accept any additional loading. We have just finished updating our radio connectivity infrastructure and we would like to start with our radio build-out for Public Safety. How do you suggest we proceed at your site?

We would like to continue in two phases with our build-out. The first phase we would add to the tower the following antennas:

Law Enforcement with a current FCC license for another site following a license modification to co-locate at Blue Hill Tower. Height to be determined by space and license modification.

911/Emergency Law Enforcement with a current FCC license for another site following a license modification to co-locate at Blue Hill Tower. Height to be determined by space and license modification.

DPW/Public works with a current FCC license for another site following a license modification to co-locate at Blue Hill Tower. Height to be determined by space and license modification.

County EMS tactical with a current FCC license for another site following a license modification to co-locate at Blue Hill Tower. Height to be determined by space and license modification.

All the above listed frequencies would use antennas equal or similar to Decibel model DB616.

The next phase we would add a minimum of 4 Fire frequencies. One for main dispatch, and at least three for tactical frequencies. Height of the antenna will be based on room and the FCC application.

nationalgrid

April 18, 2012

Mark Eger
33 Eger Rd.
Hudson, NY 12534

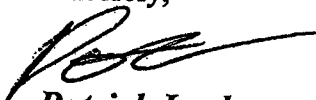
RE: WR# 12727010

Dear Mark:

In completion of National Grids site visit at Eger Rd with electric planner Lianne Chase, the new proposed communication tower will not interfere with our existing electric lines or poles. No relocation or replacement work will need to be completed for the proposed communication tower and will have no effect on National Grid facilities

If you have any questions, please contact me at 781 907 3515

Sincerely,



Patrick Lech
Customer Solutions
National Grid



**FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

August 5, 2013

VIA ELECTRONIC MAIL AND U.S. MAIL

Jacqueline Phillips Murray, Esq.
10 Maxwell Drive, Suite 100
Clifton Park, New York 12065

Re: Proposed communications tower
Eger Communications, Inc., Columbia County, New York

Dear Ms. Murray:

The Spectrum and Competition Policy Division (Division) of the Wireless Telecommunications Bureau, Federal Communications Commission (FCC or Commission), has before it a pending complaint regarding the above-referenced tower, which Eger Communications, Inc. (Eger) proposes to construct in Columbia County, New York. Specifically, the Olana Partnership and Scenic Hudson, Inc. (Olana/Hudson) have filed a Letter/Informal complaint (Informal Complaint)¹ regarding the review process for the proposed tower under Section 106 of the National Historic Preservation Act (NHPA).² Eger opposed the Informal Complaint,³ and Olana/Hudson submitted a reply.⁴ For the reasons discussed below, we grant the Informal Complaint in part and direct Eger to complete the Section 106 process pursuant to the procedures specified in the Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission (Nationwide Agreement).⁵

Eger currently owns two 199-foot guyed towers located near the Olana House State Historic Site (Olana) in Columbia County (County).⁶ The two guyed towers were built in 1993. Several County and local public safety entities have existing FCC-licensed facilities on the two

¹ See Letter from John 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).

² 16 U.S.C. § 470f.

³ See Letter from Robert Gagen, Esq., counsel for Eger Communications, Inc., to Dan Abeyta, Assistant Chief, Spectrum and Competition Policy Division, dated August 29, 2011 (Eger Response); *see also* Letter from Robert Gagen, Esq., counsel for Eger Communications, Inc., to Dan Abeyta, Assistant Chief, Spectrum and Competition Policy Division, dated October 24, 2011.

⁴ See Letter from John Caffry, Esq., counsel for Olana Partnership and Scenic Hudson, Inc., to Dan Abeyta, Assistant Chief, Spectrum and Competition Policy Division, dated October 7, 2011 (Olana/Hudson Reply).

⁵ 47 C.F.R. Pt. 1, App. C.

⁶ See Informal Complaint at 2.

towers.⁷ Eger proposes to construct a 199-foot self-support lattice tower on the site of one of the existing towers, move the existing licensees' antennas to the new tower, and remove the two guyed towers. The new construction would also provide additional collocation space for other service providers.

In their Informal Complaint and Reply, Olana/Hudson assert that the Eger tower should undergo full Section 106 review under the procedures specified in the Nationwide Agreement. Olana/Hudson assert that the proposed tower will be clearly visible near Olana, which is a National Historic Landmark (NHL) listed on the National Register of Historic Places.⁸ Olana/Hudson further contend that Olana has a unique and exceptional historic character as the home of the landscape painter Frederic Church, and that the views of the surrounding scenery in particular are integral to Frederic Church's paintings and thus to the historic character of Olana. Olana/Hudson also contend that the proposed self-support lattice tower will adversely affect the historic landscapes and views that contribute to Olana's historic character more than the two existing narrow guyed towers.⁹

The New York Parks and Recreation Department (NYSHPO), which is the designated New York State Historic Preservation Office under the NHPA,¹⁰ has raised similar arguments.¹¹ Specifically, the NYSHPO contends that a Section 106 review is necessary because the proposed Eger tower could adversely affect the historic views and scenery that were integral to Frederic Church's paintings. The NYSHPO also requests that the FCC conduct Section 106 review using the rules of the Advisory Council on Historic Preservation rather than the procedures in the Nationwide Agreement because of Olana's NHL status.¹²

Eger, in its Response, argues that the proposed tower need not complete Section 106 review because it is excluded from review under the Nationwide Agreement. Specifically, Section III.B of the Nationwide Agreement generally excludes from review a replacement for an existing tower that does not substantially increase the size of the existing tower, provided certain other conditions are met.¹³ Eger argues that the proposed tower qualifies for this exclusion because it will replace two existing guyed towers at the site of one of those towers.¹⁴ Eger also states that the NYSHPO provided no adverse effect determinations for the two guyed towers in 1993.¹⁵

⁷ *Id.*

⁸ *See* Informal Complaint at 3-5.

⁹ *Id.* at 4.

¹⁰ *See* 16 U.S.C. § 470a(b)(1).

¹¹ *See* E-mail from John Bonafide, New York Department of Parks and Recreation, to Stephen DelSordo, FCC Federal Preservation Officer, dated April 23, 2013.

¹² *Id.*; *see* 36 C.F.R. Part 800 (rules of the Advisory Council on Historic Preservation).

¹³ Nationwide Agreement, § III.B.

¹⁴ *See* Eger Response at 1-3.

¹⁵ *Id.* at 3.

After reviewing all of the pleadings, we find, based on the unique facts of this matter, that Eger must complete Section 106 review for the proposed tower under the procedures specified in the Nationwide Agreement. In reaching this decision, we need not resolve whether the proposed tower falls within the replacement tower exclusion. Rather, we rely on Section XI of the Nationwide Agreement.¹⁶ Section XI provides that any interested party may notify the Commission of its concerns regarding the Nationwide Agreement's application to the review of individual undertakings, and that the Commission shall consider such comments and take appropriate actions. Thus, Section XI affords the Division discretion to require appropriate procedures in unique unusual situations where strict adherence to the terms of the Nationwide Agreement would produce a result that is manifestly inconsistent with the intent of the Nationwide Agreement and the NHPA.

In this instance, several unique circumstances, considered in combination, render Section 106 review necessary to fulfill the purposes of the NHPA. First, the proposed tower would be plainly and prominently visible from Olana, which is an NHL. Moreover, as the home of a landscape artist and the site of many of his famous works, the view from Olana is not only a contributing characteristic to its historic integrity, but is uniquely important to understanding the life and experiences of its famous resident. In addition, the proposed lattice tower may present a significantly greater visual intrusion than the existing guyed towers on the Olana historic property and landscapes. Taking these considerations together, we find it necessary under these unique circumstances for the NYSHPO and the Division to assess under Section 106 whether the proposed tower will have an adverse effect on historic properties. Therefore, we find that Eger must complete Section 106 review pursuant to our authority under Section XI of the Nationwide Agreement.

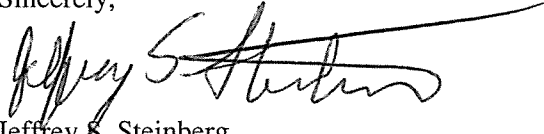
We reject the NYSHPO's request to conduct Section 106 review using the ACHP's rules only and not the Nationwide Agreement. We find that the process specified in the Nationwide Agreement will give all interested parties, including the NYSHPO, Eger, the existing licensees on the two towers, and any other potential consulting parties, a full opportunity to participate in the Section 106 process. For the same reasons, we also find it unnecessary to discuss any further arguments in the Informal Complaint.

Accordingly, the Division hereby GRANTS IN PART the Informal Complaint, filed by the Olana Partnership and Scenic Hudson, Inc., to the extent that it requests that the tower proposed by Eger Communications, Inc. complete Section 106 review. The Division otherwise DISMISSES IN PART the Olana/Hudson complaint as moot. The Division DENIES the request of the NYSHPO to use procedures other than those specified in the Nationwide Agreement. The Division FINDS that Eger Communications, Inc. must complete the Section 106 process pursuant to Sections IV through VII of the Nationwide Agreement.

¹⁶ Nationwide Agreement, § XI.

If you have any questions, please call Don Johnson of my staff at 202-418-7444.

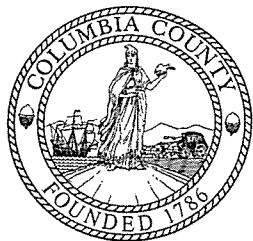
Sincerely,

A handwritten signature in black ink, appearing to read "Jeffrey S. Steinberg", with a long horizontal flourish extending to the right.

Jeffrey S. Steinberg
Deputy Chief
Spectrum and Competition Policy Division
Wireless Telecommunications Bureau

John W. Caffry, Esq.
Caffry & Flower
100 Bay Street
Glens Falls, NY 12801
Counsel for Olana Partnership and Scenic Hudson, Inc.

John A. Bonafide
Director, Division for Historic Preservation
New York State Department of Parks and Recreation
P.O. Box 189
Waterford, NY 12188-0189



COUNTY ATTORNEY
ROBERT J. FITZSIMMONS

OFFICE OF THE
COLUMBIA COUNTY ATTORNEY

401 STATE STREET, SUITE 2B
HUDSON, NEW YORK 12534

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TELEPHONE (518) 828 - 3303
FACSIMILE (518) 828 - 9535

DEPUTY COUNTY ATTORNEY
ANDREW B. HOWARD

ASSISTANT COUNTY ATTORNEYS
CLARISSA D. GARVEY
CHARLES E. HOAG, JR.
BARRETT D. MACK
BRENT R. STACK
CHRISTOPHER J. WATZ

September 19, 2013

Received & Inspected

SEP 26 2013

FCC Mail Room

Via Overnight Courier

Jeffrey S. Steinberg, Deputy Chief
Spectrum and Competition Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554

Re: Proposed Replacement Tower by Eger Communications et al.

Dear Mr. Steinberg:

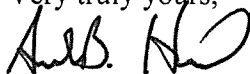
We recently received a copy of the Commission's August 5, 2013 decision on an April 5, 2011 informal complaint in respect to the above public safety replacement tower project. We understand that Eger Communications has filed a Petition for Reconsideration with the Commission because the Commission failed to consider Columbia County's imminent need for the replacement tower to support critical upgrades to its antiquated and unreliable public safety communications systems. We request that the Commission grant the Petition as soon as possible so that Columbia County is afforded an opportunity to be heard.

We note that between November 30, 2011 and January 1, 2012, several of Columbia County's public safety agencies and departments had written to the Commission expressing their imminent need for the replacement tower. The Commission did not respond and, in its August 5, 2013 decision, the Commission did not consider Columbia County's public safety need for the replacement tower. We understand that the Commission was also made aware that Columbia County's public safety agencies and departments became co-applicants to Eger Communications' application for the replacement tower on January 11, 2013, but the Commission still failed to afford Columbia County an opportunity to be heard or otherwise take into consideration Columbia County's interests in this matter.

Columbia County's public safety interest in the development of the replacement tower is distinct from that of the tower owner, Eger Communications, which, in contrast, is limited that that of a lessor of real property. Unless and until the Commission grants the Petition and takes Columbia County's public safety interests into consideration *before* deciding the informal complaint, the public interest will not be served.

We respectfully request that the Commission grant the Petition and afford Columbia County an opportunity to be heard as soon as possible.

Very truly yours,

A handwritten signature in black ink, appearing to read "A.B. Howard". The signature is fluid and cursive, with the first name "A.B." and the last name "Howard" clearly distinguishable.

Andrew B. Howard
Deputy County Attorney

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of

EGER COMMUNICATIONS, INC.
PROPOSED REPLACEMENT TOWER,
COLUMBIA COUNTY, NEW YORK.

PETITION FOR RECONSIDERATION

Filed by:

The Murray Law Firm, PLLC
Jacqueline Phillips Murray, Esq., Of Counsel
10 Maxwell Drive, Suite 100
Clifton Park, NY 12065
(518) 688-0755

Attorneys for Eger Communications, Inc.

Date: August 30, 2013

I. Introduction

Pursuant to 47 CFR §1.106, Eger Communications, Inc. ("Eger") respectfully requests that the Commission reconsider its August 5, 2013 decision to require Eger to complete a review process pursuant to Section 106 of the National Historic Preservation Act ("NHPA") in respect to Eger's proposed replacement of an existing 190-foot tower structure with a replacement tower of the same 190-foot height at the same site.

Since 1931, the Eger site has been owned and operated by the Eger family as a fruit farm and, since the 1960's, has been the site of several communications towers that support public safety communications systems throughout the region. In the early 1960's, three (3) towers were developed on the Eger site. In 1992, those three (3) towers were replaced by the 190-foot twin lattice guyed tower that exists at the Eger site today, and that Eger now proposes to replace with a stronger tower of the same height at the same site to support antennas needed to upgrade public safety communications systems in the region.

The Commission rendered its August 5, 2013 decision in response to a letter/informal complaint by The Olana Partnership and Scenic Hudson, Inc. ("Complainants") dated April 5, 2011 requesting that the Commission require an NHPA Section 106

review of Eger's proposed replacement tower. The Complainants alleged that the replacement tower would have an impact on the Olana State Historic Site located 2 miles from the Eger site.

By letter dated August 29, 2011, Eger opposed the informal complaint, explaining that the proposed replacement tower is expressly excluded from Section 106 review pursuant to Section III (B) of the Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Commission ("NPA"). Specifically, NPA Section III (B) provides that replacement towers falling within the below criteria are "excluded from Section 106 review by the SHPO/THPO, the Commission and the Council and, accordingly, shall not be submitted to the SHPO/THPO for 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 (see Attachment 1 of this Agreement, Stipulation 1.c.1-3) and that 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 or outside any existing access or utility easement related to this 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.¹

¹ See NPA Section III [B] at pg. B-8.

NPA Section III further provides that "the determination that an exclusion applies to an Undertaking should be made by an authorized individual within the Applicant's organization...."²

Consistent with NPA Section III, Eger retained Tectonic Engineering & Land Surveying, P.C. ("Tectonic"), to review the proposed replacement tower in compliance with the National Environmental Policy Act. Tectonic determined that the proposed replacement tower was excluded from Section 106 review because it met the criteria for exclusion set forth in NPA Section III (B).³ Specifically, the Eger replacement tower is the same height as the existing tower it will replace; it is at the same site and does not expand its boundaries or require any excavation outside any existing access or utility easements related to the site; and it was constructed prior to March 16, 2001. In addition to meeting all of the exclusion criteria, the existing 190-foot tower to be replaced also underwent a Section 106 review process, which was completed with a determination of No Effect rendered by the New York State Office of Parks Recreation and Historic Preservation ("NY SHPO") on September

² *Id.*

³ See FCC/NEPA Screening Report by Tectonic Engineering & Land Surveying Consultants, PC, dated August 8, 2011, a copy of which is enclosed as Exhibit "A".

28, 1992.⁴ Insofar as the replacement tower meets all of the criteria for exclusion from Section 106 review under NPA Section III (B), Eger appropriately determined that the replacement tower is excluded from Section 106 review.

In deciding to nevertheless require the Eger replacement tower to undergo a Section 106 review, the Commission stated that it "need not resolve whether the proposed tower falls within the replacement tower exclusion" and, instead, relied solely on NPA Section XI, which states that the Commission may take "appropriate actions" in response to public comments.⁵

The Commission's decision also 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 as confirmed by numerous letters to the Commission. Specifically, co-applicant Columbia County Emergency Services and its related departments and public safety agencies, including the Columbia County Emergency Communications

⁴ The NY SHPO's September 28, 1992 determination concluded that the existing 190-foot tower that Eger proposes to replace with a new 190-foot tower at the same site "will have No Impact upon cultural resources in or eligible for inclusion in the State and National Registers of Historic Places." Notably, the NY SHPO's determination was based on an in-field assessment for potential visual impacts on the 190-foot tower by the NY SHPO's Field Services Bureau. A copy is enclosed as Exhibit "B".

⁵ See FCC Letter dated August 5, 2013 at page 3.

Department, the Columbia County Office of Fire Coordinator, the Columbia County Emergency Medical Services Coordinator, the Hillsdale Fire Company No. 1, the Greenport Rescue Squad, Inc., NDP Emergency Medical Services, the Lebanon Valley Protective Association, Inc., and co-applicant the Town of Livingston Fire District had all written to the Commission to explain their need for the replacement tower to support upgrades to their public safety communications systems.⁶ During the Commission's review of the informal complaint, Eger requested that the Commission afford Eger's co-applicants an opportunity to be heard because the co-applicants' planned public safety antenna upgrades would be directly affected by the Commission's decision. The Commission rejected the request and did not take into

⁶ See Letter from Columbia County 911 Emergency Communications Department to Daniel Abeyta dated November 30, 2011; Letter from County of Columbia - Emergency Medical Services to Daniel Abeyta dated December 2, 2011; Letter from Columbia County Office of Fire Coordinator to Daniel Abeyta dated December 6, 2011; Letter from NDP Emergency Medical Services to Daniel Abeyta dated December 14, 2011; Letter from Lebanon Valley Protective Association, Inc. to Daniel Abeyta dated December 26, 2011; Letter from Livingston Fire District Board of Fire Commissioners to Daniel Abeyta dated December 27, 2011; Letter from Greenport Rescue Squad, Inc. to Daniel Abeyta dated December 29, 2011; Letter from Hillsdale Fire Company No. 1 to Daniel Abeyta dated January 1, 2012. Copies of these letters are enclosed as Exhibit "C".

consideration the written comments by the co-applicant public safety agencies in its decision.

Based on the foregoing, Eger respectfully requests that the Commission reconsider its decision to not address whether the Eger replacement tower is excluded from Section 106 review pursuant to NPA Section III (B) and, in turn, that the Commission reconsider whether it is "appropriate action" under NPA Section XI to completely avoid the NPA's express and binding provisions. Eger further asks the Commission to reconsider its decision to require Section 106 review of the Eger replacement tower and respectfully requests that the Commission issue a decision on reconsideration that the Eger replacement tower is excluded from Section 106 review because it meets the criteria for exclusion pursuant to NPA Section III (B).

II. The Commission Should Determine That The NPA Exclusion From Section 106 Review Applies To The Eger Replacement Tower

Section 214 of the NHPA authorizes the Advisory Council on Historic Preservation ("Council") to exempt from Section 106 review classes of federal undertakings that would be unlikely to impact historic properties.⁷ Consistent with such authority, the Council, together with the Commission, concluded that "categorically excluding from routine Section 106 review

⁷ See 16 U.S.C. § 470v.

categories of construction that are unlikely adversely to impact historic properties is appropriate and in the public interest."⁸ Accordingly, the Commission adopted the replacement tower exclusion in NPA Section III (B), reasoning as follows:

Similar to collocations, strengthened structures may reduce the need for more towers by housing up to two, four or more additional antennas. Given the limitation of the exclusion to replacements that do not effectuate a substantial increase in size, it is highly unlikely that a replacement tower within the exclusion could have any impact other than on archeological properties. Moreover, the limitation on construction and excavation to within 30 feet of the existing leased or owned property means that only a minimal amount of previously undisturbed ground, if any, would be turned, and that would be very close to the existing construction. Balancing the small risk of new archeological disturbance against the benefits of encouraging replacement rather than the construction of new towers, and taking into account the requirement to cease work and provide notice in case of unanticipated discoveries, we conclude that an exclusion for replacement towers, limited to within 30 feet of the existing leased or owned boundary, is reasonable and appropriate.⁹

Eger respectfully requests that the Commission reconsider its August 5, 2013 decision and, instead, determine that the replacement tower is excluded from Section 106 review pursuant to the plain language of NPA Section III (B).

⁸ See In the Matter of Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, FCC Report and Order adopted Sept. 9, 2004 at pg.15.

⁹ *Id.* at pg. 18 (footnotes omitted).

First, the Eger replacement tower meets all of the criteria set forth in NPA Section III (B): it is the same height as the existing tower it will replace; it is at the same site and does not expand its boundaries or require any excavation outside any existing access or utility easements related to the site; and it was constructed prior to March 16, 2001. Moreover, in excess of the exclusion criteria, the NY SHPO already completed a Section 106 review for the existing tower to be replaced and determined by letter dated September 28, 1992 that it has No Effect on historic or cultural resources.

Second, to require a Section 106 review notwithstanding that the replacement tower meets all of the NPA's criteria for exclusion from Section 106 review is inconsistent with the Commission's Report and Order in Matter of Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process (FCC Report and Order adopted Sept. 9, 2004). In that Report and Order, the Commission considered - and rejected - a proposed provision to allow SHPOs to "opt-out" of the NPA's exclusions from Section 106 review, reasoning as follows:¹⁰

We reject the proposed opt-out provision. As drafted, the exclusions from the Section 106 process are not

¹⁰ Id. at pgs. 27-28 (footnotes omitted).

dependent on local conditions, but identify circumstances under which construction is unlikely to significantly adversely affect historic properties in any state. Indeed, in order to avoid potential effects on historic properties, the Nationwide Agreement as adopted substantially limits the exclusions from which commenters most vigorously sought to opt-out. Thus, the opt-out provision is unnecessary. At the same time, such a provision would create a patchwork of varying agreements, state-by-state, and thus cause additional administrative burdens for applicants. Moreover, procedural changes, adopted by use of the opt-out provision, would likely occur over a period of time, creating additional burdens and confusion for all parties concerned.¹¹

Opt-out"
↓

The Commission's decision effectively amends the NPA to include an "opt-out" provision, even though the Commission has already rejected an "opt-out" provision. Insofar as NPA §XII requires that any amendment to the NPA must occur in accordance with standard processes, including public notice, comment and execution by the parties to the NPA, it is respectfully submitted that the Commission's August 5, 2013 decision amounts to an amendment of the NPA in contravention of NPA §XII.

Third, it is respectfully submitted that the Commission's decision to require Section 106 review even though the Eger replacement tower meets all of the NPA's criteria for exclusion therefrom is not "appropriate" action pursuant to NPA §XI. As explained above, the Commission has already determined that the

¹¹ *Id.*

NPA exclusion for replacement towers is "reasonable and appropriate" where a replacement tower, like the Eger replacement tower, meets the stringent criteria set forth therein. As such, the Commission's decision that it is "appropriate action" under NPA Section XI to create an exception from the NPA exclusion applicable to the Eger replacement tower simply cannot be reconciled with its prior determination that it is appropriate to exclude such replacement towers - without exception - from the NPA.

Finally, it is respectfully requested that the Commission take into consideration the critical and imminent needs of the co-applicant public safety agencies that require the Eger replacement tower to support critical upgrades to their public safety communications systems. In this regard, we submit that the Commission should afford the co-applicant public safety agencies an opportunity to be heard on this Petition. Unless and until that occurs, the record before the Commission will lack data relevant to assessing the impact to the public interest and particularly public safety.

III. Conclusion

For the reasons set forth above, Eger respectfully requests that the Commission determine that the Eger replacement tower is excluded from Section 106 review pursuant to NPA SIII (B).

Respectfully submitted,

By: 

Jacqueline Phillips Murray, Esq.
The Murray Law Firm, PLLC
10 Maxwell Drive, Suite 100
Clifton Park, NY 12065
(518) 688-0755

Attorneys for Eger Communications, Inc.

Date: August 30, 2013

Exhibit A: FCC/NEPA Screening Report by Tectonic
Exhibit B: 1992 NYSHPO Determination of No Impact
Exhibit C: Public Safety Agency Letters of Need and
Support for Replacement Tower



New York State Office of Parks, Recreation and Historic Preservation
The Governor Nelson A. Rockefeller Empire State Plaza
Agency Building 1, Albany, New York 12238-0001

September 28, 1992

Mr. Mark Eger
Mark Eger & Bros., Inc.
RD 2, Box 11A
Hudson, New York 12534

Dear Mr. Eger:

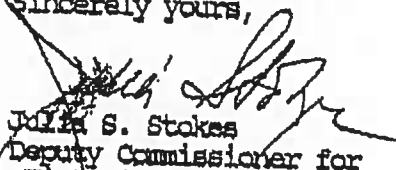
Re: SEORA
190' Communication Tower on Blue Hill
Greenport, Columbia County
92PR1602

The Office of Parks, Recreation and Historic Preservation (OPRHP) has received the documentation you provided on your project. As the state agency responsible for the coordination of the State's historic preservation programs, including the encouragement and assistance of local preservation programs, we offer the following comments.

Recently, staff from our Field Services Bureau visited the area of the proposed communication tower to assess the potential visual impact of the project. Based upon this review, it is the OPRHP's opinion that this project will have No Impact upon cultural resources in or eligible for inclusion in the State and National Registers of Historic Places.

If you have any questions, please call our Project Review Unit at (518) 474-0479.

Sincerely yours,


Julia S. Stokes
Deputy Commissioner for
Historic Preservation

JSS/RDK:tr

**FCC LAND USE SCREENING CHECKLIST
FOR PROPOSED REPLACEMENT TOWER**

**EGER COMMUNICATIONS
170 EGER ROAD, HUDSON,
COLUMBIA COUNTY, NEW YORK**

PREPARED FOR:

**EGER COMMUNICATIONS
33 EGER ROAD
HUDSON, NY 12534**

PREPARED BY:

**TECTONIC ENGINEERING & SURVEYING CONSULTANTS P.C.
70 PLEASANT HILL ROAD
MOUNTAINVILLE, NEW YORK 10953**

August 8, 2011

TECTONIC

Practical Solutions, Exceptional Service

**FCC LAND USE SCREENING CHECKLIST
FOR PROPOSED REPLACEMENT TOWER
170 EGER ROAD, HUDSON,
COLUMBIA COUNTY, NEW YORK**

SUMMARY OF RESEARCH

1

FIGURE I SITE LOCATION MAP

FIGURE II SITE PLAN

APPENDIX I FCC REGULATIONS (47 CFR Part 1, Subpart 1, Section 1.1307)

APPENDIX II NEPA CHECKLIST

APPENDIX III TOPOGRAPHIC MAP

APPENDIX IV WILDLIFE DOCUMENTATION

APPENDIX V FEMA FLOODPLAIN MAP

APPENDIX VI WETLAND MAPS

1. Wilderness Areas (47 CFR 1 § 1.1307 (a)(1) and (2))

Tectonic has conducted a review of the current United States Geologic Survey 7.5 Minute Topographic Quadrangle for the Subject Site (Appendix III), as well as the U.S. National Wilderness Preservation System Map, the Federal Lands and Indian Reservations Map, and the National Landscape Conservation System: Wilderness and Wilderness Study Areas Map. According to these maps, the Subject Site is not located within an officially designated Wilderness Area. As such, no further investigation regarding Wilderness Areas is required.

2. Wildlife Preserves (47 CFR 1 § 1.1307 (a)(1) and (2))

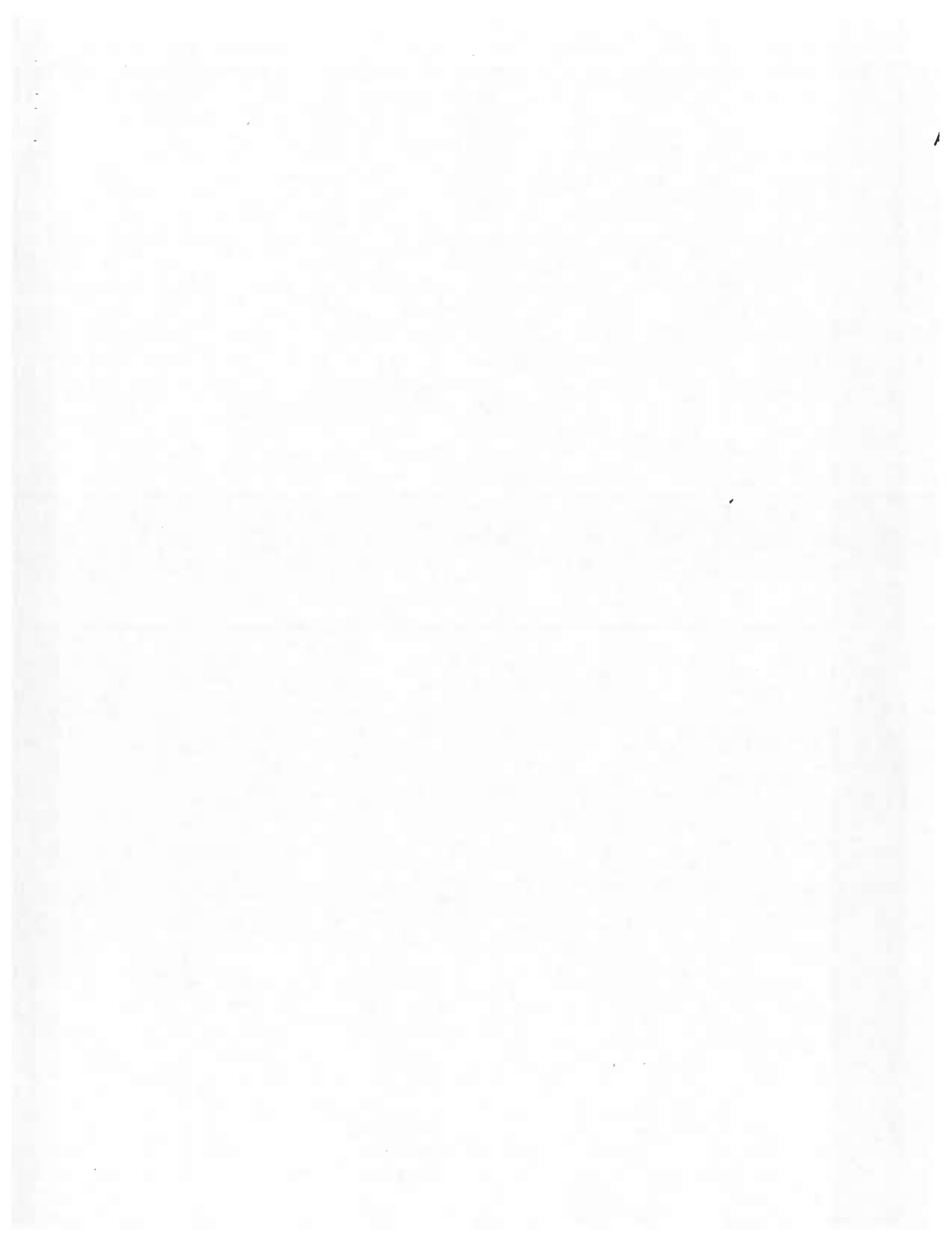
Tectonic has conducted a review of the current United States Geologic Survey 7.5 Minute Topographic Quadrangle for the Subject Site (Appendix III), as well as the National Wildlife Refuge System Map. According to these maps, the Subject Site is not located within an officially designated Wildlife Preserve. As such, no further investigation regarding Wildlife Preserves is required.

3. Listed Threatened or Endangered Species or Designated Critical Habitat (47 CFR 1 § 1.1307 (a)(3))

The New York State Department of Environmental Conservation (NYSDEC) has determined that certain telecommunication/tower projects will not adversely affect threatened or endangered species, or designated critical habitats. According to the NYSDEC, the proposed project will have no adverse effect upon rare species or significant natural communities, provided that the development meets one of the following criteria:

1. New antennae or panels on existing towers, or new communications equipment installed within existing fenced equipment areas, provided that all new work is confined within existing equipment areas, no previously undisturbed land is disturbed, and no new access roads or expansion of existing access roads is involved.
2. New or existing towers, antennae and associated equipment installed at a location currently wholly occupied by lawn, pavement and/or gravel.
3. New or existing towers, antennae and associated equipment installed on or in existing buildings, rooftops, billboards or bridges, with the exception of buildings and bridges with peregrine falcon nests.

Based on a review of the Subject Site, the proposed replacement installation will be limited to an existing manicured lawn and previously disturbed, gravel parking area located approximately 5 feet from the existing guyed tower. A further review of the NYSDEC Environmental Resource Map of the project area indicates that there are no significant natural communities within the Subject Site. As the Subject Site meets the NYSDEC criteria and is not located within a significant natural community, Tectonic has



New York State Office of Parks, Recreation and Historic Preservation
The Governor Nelson A. Rockefeller Empire State Plaza
Agency Building 1, Albany, New York 12238-0001

September 28, 1992

Mr. Mark Eger
Mark Eger & Bros., Inc.
RD 2, Box 11A
Hudson, New York 12534

Dear Mr. Eger:

Re: SEQRA
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Greenport, Columbia County
92PR1502

The Office of Parks, Recreation and Historic Preservation (OPRHP) has received the documentation you provided on your project. As the state agency responsible for the coordination of the State's historic preservation programs, including the encouragement and assistance of local preservation programs, we offer the following comments.

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If you have any questions, please call our Project Review Unit at (518) 474-0479.

Sincerely yours,

[Signature]
Julia S. Stokes
Deputy Commissioner for
Historic Preservation

JSS/RDK:tr

**FCC LAND USE SCREENING CHECKLIST
FOR PROPOSED REPLACEMENT TOWER**

**EGER COMMUNICATIONS
170 EGER ROAD, HUDSON,
COLUMBIA COUNTY, NEW YORK**

PREPARED FOR:

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1. New antennae or panels on existing towers, or new communications equipment installed within existing fenced equipment areas, provided that all new work is confined within existing equipment areas, no previously undisturbed land is disturbed, and no new access roads or expansion of existing access roads is involved.
2. New or existing towers, antennae and associated equipment installed at a location currently wholly occupied by lawn, pavement and/or gravel.
3. New or existing towers, antennae and associated equipment installed on or in existing buildings, rooftops, billboards or bridges, with the exception of buildings and bridges with peregrine falcon nests.

Based on a review of the Subject Site, the proposed replacement installation will be limited to an existing manicured lawn and previously disturbed, gravel parking area located approximately 5 feet from the existing guyed tower. A further review of the NYSDEC Environmental Resource Map of the project area indicates that there are no significant natural communities within the Subject Site. As the Subject Site meets the NYSDEC criteria and is not located within a significant natural community, Tectonic has

determined that the proposed project will have no adverse effect on listed or proposed threatened or endangered species, or designated critical habitats.

Tectonic has also reviewed the Subject Site in accordance with the United States Fish and Wildlife Services' (USF&WS) *Service Interim Guidelines for Recommendations on Communications Tower Siting, Construction, Operation and Decommissioning*. Per the Service's Guidelines, the proposed installation has been designed as a 190 high self-supporting lattice tower without lighting, and will not be located in or near an area of wetlands or wildlife refuge.

Based on the assessment of the Subject Site in accordance with NYSDEC policies, the NYSDEC Environmental Resource Map, and USF&WS guidelines, Tectonic has concluded that no further investigation regarding Listed Threatened or Endangered Species, or Designated Critical Habitats is required.

All relevant documents are included in Appendix IV.

4. **Historic Places (47 CFR 1 § 1.1307 (a)(4)) - "May affect districts, sites, building, structures, or objects, significant in American history, architecture, engineering or culture that are eligible for listing in the National Register of Historic Places..."**

Tectonic has reviewed the Subject Site in accordance with the *Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission* (NPA). According to the NPA, certain undertakings are excluded from Section 106 review. These undertakings include: "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 direction or involve excavation outside of 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."

Elements 1-3 of the Collocation Agreement define a substantial increase as:

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 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."

According to a review of the Subject Site, the proposed replacement tower meets the Section 106 exclusion policies outlined in the NPA. The following information was determined through Tectonic's review of the Subject Site in regards to these stipulations:

- The existing tower structure was built in 1992 and is being replaced because it is structurally unsound.
- The proposed replacement tower and related construction activities will be limited to the current boundaries of the owned property.
- The proposed replacement tower will not substantially increase the size of the existing guyed tower.

Based on Tectonic's review of the Subject Site, the proposed project complies with the stipulations set forth by the NPA. Therefore, in accordance with the NPA, the proposed replacement tower may be installed without being reviewed under the consultation process set forth under Subpart B of 36 CFR Part 800.

All relevant documentation is provided in Appendix V.

5. Indian Religious Sites (47 CFR 1 § 1.1307 (a)(5))

According to a review of the Subject Site in accordance with the NPA, as outlined above, the proposed replacement tower is excluded from Section 106 review. As such, Tectonic did not participate in tribal consultation through the FCC Tower Construction Notification System.

In the unlikely event that unanticipated historic properties, cultural artifacts, archaeological deposits or human remains are inadvertently encountered during the proposed construction and installation activities, Eger Communications must halt activities immediately and contact the appropriate tribal governments, local officials and state agencies, in accordance with federal and state regulations.

6. Located in a Flood Plain (Executive Order 11988) (47 CFR 1 § 1.1307 (a)(6))

Tectonic has reviewed the FEMA Flood Insurance Rate Map of the project area (Appendix V). Based on the information obtained, the Subject Site is not located within a 100-year or 500-year flood plain.

As the Subject Site is not located within a 100-year or 500-year flood plain, Tectonic has determined that no further investigation regarding Flood Plains is required.

7. Wetlands (47 CFR § 1.1307 (a)(7)) "Construction will involve significant change in surface features (e.g. wetland fill, deforestation or water diversion)"

Tectonic has conducted a review of the USF&WS National Wetlands Inventory map and the NYSDEC Natural Resource Mapper for the Subject Site (Appendix VI). Upon review of these federal and state wetlands maps, it was determined that the Subject Site is not located within or adjacent to a mapped wetland or regulated water body.

As the Subject Site is not located within a mapped wetland, Tectonic has determined that no further investigation regarding Wetlands or other surface features is required.

8. High Intensity White Lights (47 CFR 1 § 1.1307 (a)(8))

According to the location of the Subject Site and the height of the proposed tower, the Subject Site will not require High Intensity White Lights in a residential neighborhood.

9. Radio Frequency Radiation (47 CFR 1 § 1.1307 (b))

The proposed Eger Communications replacement installation will be limited to the construction of a self-supporting lattice tower. The tower itself will not emit radio frequency radiation. FCC licensees who may transmit from antennae mounted to the tower will be required to comply with applicable radio frequency exposure standards.

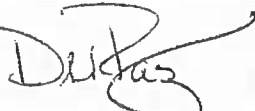
CONCLUSIONS/RECOMMENDATIONS

Based on the review of readily available information regarding the above-referenced FCC issues, no further investigation is warranted prior to the development of the proposed replacement tower at 33 Eger Road in Hudson, Columbia County, New York as outlined in 47 CFR Part 1, Subpart 1, Section 1.1307 (a) and (b).

If you have any questions about information in this report or if we can be of further assistance, please contact the undersigned at (845) 534-5959.

Sincerely,

TECTONIC ENGINEERING & SURVEYING CONSULTANTS P.C.

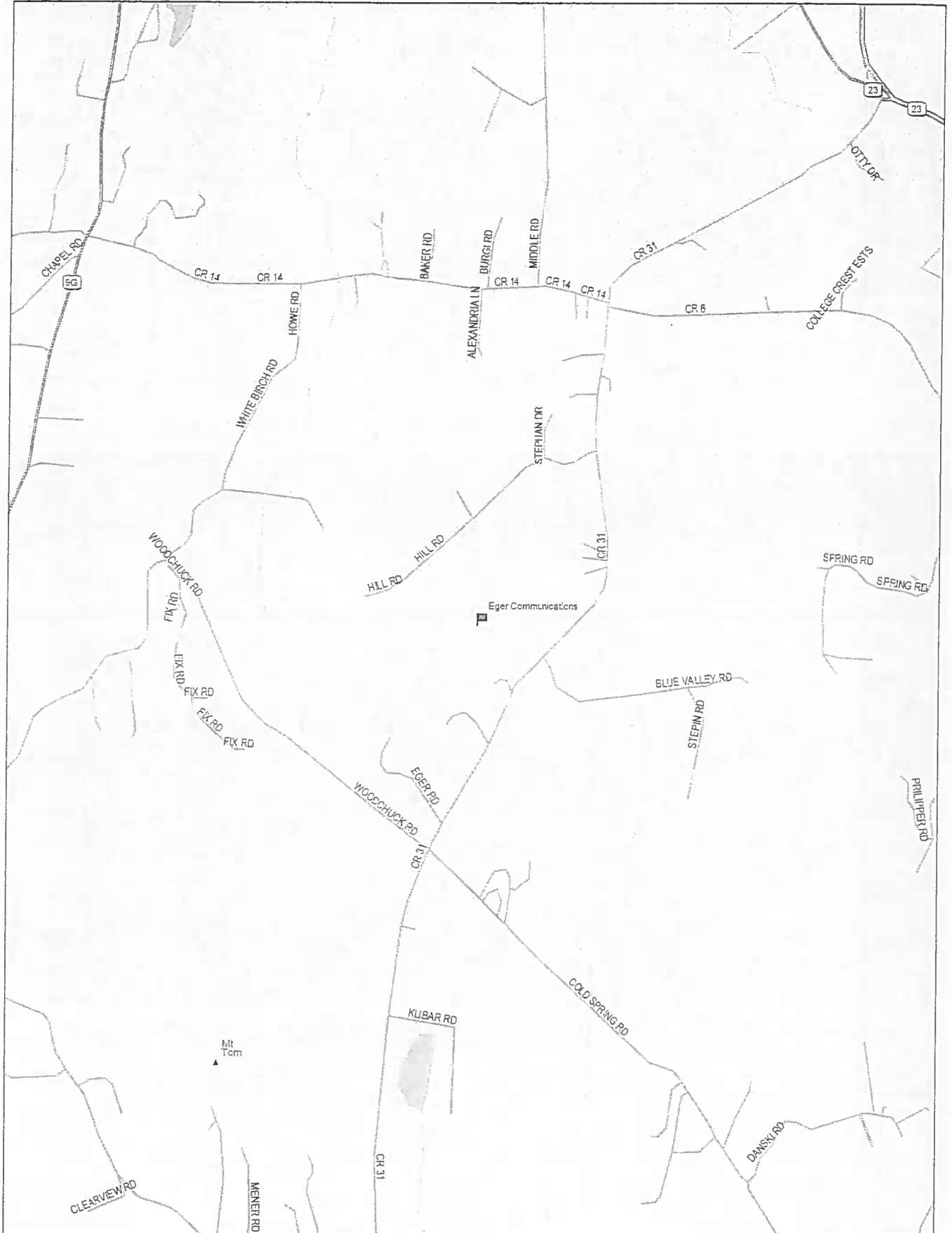


Denise Pantzer
Staff Archaeologist



Peter T. Sutherland, P.E., L.E.P., C.P.G.
Vice President, Manager of Environmental Services

FIGURE I



Data use subject to license.

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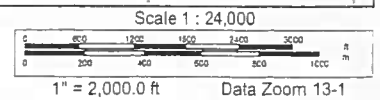
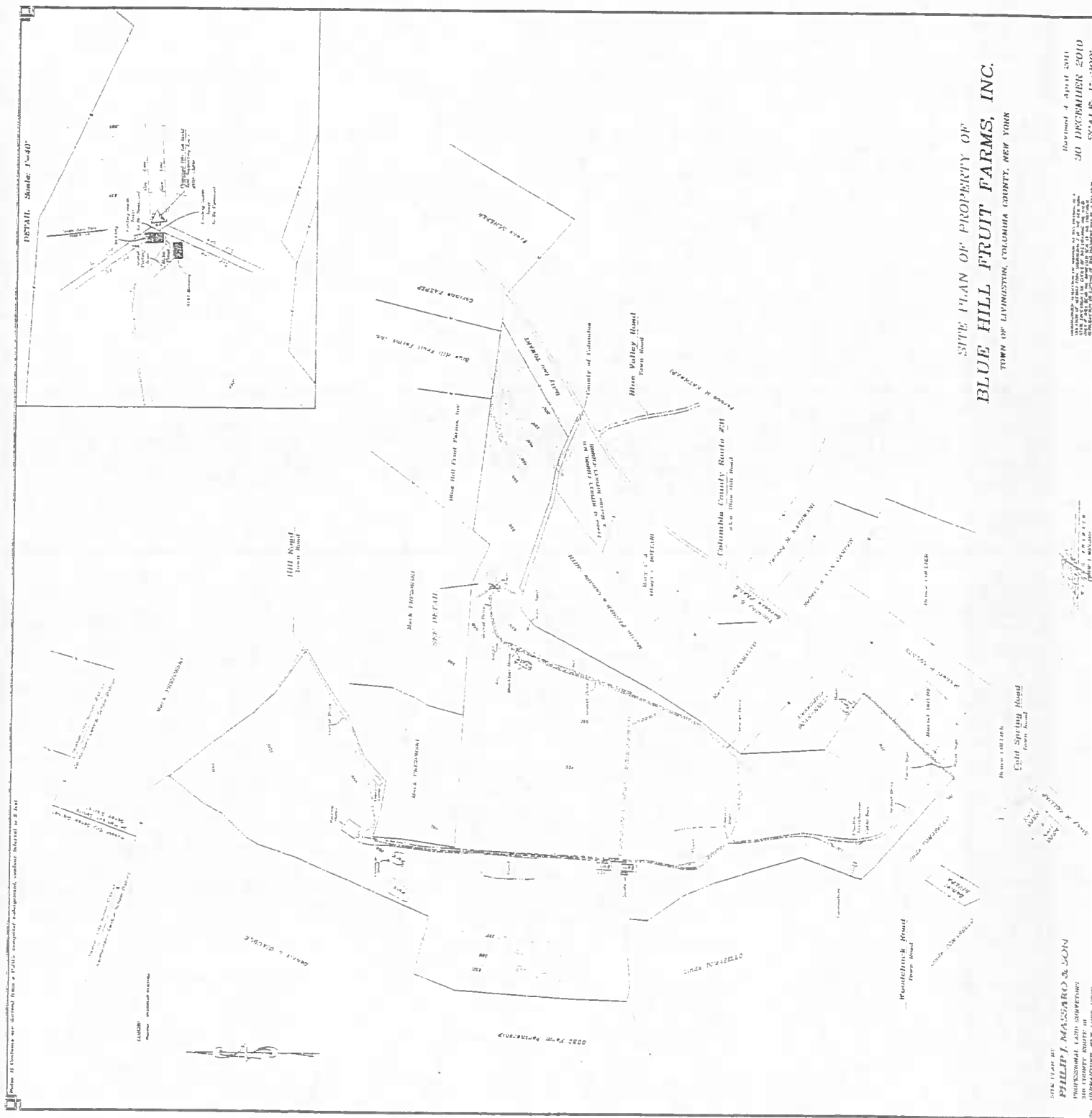


FIGURE II



SITE PLAN OF PROPERTY OF
BLUE HILL FRUIT FARMS, INC.
 TOWN OF LIVINGSTON, COLUMBIA COUNTY, NEW YORK

Revised 4 April 2011
 30 DECEMBER 2010
 SCALE: 1"=200'

PHILIP J. MASARO & SON
 PROFESSIONAL LAND SURVEYORS
 300 EIGHTH AVENUE, SUITE 100
 NEW YORK, NEW YORK 10018

These dimensions were derived from a 1940s computer enlargement, and are shown in feet.

APPENDIX I

Federal Communications Commission

§ 1.1307

the applicable health and safety guidelines cited in § 1.1307(b).

[51 FR 15000, Apr. 22, 1986, as amended at 51 FR 18889, May 23, 1986; 53 FR 28393, July 28, 1988; 56 FR 13414, Apr. 2, 1991; 64 FR 19061, Apr. 19, 1999]

§ 1.1307 Actions that may have a significant environmental effect, for which Environmental Assessments (EAs) must be prepared.

(a) Commission actions with respect to the following types of facilities may significantly affect the environment and thus require the preparation of EAs by the applicant (see §§ 1.1308 and 1.1311) and may require further Commission environmental processing (see §§ 1.1314, 1.1315 and 1.1317):

(1) Facilities that are to be located in an officially designated wilderness area.

(2) Facilities that are to be located in an officially designated wildlife preserve.

(3) Facilities that: (i) May affect listed threatened or endangered species or designated critical habitats; or (ii) are likely to jeopardize the continued existence of any proposed endangered or threatened species or likely to result in the destruction or adverse modification of proposed critical habitats, as determined by the Secretary of the Interior pursuant to the Endangered Species Act of 1973.

NOTE: The list of endangered and threatened species is contained in 50 CFR 17.11, 17.22, 222.23(a) and 227.4. The list of designated critical habitats is contained in 50 CFR 17.95, 17.96 and part 226. To ascertain the status of proposed species and habitats, inquiries may be directed to the Regional Director of the Fish and Wildlife Service, Department of the Interior.

(4) Facilities that may affect districts, sites, buildings, structures or objects, significant in American history, architecture, archeology, engineering or culture, that are listed, or are eligible for listing, in the National Register of Historic Places. (See 16 U.S.C. 470w(5); 36 CFR 60 and 800.)

NOTE: The National Register is updated and re-published in the FEDERAL REGISTER each year in February. To ascertain whether a proposal affects a historical property of national significance, inquiries also may be made to the appropriate State Historic Pres-

ervation Officer, see 16 U.S.C. 470a(b); 36 CFR parts 63 and 800.

(5) Facilities that may affect Indian religious sites.

(6) Facilities to be located in a flood Plain (See Executive Order 11988.)

(7) Facilities whose construction will involve significant change in surface features (e.g., wetland fill, deforestation or water diversion). (In the case of wetlands on Federal property, see Executive Order 11990.)

(8) Antenna towers and/or supporting structures that are to be equipped with high intensity white lights which are to be located in residential neighborhoods, as defined by the applicable zoning law.

(b) In addition to the actions listed in paragraph (a) of this section, Commission actions granting construction permits, licenses to transmit or renewals thereof, equipment authorizations or modifications in existing facilities, require the preparation of an Environmental Assessment (EA) if the particular facility, operation or transmitter would cause human exposure to levels of radiofrequency radiation in excess of the limits in §§ 1.1310 and 2.1093 of this chapter. Applications to the Commission for construction permits, licenses to transmit or renewals thereof, equipment authorizations or modifications in existing facilities must contain a statement confirming compliance with the limits unless the facility, operation, or transmitter is categorically excluded, as discussed below. Technical information showing the basis for this statement must be submitted to the Commission upon request. Such compliance statements may be omitted from license applications for transceivers subject to the certification requirement in § 25.129 of this chapter.

(1) The appropriate exposure limits in §§ 1.1310 and 2.1093 of this chapter are generally applicable to all facilities, operations and transmitters regulated by the Commission. However, a determination of compliance with the exposure limits in § 1.1310 or § 2.1093 of this chapter (routine environmental evaluation), and preparation of an EA if the limits are exceeded, is necessary only for facilities, operations and transmitters that fall into the categories listed

in table 1, or those specified in paragraph (b)(2) of this section. All other facilities, operations and transmitters are categorically excluded from making such studies or preparing an EA, except as indicated in paragraphs (c) and (d) of this section. For purposes of table 1, building-mounted antennas means antennas mounted in or on a building structure that is occupied as a workplace or residence. The term power in column 2 of table 1 refers to total operating power of the transmitting operation in question in terms of effective radiated power (ERP), equivalent isotropically radiated power (EIRP), or peak envelope power (PEP), as defined in § 2.1 of this chapter. For the case of the Cellular Radiotelephone Service, subpart H of part 22 of this chapter; the

Personal Communications Service, part 24 of this chapter and the Specialized Mobile Radio Service, part 90 of this chapter, the phrase total power of all channels in column 2 of table 1 means the sum of the ERP or EIRP of all co-located simultaneously operating transmitters owned and operated by a single licensee. When applying the criteria of table 1, radiation in all directions should be considered. For the case of transmitting facilities using sectorized transmitting antennas, applicants and licensees should apply the criteria to all transmitting channels in a given sector, noting that for a highly directional antenna there is relatively little contribution to ERP or EIRP summation for other directions.

TABLE 1—TRANSMITTERS, FACILITIES AND OPERATIONS SUBJECT TO ROUTINE ENVIRONMENTAL EVALUATION

Service (title 47 CFR rule part)	Evaluation required if
Experimental Radio Services (part 5)	Power > 100 W ERP (164 W EIRP)
Multipoint Distribution Service (subpart K of part 21).	<i>Non-building-mounted antennas:</i> height above ground level to lowest point of antenna < 10 m and power > 1640 W EIRP <i>Building-mounted antennas:</i> power > 1640 W EIRP MDS licensees are required to attach a label to subscriber transceiver or transverter antennas that: (1) provides adequate notice regarding potential radiofrequency safety hazards, e.g., information regarding the safe minimum separation distance required between users and transceiver antennas; and (2) references the applicable FCC-adopted limits for radiofrequency exposure specified in § 1.1310.
Paging and Radiotelephone Service (subpart E of part 22).	<i>Non-building-mounted antennas:</i> height above ground level to lowest point of antenna < 10 m and power > 1000 W ERP (1640 W EIRP) <i>Building-mounted antennas:</i> power > 1000 W ERP (1640 W EIRP)
Cellular Radiotelephone Service (subpart H of part 22).	<i>Non-building-mounted antennas:</i> height above ground level to lowest point of antenna < 10 m and total power of all channels > 1000 W ERP (1640 W EIRP) <i>Building-mounted antennas:</i> total power of all channels > 1000 W ERP (1640 W EIRP)
Personal Communications Services (part 24) ...	(1) Narrowband PCS (subpart D): <i>non-building-mounted antennas:</i> height above ground level to lowest point of antenna < 10 m and total power of all channels > 1000 W ERP (1640 W EIRP) <i>Building-mounted antennas:</i> total power of all channels > 1000 W ERP (1640 W EIRP) (2) Broadband PCS (subpart E): <i>non-building-mounted antennas:</i> height above ground level to lowest point of antenna < 10 m and total power of all channels > 2000 W ERP (3280 W EIRP) <i>Building-mounted antennas:</i> total power of all channels > 2000 W ERP (3280 W EIRP)
Satellite Communications (part 25)	All included. In addition, for NGSO subscriber equipment, licensees are required to attach a label to subscriber transceiver antennas that: (1) provides adequate notice regarding potential radiofrequency safety hazards, e.g., information regarding the safe minimum separation distance required between users and transceiver antennas; and (2) references the applicable FCC-adopted limits for radiofrequency exposure specified in § 1.1310 of this chapter.
General Wireless Communications Service (part 26).	Total power of all channels > 1640 W EIRP
Wireless Communications Service (Part 27)	(1) for the 1390–1392 MHz, 1392–1395 MHz, 1432–1435 MHz 1670–1675 MHz and 2385–2390 MHz bands: <i>Non-building-mounted antennas:</i> Height above ground level to lowest point of antenna < 10 m and total power of all channels > 2000 W ERP (3280 W EIRP).

APPENDIX II

NEPA LAND USE SCREENING CHECKLIST

TECTONIC

Client: Eger Communications

Site Name: n/a

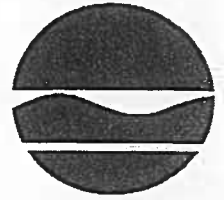
Tectonic W.O. #5920.01

Location: 170 Eger Road, Hudson,
Columbia County, New York

FCC NEPA Category	Database/Agency/Map	No Adverse Impact	Potential Adverse Impact	Exempt from Review*	Collocation NPA or Exclusion Applies
1. Wilderness Area Is the proposed facility located in an officially designated wilderness area?	GIS Research Center U. S. Fish & Wildlife Service (USF&WS) Dept. of Environmental Conserv. (DEC)	X			
2. Wildlife Preserve Is the proposed facility located in an officially designated wildlife preserve?	United States Fish & Wildlife Service (USF&WS) Dept. of Environmental Conserv. (DEC)	X			
3A. Listed Threatened or Endangered Species Will the proposed facility likely affect threatened or endangered species?	U. S. Fish & Wildlife Service (USF&WS) Dept. of Environmental Conserv. (DEC)	X			
3B. Listed Threatened or Endangered Species Will the proposed facility likely jeopardize the cont. existence of any designated or proposed threatened or endangered species?	U. S. Fish & Wildlife Service (USF&WS) Dept. of Environmental Conserv. (DEC)	X			
3C. Critical Habitat Will the proposed facility likely result in the destruction or adverse modification of designated or proposed critical habitats, as determined by the Endangered Species Act of 1973?	U. S. Fish & Wildlife Service (USF&WS) Dept. of Environmental Conserv. (DEC)	X			
4. National Register of Historic Places Will the facility affect districts, sites, buildings, structures or objects, significant in American history, architecture, archaeology, engineering or culture, that are listed (or eligible for listing) in the National Register of Historic Places?	State Historic Preservation Office (SHPO)				X
5. Indian Religious Sites Will the facility affect Indian Religious Sites?	Tribal Historic Preservation Office (THPO)				X
6. Flood Plain Is the facility located in a flood plain?	Federal Emergency Management Agency (FEMA)	X			
7. Surface Features Will the construction of the proposed facility involve significant change in surface features (e.g. wetland fill, deforestation or water diversion)?	National Wetlands Inventory	X			
8. High Intensity White Lights Is the proposed facility located in a residential neighborhood, as defined by local zoning law, and required to be equipped with high intensity white lights?	Federal Aviation Administration (FAA) and Local Zoning (tower ht. and lighting requirement supplied by carrier)	X			
*For collocations, NEPA Land Use Screening Categories 4 & 5 are required. The remaining categories are categorically excluded.					
The undersigned has reviewed and approved the completion of this NEPA checklist for the above referenced site.					
Signed: _____					
Title: Staff Archaeologist _____					
Date: August 8, 2011 _____					
B. Facility Power *Responsibility of Client		Reference health-safety and/or power density report(s) prepared by carrier.			

APPENDIX IV

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION
Division of Fish, Wildlife & Marine Resources
New York Natural Heritage Program
625 Broadway, 5th Floor, Albany, New York 12233-4757
Phone: (518) 402-8935 • **Fax:** (518) 402-9027
Website: www.dec.ny.gov



Joe Martens
Commissioner

November, 2011

**Guidelines for Consultation with NY Natural Heritage
regarding
Proposed Collocations of Telecommunication Facilities
on Existing Towers and Buildings**

Regarding reviews of the databases of the New York Natural Heritage Program for rare, endangered, or threatened species in the vicinity of proposed telecommunication equipment to be collocated on existing telecommunications towers and on existing buildings: New York Natural Heritage has no records of rare or listed species which would be of concern, and therefore does not require a consultation with NY Natural Heritage, for any communication facilities projects that meet one of three criteria below:

- 1) New antennae or panels on existing towers, or new communications equipment installed within existing fenced equipment areas, provided that all new work is confined within existing equipment areas, no previously undisturbed land is disturbed, and no new access roads or expansion of existing access roads is involved.
- 2) New or existing towers, antennae, and associated equipment installed at a location currently wholly occupied by lawn, pavement and/or gravel.
- 3) New or existing towers, antennae, and associated equipment installed on or in existing buildings, rooftops, billboards, or bridges, with the exception of the buildings and bridges with peregrine falcon nests listed later in this letter.

For projects which meet the above criteria, we do not have any records of rare species or significant natural communities which will be of concern in relation to the proposed projects. Therefore, in these cases, separate consultation with the New York Natural Heritage Program is not necessary for a project sponsor to complete the environmental assessment required by the FCC; this letter may serve as a finding of no known impacts on state-listed species or on other rare species. This determination may be reconsidered at any time should additional information on communication facility projects or on rare species become available. Please note that neither this office, nor the NYS DEC Endangered Species Unit, need to be consulted in the future regarding communication facilities and equipment collocated on existing towers in New York State, nor for those located on buildings and bridges except for those listed below.

The NYS DEC Endangered Species Unit offers this guidance regarding cellular communication facilities atop buildings in urban areas: There is not a concern with regards to peregrine falcons when new antennas or communications towers and associated equipment are

proposed, or existing ones modified, unless they are actually on the same building or bridge that a nest is located on. Projects located in adjacent areas will not have a significant impact on this species. If the projects are proposed for construction on the same building or bridge as a nest or breeding pair, then please contact the Endangered Species Unit for further consultation at 625 Broadway, Albany, NY, 12233-4754.

For your reference, peregrine falcon nests currently occur on the following buildings and bridges in the following major urban areas:

New York City buildings:

- Cornell Medical College, 68th Street and York Avenue
- Wall Street: 48 Wall Street at Nassau Ave., and at 55 Water Street
- Riverside Church, Riverside Drive and 120th
- Met Life Building, 200 Park Avenue
- Candler Building, W 42nd and Fashion Avenue (near Times Square)
- Pier 57

New York City bridges:

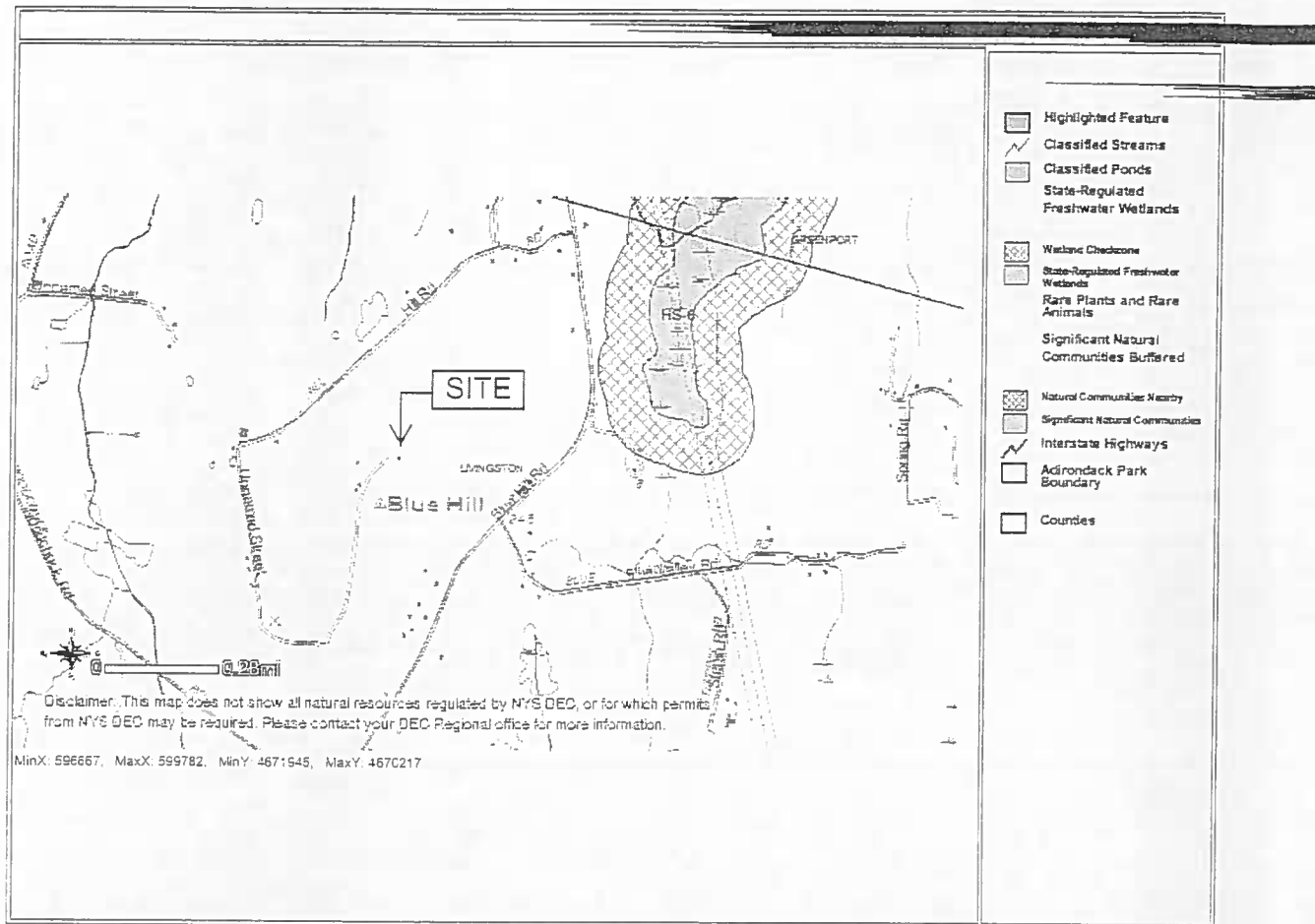
- Verrazano Narrows, Throgs Neck, Hell Gate Railroad, Triborough, Outerbridge Crossing, Marine Parkway, Goethals, George Washington, Bayonne, Brooklyn, Broadway, Williamsburg, Park Avenue Railroad
- Town of Hempstead, Nassau County: Nassau County Medical Center, East Meadow
- Town of Islip, Suffolk County: Captree Island Bridge
- Buffalo: Statler Building (Franklin and West Genessee Streets), City Hall (Niagara Square), Central Terminal, and State University at Buffalo's South Campus
- Rochester: Marine Midland Plaza Building (Court and Chestnut Streets) and Eastman Kodak Building (State Street near Plymouth and Platt)
- Syracuse: State Tower Building (South Warren Street)
- Binghamton: Exchange Street
- Albany: Dunn Memorial Bridge
- Troy: Collar City (Route 7) Bridge
- Hudson River Bridges: Tappan Zee, Newburgh-Beacon, Kingston-Rhinecliff, Mid-Hudson, Rip van Winkle, Castleton-on-Hudson, and Bear Mountain
- Ogdensburg: Ogdensburg Bridge
- Grand Island/Niagara Falls: North and South Grand Island Bridges (I-190 over Niagara River)

For proposed telecommunications facilities which do not meet the above criteria, including those projects involving the construction of new towers, please submit a request to the New York Natural Heritage Program for a review of any rare or listed species in the vicinity of the proposed project. Directions for submitting a request can be found at <http://www.dec.ny.gov/animals/31181.html>, or can be provided by NY Natural Heritage.

If you have any questions regarding these determinations, please contact our office.

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Please set your printer orientation to "Landscape".



Disclaimer: This map was prepared by the New York State Department of Environmental Conservation using the most current data available. It is deemed accurate but is not guaranteed. NYS DEC is not responsible for any inaccuracies in the data and does not necessarily endorse any interpretations or products derived from the data.

United States Department of Interior
Fish and Wildlife Service
Washington, DC 20240

September 14, 2000

To: Regional Directors

From: Director /s/ Jamie Rappaport Clark

Subject: Service Guidance on the Siting, Construction, Operation and Decommissioning of Communications Towers

Construction of communications towers (including radio, television, cellular, and microwave) in the United States has been growing at an exponential rate, increasing at an estimated 6 percent to 8 percent annually. According to the Federal Communication Commission's *2000 Antenna Structure Registry*, the number of lighted towers greater than 199 feet above ground level (AGL) currently number over 45,000 and the total number of towers over 74,000. Non-compliance with the registry program is estimated at 24 percent to 38 percent, bringing the total to 92,000 to 102,000. By 2003, all television stations must be digital, adding potentially 1,000 new towers exceeding 1,000 feet AGL.

The construction of new towers creates a potentially significant impact on migratory birds, especially some 350 species of night-migrating birds. Communications towers are estimated to kill 4-5 million birds per year, which violates the spirit and the intent of the Migratory Bird Treaty Act and the Code of Federal Regulations at Part 50 designed to implement the MBTA. Some of the species affected are also protected under the Endangered Species Act and Bald and Golden Eagle Act.

Service personnel may become involved in the review of proposed tower sitings and/or in the evaluation of tower impacts on migratory birds through National Environmental Policy Act review; specifically, Sections 1501.6, opportunity to be a cooperating agency, and 1503.4, duty to comment on federally-licensed activities for agencies with jurisdiction by law, in this case the MBTA, or because of special expertise. Also, the National Wildlife Refuge System Improvement Act requires that any activity on Refuge lands be determined as compatible with the Refuge system mission and the Refuge purpose(s). In addition, the Service is required by the ESA to assist other Federal agencies in ensuring that any action they authorize, implement, or fund will not jeopardize the continued existence of any Federally endangered or threatened species.

A Communication Tower Working Group composed of government agencies, industry, academic researchers and NGO's has been formed to develop and implement a research protocol to determine the best ways to construct and operate towers to prevent bird strikes. Until the research study is completed, or until research efforts uncover significant new mitigation measures, all Service personnel involved in the review of proposed tower sitings and/or the evaluation of the impacts of towers on migratory birds should use the attached interim guidelines when making recommendations to all companies, license applicants, or licensees proposing new tower sitings. These guidelines were developed by Service personnel from research conducted in several eastern, midwestern, and southern states, and have been refined through Regional review. They are based on the best information available at this time, and are the most prudent and effective measures for avoiding bird strikes at towers. We believe that they will provide significant protection for migratory birds pending completion of the Working Group's recommendations. As new information becomes available, the guidelines will be updated accordingly.

Implementation of these guidelines by the communications industry is voluntary, and our recommendations must be balanced with Federal Aviation Administration requirements and local

community concerns where necessary. Field offices have discretion in the use of these guidelines on a case by case basis, and may also have additional recommendations to add which are specific to their geographic area.

Also attached is a Tower Site Evaluation Form which may prove useful in evaluating proposed towers and in streamlining the evaluation process. Copies may be provided to consultants or tower companies who regularly submit requests for consultation, as well as to those who submit individual requests that do not contain sufficient information to allow adequate evaluation. This form is for discretionary use, and may be modified as necessary.

The Migratory Bird Treaty Act (16 U.S.C. 703-712) prohibits the taking, killing, possession, transportation, and importation of migratory birds, their eggs, parts, and nests, except when specifically authorized by the Department of the Interior. While the Act has no provision for allowing unauthorized take, it must be recognized that some birds may be killed at structures such as communications towers even if all reasonable measures to avoid it are implemented. The Service's Division of Law Enforcement carries out its mission to protect migratory birds not only through investigations and enforcement, but also through fostering relationships with individuals and industries that proactively seek to eliminate their impacts on migratory birds. While it is not possible under the Act to absolve individuals or companies from liability if they follow these recommended guidelines, the Division of Law Enforcement and Department of Justice have used enforcement and prosecutorial discretion in the past regarding individuals or companies who have made good faith efforts to avoid the take of migratory birds.

Please ensure that all field personnel involved in review of FCC licensed communications tower proposals receive copies of this memorandum. Questions regarding this issue should be directed to Dr. Benjamin Tuggle, Chief, Division of Habitat Conservation, at (703)358-2161, or Jon Andrew, Chief, Division of Migratory Bird Management, at (703)358-1714. These guidelines will be incorporated in a Director's Order and placed in the Fish and Wildlife Service Manual at a future date.

Service Interim Guidelines For Recommendations On

Communications Tower Siting, Construction, Operation, and Decommissioning

1. Any company/applicant/licensee proposing to construct a new communications tower should be strongly encouraged to collocate the communications equipment on an existing communication tower or other structure (*e.g.*, billboard, water tower, or building mount). Depending on tower load factors, from 6 to 10 providers may collocate on an existing tower.
2. If collocation is not feasible and a new tower or towers are to be constructed, communications service providers should be strongly encouraged to construct towers no more than 199 feet above ground level (AGL), using construction techniques which do not require guy wires (*e.g.*, use a lattice structure, monopole, etc.). Such towers should be unlighted if Federal Aviation Administration regulations permit.
3. If constructing multiple towers, providers should consider the cumulative impacts of all of those towers to migratory birds and threatened and endangered species as well as the impacts of each individual tower.
4. If at all possible, new towers should be sited within existing "antenna farms" (clusters of towers). Towers should not be sited in or near wetlands, other known bird concentration areas (*e.g.*, state or

Federal refuges, staging areas, rookeries), in known migratory or daily movement flyways, or in habitat of threatened or endangered species. Towers should not be sited in areas with a high incidence of fog, mist, and low ceilings.

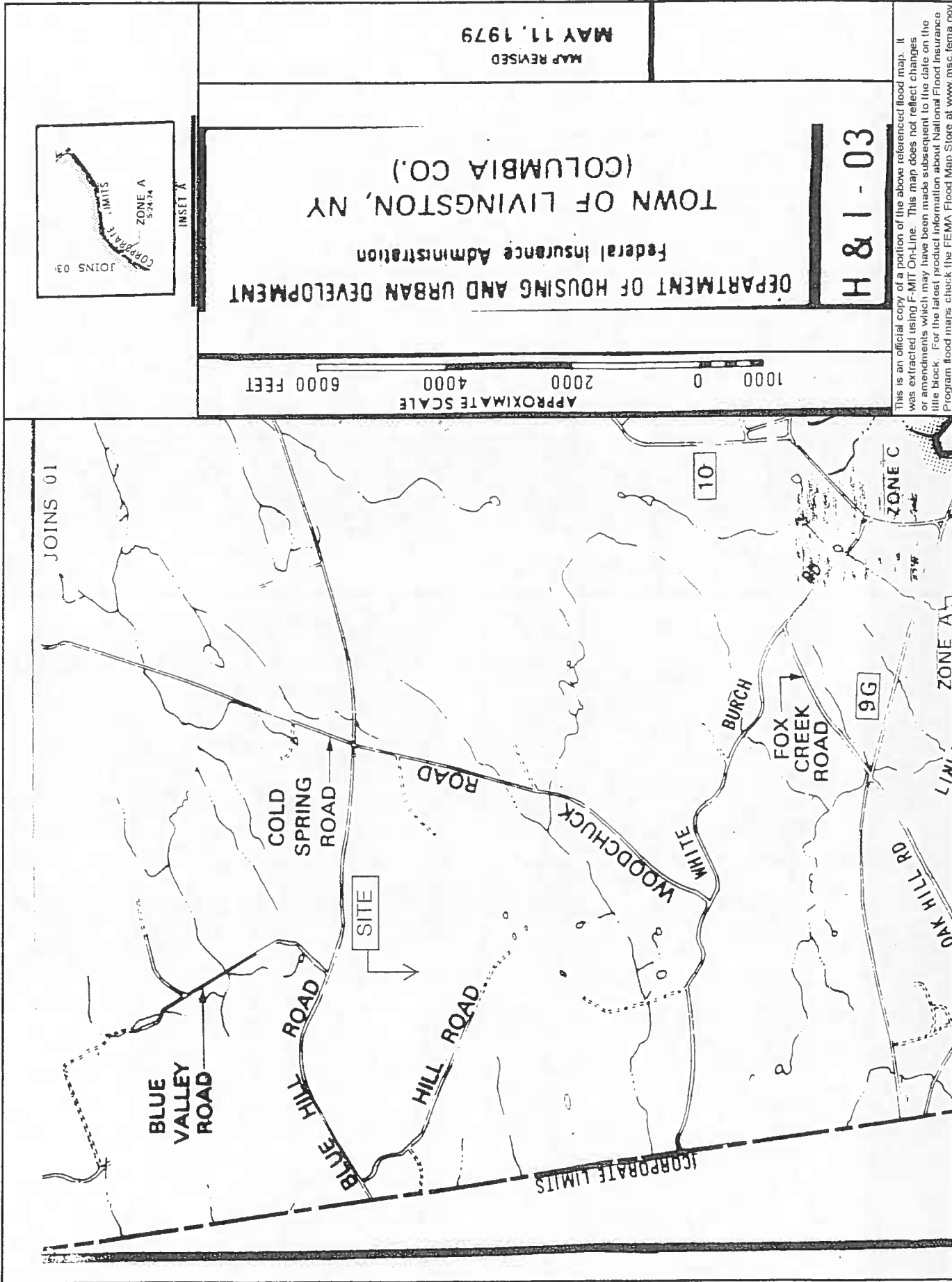
5. If taller (>199 feet AGL) towers requiring lights for aviation safety must be constructed, the minimum amount of pilot warning and obstruction avoidance lighting required by the FAA should be used. Unless otherwise required by the FAA, only white (preferable) or red strobe lights should be used at night, and these should be the minimum number, minimum intensity, and minimum number of flashes per minute (longest duration between flashes) allowable by the FAA. The use of solid red or pulsating red warning lights at night should be avoided. Current research indicates that solid or pulsating (beacon) red lights attract night-migrating birds at a much higher rate than white strobe lights. Red strobe lights have not yet been studied.
6. Tower designs using guy wires for support which are proposed to be located in known raptor or waterbird concentration areas or daily movement routes, or in major diurnal migratory bird movement routes or stopover sites, should have daytime visual markers on the wires to prevent collisions by these diurnally moving species. (For guidance on markers, see *Avian Power Line Interaction Committee (APLIC). 1994. Mitigating Bird Collisions with Power Lines: The State of the Art in 1994. Edison Electric Institute, Washington, D.C., 78 pp*, and *Avian Power Line Interaction Committee (APLIC). 1996. Suggested Practices for Raptor Protection on Power Lines. Edison Electric Institute/Raptor Research Foundation, Washington, D.C., 128 pp*. Copies can be obtained via the Internet at <http://www.eei.org/resources/pubcat/enviro/>, or by calling 1-800/334-5453).
7. Towers and appendant facilities should be sited, designed and constructed so as to avoid or minimize habitat loss within and adjacent to the tower "footprint". However, a larger tower footprint is preferable to the use of guy wires in construction. Road access and fencing should be minimized to reduce or prevent habitat fragmentation and disturbance, and to reduce above ground obstacles to birds in flight.
8. If significant numbers of breeding, feeding, or roosting birds are known to habitually use the proposed tower construction area, relocation to an alternate site should be recommended. If this is not an option, seasonal restrictions on construction may be advisable in order to avoid disturbance during periods of high bird activity.
9. In order to reduce the number of towers needed in the future, providers should be encouraged to design new towers structurally and electrically to accommodate the applicant/licensee's antennas and comparable antennas for at least two additional users (minimum of three users for each tower structure), unless this design would require the addition of lights or guy wires to an otherwise unlighted and/or unguyed tower.
10. Security lighting for on-ground facilities and equipment should be down-shielded to keep light within the boundaries of the site.
11. If a tower is constructed or proposed for construction, Service personnel or researchers from the Communication Tower Working Group should be allowed access to the site to evaluate bird use, conduct dead-bird searches, to place net catchments below the towers but above the ground, and to place radar, Global Positioning System, infrared, thermal imagery, and acoustical monitoring equipment as necessary to assess and verify bird movements and to gain information on the impacts of various tower sizes, configurations, and lighting systems.

12. Towers no longer in use or determined to be obsolete should be removed within 12 months of cessation of use.

In order to obtain information on the extent to which these guidelines are being implemented, and to identify any recurring problems with their implementation which may necessitate modifications, letters provided in response to requests for evaluation of proposed towers should contain the following request:

“In order to obtain information on the usefulness of these guidelines in preventing bird strikes, and to identify any recurring problems with their implementation which may necessitate modifications, please advise us of the final location and specifications of the proposed tower, and which of the measures recommended for the protection of migratory birds were implemented. If any of the recommended measures can not be implemented, please explain why they were not feasible.”

Return to [Home Page](#)



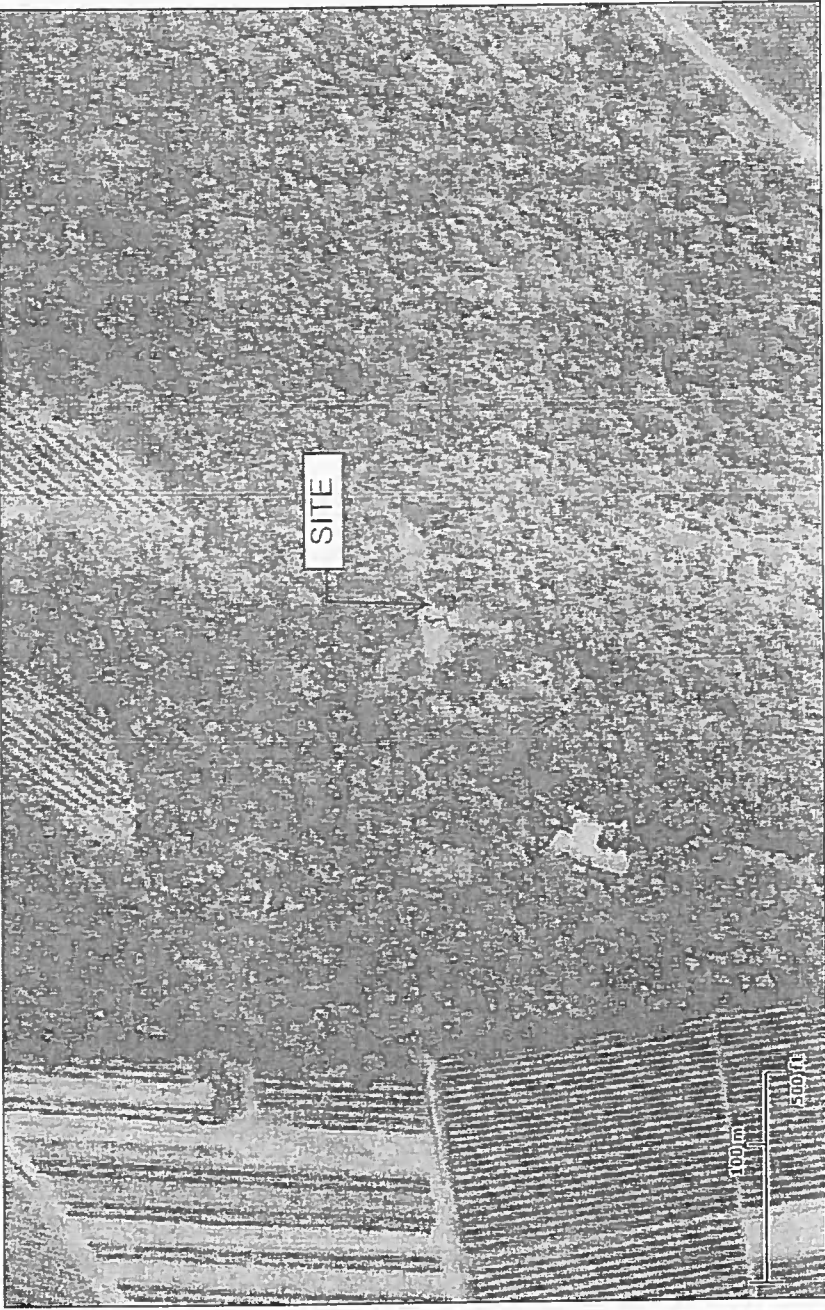
APPENDIX VI



U.S. Fish and Wildlife Service National Wetlands Inventory

NWI Map

Aug 1, 2011



Wetlands

- Freshwater Emergent
- Freshwater Forested/Shrub
- Estuarine and Marine Deepwater
- Estuarine and Marine
- Freshwater Pond
- Lake
- Riverine
- Other

Riparian

- Herbaceous
- Forested/Shrub

Status

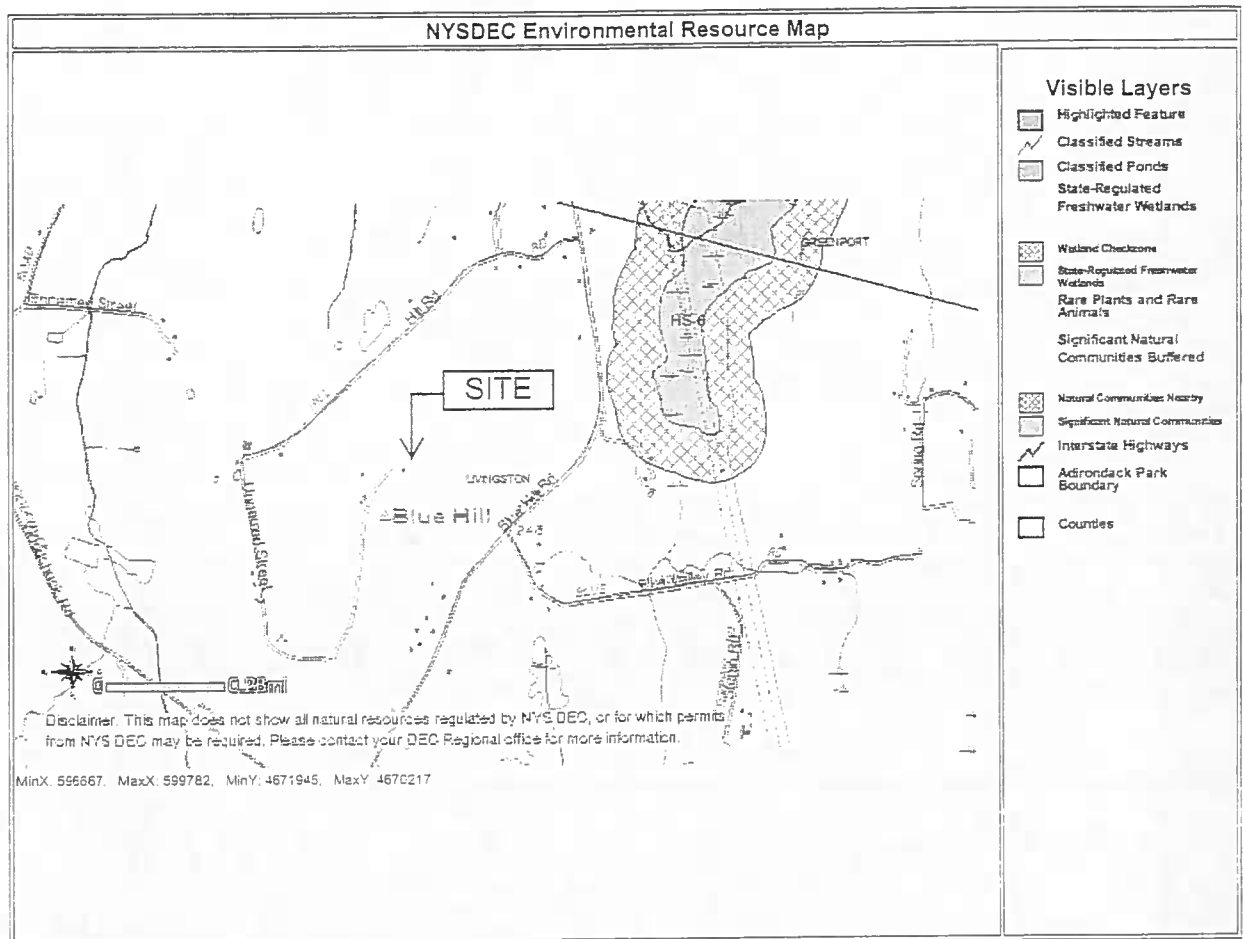
- Digital
- Scan
- Non-Digital
- No Data

This map is for general reference only. The US Fish and Wildlife Service is not responsible for the accuracy or currentness of the base data shown on this map. All wetlands related data should be used in accordance with the layer metadata found on the Wetlands Mapper web site.

User Remarks:

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Columbia County 911

EMERGENCY COMMUNICATIONS DEPARTMENT

85 Industrial Tract
Hudson, New York 12534

Robert C. Lopez
Director

Office: 518-828-1263
Fax: 518-828-9088

November 30, 2011

Mr. Daniel Abeyta, Assistant Chief
Spectrum & Competition Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
1445 12th Street SW
Washington, DC 20554

Re: Letter of support for the Eger Communications REPLACEMENT tower – located on Blue Hill in the Town of Livingston, County of Columbia, State of New York.

Dear Mr. Abeyta,

I am writing to express, from a public safety standpoint, my strong support for the Eger Communications replacement tower project.

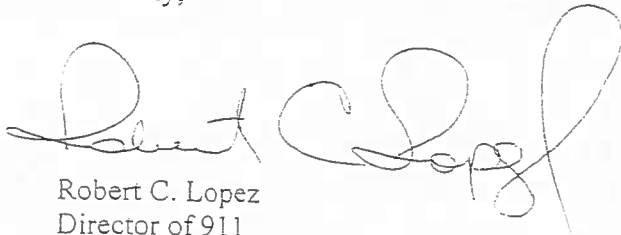
The topography in Columbia County makes radio communications difficult. The 634 square miles encompassing Columbia County are bordered to the west by the Hudson River and to the east by the Berkshire Mountains, with the Taconic Mountain range extending through the center of the county. We are a county of rolling hills and deep valleys, making effective communications a challenge. As the primary public safety answering point in Columbia County, we dispatch for 31 fire departments, 5 ambulance services, 9 police departments, and many other support agencies. Critical to all of these agencies, and the public safety response system in general, is the ability to effectively communicate. Responders depend on this vital link to receive dispatch information via pager and to communicate with the dispatch center while operating on emergency incidents.

For the past six plus years, with the help of professional radio consultants, we have evaluated our radio communications network and identified areas that require attention. Most critical are areas of poor pager, portable radio, and mobile radio coverage across the public safety spectrums we utilize. We also need to address interoperability issues. To mitigate these issues we formulated a 3-phase upgrade plan centered on a simulcast solution. As part of the upgrade project we had an independent structural analysis performed at each of our tower sites. The structural analysis at Eger's Blue Hill tower revealed that the twin guyed towers could not accept any additional loading beyond replacing our point to point infrastructure. The inability to expand our capability at this tower site jeopardizes the entire upgrade project – which jeopardizes public safety. It's important to note that the Blue Hill tower site offers excellent coverage throughout the County. It is without question one of our best sites. Without this site we would have to add, minimally, two to three additional sites to achieve the same coverage.

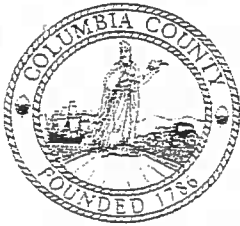
We recently completed phase one of our project which included replacement of our 45 year old legacy microwave system (including replacement of equipment at Eger's Blue Hill tower). We are now at a standstill, waiting for Eger Communications to install a replacement tower that can support our equipment needs. In order to complete our build-out, which is long overdue, and to be consistent with the National Emergency Communications Plan, we need the replacement tower installed. The current tower is just not capable of handling the additional loading.

I appreciate this opportunity to express our support for this project and strongly urge your favorable consideration for the Eger Communications replacement tower. This tower has been a critical link in Columbia County's public safety radio system for many years and continues to be today. Please feel free to contact me with any questions.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert C. Lopez". The signature is written in dark ink and is positioned to the right of the printed name.

Robert C. Lopez
Director of 911



County of Columbia - Emergency Medical Services

85 Industrial Tract ~ Hudson, New York 12534

(518) 822-8610 Fax: (518) 828-2790

email: info@ccemscoordinator.com

website: www.ccemscoordinator.com

EMS Coordinator

P. J. Keeler

Deputy EMS Coordinators

Kevin Johnson

Sue VanEgghen

JoAnn Sheehy

John Silvernail

Brian Gagne

December 2, 2011

Mr. Daniel Abeyta, Assistant Chief
Spectrum & Competition Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
1445 12th Street SW
Washington, DC 20554

Dear Mr. Abeyta,

I write in support of the Eger Communications Blue Hill replacement tower located in the town of Livingston (Columbia County, NY). This replacement tower is an absolute essential part of the Columbia County public safety radio network and it is imperative the project move forward without delay.

The Blue Hill site currently consists of two 190' towers that have been used by Columbia County emergency service agencies for decades. This tower is an ideal site that provides critical communication capability to many of our fire, EMS and police agencies. Unfortunately, we have reached a point where additional build-out on this tower is not possible due to loading issues. Columbia County 911 conducted its own independent structural analysis which confirmed this. The proposed replacement tower would replace one of the two existing towers at the site with a heavy duty 190' tower that is capable of supporting additional load.

Without this replacement tower Columbia County is unable to move forward with our countywide public safety radio infrastructure upgrade project that began back in 2005. This upgrade project includes replacement of our aging microwave system and the addition of simulcasting ability to help resolve critical gaps in coverage around the county. This is a much needed and long awaited upgrade to our public safety radio network. Unfortunately, it is all on hold until the Eger Communications replacement tower is erected.

I urge you to ensure this replacement project is moved along without delay. Columbia County's emergency services agencies, and the residents they serve, are depending on this.

Sincerely,

P. J. Keeler
EMS Coordinator

COLUMBIA COUNTY
OFFICE OF FIRE COORDINATOR

85 INDUSTRIAL TRACT- HUDSON, NY 12534 OFFICE (518) 822-8610 CELL (518) 821-9758
FAX (518) 828-2790

WILLIAM HUNT
DEPUTY COORDINATOR
PO BOX 144
ANCRAM, NY 12502

JAMES VAN DEUSEN
FIRE COORDINATOR
102 ROUTE 23
CLAVESACK, NY 12513

TAB EIGENBRODT
DEPUTY COORDINATOR
95 CODY LANE
EAST CHATHAM, NY 12060

JOHN HOWE
DEPUTY COORDINATOR
17 SHORE ROAD
CHATHAM, NY 12037

GEORGE KEELER
DEPUTY COORDINATOR
PO BOX 383
CLAVESACK, NY 12513

Dec. 6, 2011

Daniel Abeyta, Assistant Chief
Spectrum & Competition Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
1445 12th Street SW
Washington, DC 20554

Re: Eger Communications REPLACEMENT tower

The Eger Communication tower located on Blue Hill in the town of Livingston, Columbia County, State of New York is the main tower for our Fire and EMS communications in our county. It has been for years. We can't lose this location. They only want to replace a tower. This office fully supports this endeavor.

Sincerely,



James VanDeusen,
Columbia Co. Fire Coordinator



P.O. Box 672 • Rhinebeck, NY 12572

(845) 876-0338 • (800) 580-2909 • Fax (845) 876-7071 • www.ndpems.com

December 14, 2011

Mr. Daniel Abeyta, Assistant Chief
Spectrum & Competition Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
1445 12th Street SW
Washington, DC 20554

Dear Mr. Abeyta,

I write in support of the Eger Communications Blue Hill replacement tower located in the town of Livingston (Columbia County, NY). This replacement tower is an absolutely essential part of the Columbia County's public safety radio network and it is imperative the project move forward without delay.

The Blue Hill site currently consists of two 190' towers that have been used by Columbia County emergency service agencies for decades. This tower is an ideal site that provides critical communication capability to many of our fire, EMS and police agencies including ours. Unfortunately, the point has been reached where additional build-out on this tower is not possible due to loading issues. Columbia County 911 conducted its own independent structural analysis which confirmed this. The proposed replacement tower would replace one of the two existing towers at the site with a heavy duty 190' tower that is capable of supporting additional load.

Without this replacement tower Columbia County is unable to move forward with their countywide public safety radio infrastructure upgrade project that began back in 2005. This upgrade project includes replacement of an aging microwave system and the addition of simulcasting ability to help resolve critical gaps in coverage around the county. This is a much needed and long awaited upgrade to the public safety radio network. Unfortunately, it is all on hold until the Eger Communications replacement tower is erected.

Proper communications capabilities are imperative for the timely provision of emergency medical services, and other essential emergency service to the residents of our service area. I urge you to ensure that the replacement project is moved along without delay to ensure the safety and security of the residents of Columbia County.

Sincerely,

Mark Browne
Vice President - Operations

Lebanon Valley Protective Association, Inc.

BOX 162, NEW LEBANON, NEW YORK 12125

December 26, 2011

Daniel Abeyta, Assistant Chief
Spectrum & Competition Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
1445 12th Street SW
Washington, DC 20554

Asst. Chief Abeyta,

As the Chief of the Lebanon Valley Protective Association, Inc., I am sending you this letter in support of the Eger Communications REPLACEMENT tower located on Blue Hill in the Town of Livingston, Columbia County, State of New York.

Columbia County has completed Phase I of planned upgrades to the emergency communications system in this county and is in the process of completing Phase II. These upgrades are now at a standstill as they are awaiting approval of the replacement tower. Our current low band system is a functional but antiquated system that will not support additional upgrades to stay in compliance with future FCC regulations. The system is also running on parts that are obsolete and non-repairable should we have a malfunction of some of our main transmission components. This radio tower needs to be replaced so that the necessary upgrades to our communication system can be completed. As a member of the communications community, I do not need to tell you the pending ramifications of a failed radio system in this county should these upgrades not be completed prior to failure of our current system.

I and the rest of my department and emergency response community appreciate your time in reading this letter. We also hope that you will see that this replacement tower project continues so that we may have uninterrupted emergency communications in Columbia County.

Sincerely,



Benjamin A. Wheeler Chief



Livingston Fire District
Board of Fire Commissioners

P.O. Box 34 Livingston, NY 12541

518-851-2710

Fax: 518-851-6540

WWW.LIVINGSTONFD.COM E-mail: lfid@mhccable.com

Livingston Fire District
Chief Paul Jahns
P.O. Box 34
Livingston, New York 12541

Daniel Abeyta, Assistant Chief
Spectrum & Competition Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
1445 12th Street SW
Washington, DC 20554

December 27, 2011

Dear Mr. Abeyta:

I am writing you regarding the "Edgar Communications REPLACEMENT tower" located on Blue Hill in the town of Livingston/County of Columbia in the state of New York.

The Livingston Fire District and myself are writing you in support of the replacement tower. This tower has been there over 40 years where our emergency attenas for fire, ems and police agencies have been located on this tower.

Now it is time to replace this tower and two special interest groups Scenic Hudson and Olana Society are objecting to this replacement with no merit. This will not affect the environment or community but will affect communications for emergency responders because this is a prime communication site in columbia county. Moving the entire site would decrease our communications abilities.

This tower is located in our town of Livingston.

The town and the county would appreciate your speedy assistance on approving this communication replacement site.

Sincerely,

Chief Paul Jahns

Chief Paul Jahns
Livingston Fire District



Greenport Rescue Squad, Inc.

3 Newman Road • P. O. Box 275 • Hudson, New York 12534
Office (518) 822-8511 • Fax (518) 822-0047 • Operations (518) 828-5175

December 29, 2011

Mr. Daniel Abeyta, Assistant Chief
Spectrum & Competition Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
1445 12th Street SW
Washington, DC 20554

Dear Assistant Chief Abeyta:

I write on behalf of the Greenport Rescue Squad, Inc. in support of the Blue Hill replacement tower located in the State of New York, County of Columbia, Town of Livingston. This replacement tower is an indispensable part of the Columbia County, NY public safety radio network and it is imperative that the project move forward without delay.

The Blue Hill Tower site is currently comprised of two (2) one hundred ninety feet (190') towers that have been used by emergency service agencies within the County for decades. This tower site provides mission-critical communications. Due to loading limitations, additional build-out on this tower is not possible. Columbia County's independent structural analysis confirmed this. The proposed replacement tower would replace one of the two existing towers and is a heavy duty tower of the same height that is capable of supporting additional load.

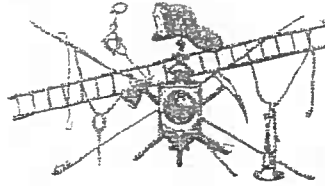
Without this replacement tower Columbia County is unable to complete the County-wide public safety radio infrastructure upgrade project that was initiated in 2005. This upgrade project will help resolve critical gaps in radio communications around the County. This entire project is at a standstill and cannot be resumed and completed until the Eger Communications replacement tower is erected.

I urge you to ensure that this replacement tower project is moved forward without delay. Columbia County's emergency services and the residents they serve are depending on this.

Very truly yours,

Michael Cozzolino
Secretary
Board of Directors

HILLSDALE FIRE COMPANY No. 1



9387 STATE ROUTE 22
HILLSDALE, NEW YORK 12529

1/1/12

Fred R. Miller, Chief HFC
16 Deerfield Circle
Copake, NY 12516

Daniel Abeyta, Assistant Chief
Spectrum & Competition Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
1445 12th Street SW
Washington, DC 20554

Dear Chief Abeyta,

As a member and Chief of the Hillsdale Fire Company, I am writing this letter on behalf of our membership. Hillsdale is located at the Eastern edge of Columbia County in the state of New York. Because of Hillsdale's geographic layout our county, emergency radio communications can be intermittent in various locations. We strongly support the Eger Communications REPLACEMENT Tower, which is located in the town of Livingston, NY in Columbia County on Blue Hill. This REPLACEMENT tower would help to maintain and improve much needed communications during emergency responses. Clear, precise communications saves lives of the residents, as well as, the emergency responders of this, and neighboring counties. We respond wherever needed, in times of such emergencies and disasters, 24/7/365 and we believe in and support this tower REPLACEMENT to help protect lives and property.

Thank you for your consideration in this important matter.

Firematically,

A handwritten signature in cursive script that reads "Fred R. Miller". The signature is written in dark ink and is positioned above the printed name.

Fred R. Miller
Chief Hillsdale Fire Company
(518) 965-3159

Caffry & Flower

ATTORNEYS AT LAW

100 BAY STREET
GLENS FALLS, NEW YORK 12801
(518) 792-1582 • FAX: 793-0541

JOHN W. CAFFRY

CLAUDIA K. BRAYMER

KRISTINE K. FLOWER

September 12, 2013

VIA OVERNIGHT MAIL

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
9300 East Hampton Drive
Capitol Heights MD 20743

Re: Opposition to Petition for Reconsideration
Regarding Eger Communications Tower Project
Blue Hill, Town of Livingston, Columbia County, New York

Dear Ms. Dortch:

Please find enclosed for filing an original and one copy of an Opposition to Petition for Reconsideration, with attachments, regarding the above-referenced matter. A third "File Copy" is also enclosed, along with a self-addressed stamped envelope. Please stamp the File Copy with the time/date of filing and return it to us in the enclosed envelope.

Also enclosed is an Affidavit of Service for filing. Please stamp the copy and return it to us in the enclosed envelope.

If there are any questions. Please feel free to contact me. Thank you kindly.

Sincerely,



Claudia K. Braymer

cbraymer@caffrylawoffice.com

CKB/ljs
enc.

cc: Jeffrey S. Steinberg, FCC
Donald Johnson, Esq., FCC (via e-mail)
Jacqueline P. Murray, Esq., Attorney for Eger Communications
John A. Bonafide, OPRHP
Sara Griffen, TOP (via e-mail)
Jeffrey Anzevino, Scenic Hudson (via e-mail)

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of

**OPPOSITION TO PETITION
FOR RECONSIDERATION**

EGER COMMUNICATIONS
PROPOSED TOWER PROJECT
COLUMBIA COUNTY, NEW YORK.

Filed by:

Caffry & Flower
John W. Caffry, of Counsel
Claudia K. Braymer, of Counsel
100 Bay Street
Glens Falls, New York 12801
(518) 792-1582

Attorneys for Scenic Hudson, Inc. and The Olana Partnership

Date: September 12, 2013

**I. Background Regarding the New Tower
And Its Potential Adverse Effects
On a National Historic Landmark**

This firm represents Scenic Hudson, Inc. ("Scenic Hudson") and The Olana Partnership ("TOP") with respect to this matter. Scenic Hudson and TOP were granted "consulting party" status (16 U.S.C. § 800.2) in this matter pursuant to a determination by the Federal Preservation Officer for the Federal Communications Commission ("FCC") dated August 27, 2013.¹ Eger Communications² ("Eger") is the current owner and operator of two 190 foot tall guyed towers located on Blue Hill in the Town of Livingston, Columbia County, New York. Those towers support several antennas and other devices that are licensed by the FCC.

Eger proposes to construct a new tower on Blue Hill. The proposed new tower would be located within the viewshed of the Olana State Historic Site ("Olana"), which was designated as a National Historic Landmark in 1965, and was added to the National Park Service's Watch List of Threatened and Endangered National

¹ The National Park Service ("NPS") also requested to participate in the Section 106 consultation process, but Eger declined to grant that agency consulting party status. See Letter from Maryanne Gerbauckas (NPS) to Mr. Mark Eger (Eger) dated October 19, 2010, a copy of which is attached hereto as Attachment A.

² Although the Petition for Reconsideration refers to "Eger Communications, Inc.", there is no New York Corporation by that name. It is our understanding that Eger Communications is a general partnership.

Historic Landmarks in 2004. Our clients share the position of the New York State Historic Preservation Office ("SHPO") - the Office of Parks, Recreation and Historic Preservation ("OPRHP") - that the new tower will have an adverse visual effect on Olana and its viewshed. *SHPO

Due to the potential adverse effects on Olana, and Eger's apparent lack of regard for those effects (Eger refused numerous requests by Scenic Hudson and TOP to have these effects addressed and mitigated), Scenic Hudson and TOP filed a complaint with the FCC requesting that Eger be required to complete the Section 106 process for the proposed tower.³ Eger opposed the complaint, arguing that the new tower was a "replacement" tower and as such was excluded from Section 106 review by the Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission ("NPA").⁴ After careful consideration over a two-year period of time, FCC determined that the new tower was subject to Section 106 review and "direct[ed] Eger to

³ See Letters from John Caffry, Esq. to Dan Abeyta (FCC) dated April 5, 2011 and October 7, 2011, with attachments.

⁴ See Letters from Robert J. Gagen, Esq. and Jacqueline Phillips Murray, Esq. to Daniel Abeyta (FCC) dated August 29, 2011 and October 24, 2011.

complete the Section 106 process pursuant to the procedures specified in the [NPA]".⁵

In the meantime, Eger sought and received local zoning approval from the Town of Livingston to construct the new tower on Blue Hill. Scenic Hudson and TOP have filed a proceeding in New York State Supreme Court to challenge the Town's approval of the new tower.

II. The Petition for Reconsideration Should Be Dismissed Because There Are No New Facts or Arguments

Petitions for reconsideration of final FCC actions may be summarily dismissed or denied if they do not present new facts or arguments. See 47 C.F.R. § 1.106(c), (p).

Here, Eger's attorneys argued in 2011 that the tower was excluded from Section 106 review because it a "replacement" tower. Now, in 2013, Eger's attorneys make the exact same argument - "that the replacement tower is excluded from Section 106 review pursuant to the plain language of NPA Section III (B)".⁶ "After reviewing all of the pleadings", the FCC explicitly decided to reject the parties' arguments relating to

⁵ Letter from Jeffrey S. Steinberg (FCC) to Jacqueline Phillips Murray, Esq. dated August 5, 2013.

⁶ Eger's Petition for Reconsideration dated August 30, 2013 (hereinafter "Eger's Petition"), p. 8.

whether or not the tower qualified as a replacement tower.⁷

Therefore, since this is not a new argument, but is one that has been "fully considered and rejected," Eger's Petition must be dismissed. 47 C.F.R. § 1.106(p)(3); see 47 C.F.R. § 1.106(c).

Eger tried to raise new facts by referencing the need for the new tower "to support upgrades to public safety communications systems that serve the area". Eger's Petition, p. 5. However, this information relates to circumstances that were present prior to 2011, and were known to Eger in 2011, when the original complaint was filed and opposed by Eger. There have been no changed circumstances; Eger could have brought these facts to the FCC in its prior opposition to the complaint. See 47 C.F.R. § 1.106(b)(2)(i), (ii). Indeed, Eger admits that it attempted to raise this information previously⁸ and that the FCC "rejected" it. Eger's Petition, p. 6. Therefore, Eger's Petition relies upon old facts and arguments that were, or could have been, brought before the FCC. See 47 C.F.R. § 1.106(b)(2). As such, Eger's Petition can not be granted, and must be dismissed. See 47 C.F.R. § 1.106(c); 47 C.F.R. § 1.106(p)(1), (2).

⁷ Letter from Jeffrey S. Steinberg (FCC) to Jacqueline Phillips Murray, Esq. dated August 5, 2013, p. 3.

⁸ At least eight different letters were sent to Mr. Daniel Abeyta (FCC) in 2011 regarding the use of the tower by public safety organizations for communication services.

III. The New Tower is Not a Replacement Tower

The proposed tower is not a "replacement" tower that is exempt from Section 106 review under the NPA.⁹ Neither the NPA or the applicable FCC and Advisory Council on Historic Preservation ("ACHP") regulations regarding Section 106 define a "replacement" tower. However, as Eger points out, the NPA "substantially limits the exclusions" from Section 106 review available under the NPA, Section III. Eger's Petition, p. 10, quoting Matter of Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process (FCC Report and Order adopted September 9, 2004). Therefore, if FCC were to decide the question of whether the exclusion applies to the proposed tower, the FCC should determine that the limited exclusion does not apply to the new tower, especially because the tower would cause adverse effects on Olana (see Point IV, infra).¹⁰

The new tower would be a relocated, alternative tower and would not be a mere in-kind "replacement" of one of the two existing towers on the site. First, it will be a stand-alone

⁹ See Letter from John Caffry, Esq. to Dan Abeyta (FCC) dated October 7, 2011, p. 5.

¹⁰ See 36 C.F.R. § 800.14(c) (exclusions under agency programmatic agreements are allowed only when the "potential effects of the undertakings . . . are foreseeable and likely to be minimal or not adverse").

lattice tower, that will be much more visible.¹¹ The existing towers are slender guyed towers. Also, because it would hold the equipment from the two existing towers, and additional new equipment, plus capacity for even more apparatus in the future, its visibility will be increased.¹² The proposed tower will support large antennas and other large equipment (20 feet or more in height), so that it is not exempt under the criteria § I.C of the Collocation NPA.¹³ Thus, the new, alternative tower structure is not a "replacement", as that term is used in the NPA.

**IV. FCC Can Determine That There
Are Unique Circumstances That
Require Section 106 Review**

The NPA is the means by which the FCC implements the National Historic Preservation Act (see 16 U.S.C. § 470f), and meets its obligations under the ACHP's regulations (see 36 C.F.R. § 800.1). While the NPA provides the process for FCC's review of an undertaking, rather than using ACHP's process, the remainder of ACHP's regulations remain in effect. See 36 C.F.R.

¹¹ See Letters from Matthew W. Allen (Saratoga Associates) to Lawrence Hermance and Thomas Alvarez (Town of Livingston) dated April 22, 2013 and June 28, 2013, copies of which are attached hereto as Attachment B.

¹² See id.

¹³ See id.

§ 800.14(a). The ACHP's regulations specifically provide that an agency can "determine[] that there are circumstances under which the normally excluded undertaking should be reviewed". 36 C.F.R. § 800.14(c)(6).

Moreover, the NPA allows the FCC to hear and consider "[c]oncerns regarding the application of these exclusions from Section 106 review". NPA, Section III. Upon considering those concerns, the FCC can "take appropriate action". NPA, Section XI. Appropriate action here means overruling Eger's faulty determination that the exclusion applies to its tower, and determining that the tower should undergo Section 106 review due to its potential adverse effects on Olana.

The SHPO (in this case, New York State OPRHP) has stated that the proposed tower "would be significantly more visible in the historic viewshed" from Olana than the existing guyed towers.¹⁴ The SHPO has explained that the "density of the proposed 190 foot free-standing tower is demonstrably more visible in the landscape than the existing guyed units which are viewed one behind the other from Olana."¹⁵ In a more recent letter, OPRHP stated that the Tower "will have a significant

¹⁴ Letter from Andy Beers (SHPO) to Kevin McDonald and Lawrence Hermance (Town of Livingston) dated December 2, 2010, a copy of which is attached hereto as Attachment C.

¹⁵ Id.

adverse impact on the historic viewsheds associated with" Olana.¹⁶

A visual impact analysis procured by Scenic Hudson and TOP stated that the tower would be "front and center in Olana's signature south viewshed and will be directly visible from virtually all of the places on the property commonly visited by the public".¹⁷ The analysis explained that the new tower's structure, size, and proposed appurtenances and equipment make the new tower "significantly more visible" than the existing two guyed towers.¹⁸ The SHPO also found that the "existing thin guyed towers currently blend well into the view from Olana in most atmospheric conditions", but that the new proposed tower would have a "much more pronounced silhouette in the landscape" because it would be a "solid mass in the landscape" and would be "further exaggerated" by the new telecommunications equipment mounted on the tower.¹⁹

¹⁶ Letter from Ruth L. Pierpont (SHPO) to Mr. Alvarez and Mr. Hermance (Town of Livingston) dated April 18, 2013, a copy of which is attached hereto as Attachment D.

¹⁷ Letter from Matthew W. Allen (Saratoga Associates) to Lawrence Hermance and Thomas Alvarez (Town of Livingston) dated April 22, 2013, Attachment B hereto.

¹⁸ Id.

¹⁹ Letter from Ruth L. Pierpont (SHPO) to Mr. Alvarez and Mr. Hermance (Town of Livingston) dated April 18, 2013, Attachment D hereto.

Eger's reliance on an old letter from the SHPO, relating to an entirely different tower (one of the two guyed towers), is inappropriate. The SHPO's determination from 1992 does not address the current concerns raised by the new tower's mass and associated equipment. Furthermore, the SHPO's 1992 determination does not constitute Section 106 review for that tower, or for this new tower.²⁰

Eger's continued reliance on this old information, and refusing to conduct the Section 106 review, has caused delays for several years.²¹ If Eger had done the Section 106 review a few years ago, when requested by Scenic Hudson and TOP, the critical needs of the various public safety agencies could have been met by now. The public safety agencies have no expertise on the potential effects of the new tower on historic properties, such as Olana. Therefore, their input is not necessary at this stage of the process.

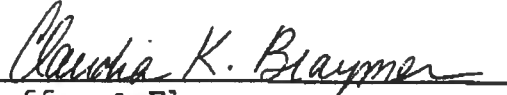
²⁰ We respectfully request that FCC provide documentation of a Section 106 review for the existing guyed towers, if any review was conducted.

²¹ As early as 2007, when the new tower was first proposed, the SHPO advised Eger that the tower was subject to Section 106 review, and that the effects on Olana must be addressed in that process. See Letter from John A. Bonafide (SHPO) to Mr. Mark Eger (Eger) dated May 30, 2007, a copy of which is attached hereto as Attachment E.

V. Conclusion

Eger's Petition for Reconsideration must be dismissed, and the Section 106 process must proceed due to the tower's potential adverse effects on Olana. We look forward to working with the FCC, the SHPO and Eger throughout the Section 106 review.

Dated: September 12, 2013


Caffry & Flower
John W. Caffry, of Counsel
Claudia K. Braymer, of Counsel
Attorneys for Scenic Hudson, Inc.
and The Olana Partnership
100 Bay Street
Glens Falls, New York 12801
(518) 792-1582

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ATTACHMENT A



United States Department of the Interior

NATIONAL PARK SERVICE
Northeast Region
U.S. Custom House
200 Chestnut Street
Philadelphia, PA 19106-2878

IN REPLY REFER TO:

H30(4506)

OCT 19 2010

Mark Eger
Eger Communications
33 Eger Road
Hudson, NY 12534

Dear Mr. Eger:

The National Park Service (NPS) is writing to request to participate in the Section 106 consultation process for the Federal Communications Commission (FCC) permit for a communication tower at Blue Hill, Columbia County, NY. NPS will represent the Secretary of the Interior in the Section 106 consultation process. This proposed tower would be in the viewshed of the Frederic E. Church House (Olana), a National Historic Landmark (NHL) in Columbia County, NY. The NHL is owned by the State of New York as Olana State Historic Site. Olana was designated an NHL by the Secretary of the Interior on June 22, 1965.

We have listed Olana on our Watch List of Threatened and Endangered National Historic Landmarks since 2004. We hope the resolution of this project will reduce threats to Olana.

If you have any questions or have material for us to review, please contact Bill Brookover, Historical Architect, at 215-597-1774 or by e-mail at bill_brookover@nps.gov.

Sincerely,

Maryanne Gerbauckas
Associate Regional Director
Heritage Preservation, Planning & Compliance

cc:

Stephen DelSordo, Federal Communications Commission
John Bonafide, New York State Historic Preservation Office
Jeffrey Anzevino, Scenic Hudson
Sara J. Griffen, The Olana Partnership
Sara Olson, Superintendent, Roosevelt Vanderbilt National Historic Site

ATTACHMENT B

SARATOGA ASSOCIATES

Landscape Architects, Architects,
Engineers, and Planners, P.C.

April 22, 2013

Lawrence Hermance, Chair Town of Livingston Planning Board, and
Thomas Alvarez, Chair Town of Livingston Zoning Board of Appeals
PO Box 65
Livingston, NY 12541

Re: Application of Eger Communications, Blue Hill Tower Proposal

Dear Chairmen Hermance and Alvarez:

I am writing on behalf of The Olana Partnership and Scenic Hudson, Inc. concerning Eger Communication's proposal to construct a 190 foot-tall self-supporting lattice frame tower to replace two guyed lattice structures atop Blue Hill in the Town of Livingston. While understanding and supportive of the community's need for telecommunications services, I respectfully ask the Planning Board and Zoning Board of Appeals to thoroughly consider the impact that this project will have on the scenic character of the landscape surrounding the Olana State Historic Site. The proposed tower will be front and center in Olana's signature south viewshed and will be directly visible from virtually all of the places on the property commonly visited by the public.

Saratoga Associates has practiced in the specialized discipline of visual impact assessment for more than 30 years. Over this time, I have worked closely with project sponsors, regulatory decision makers, environmental advocacy groups and other stakeholders to craft visual assessment protocol and mitigation solutions to balance the ostensibly conflicting objectives of economic development and scenic resource management. As a landscape architect, consideration of scenic quality as part of the planning and decision-making process is one of my core values. My interest in this matter is assuring that the project meets the communication and public safety needs of the community in a manner that preserves the aesthetic character of this nationally significant cultural resource.

SARATOGA ASSOCIATES

Mr. Lawrence Hermance and Mr. Thomas Alvarez

April 22, 2013

Page 2 of 5

Olana is both a State Historic Site and a National Historic Landmark. These unique designations were made in recognition of the cultural importance of both its architecture and landscape. Frederic Church created the entirety of Olana as a 3-dimensional work of art, with a foreground (the house environs), middle ground (the rolling fields and forest), and background (the Hudson River, Catskill Mountains and Taconic Range). Blue Hill is a dominant landscape element within Church's middle ground composition. Referring to his work at Olana, Frederic Church once wrote "I am busy landscape architecturing!" By keeping the picturesque views intact the public is able to understand Church's genius as a landscape designer and artist in a way that would not otherwise be available to the public.

Views from Olana were and are an essential part of its aesthetic, and any intrusions of incompatible structures into those views negatively affect that aesthetic. The many drawings and paintings by Frederic Church, particularly of the cherished southerly view, is evidence of his interest in and devotion to his conception of the property and its significance in its entirety. This was recognized in the Comprehensive Plan for Olana State Historic Site, which called for the need to "eliminate, reduce or mitigate threats" to the viewshed.

New York State has invested heavily in the restoration of the State Historic Site over the past five years including renovation of the main house and major clearing initiatives to reestablish Church's view creation in the North Meadow and Crown Hill. The artist-designed landscape is not fully restored yet, especially the farm and orchard zones. Completion of these areas will bring even more people to portions of the property where Blue Hill is a major component of the visible landscape.

The New York State Department of State (DOS) has also recognized the importance of Olana's viewshed through the creation of the Catskill-Olana Scenic Area of Statewide Significance (SASS). In the descriptive language about the SASS, the DOS recognizes the importance of the surrounding views from Olana, not just the property itself. "Olana's viewsheds are some of the most dramatic and famous in the Hudson River Valley." The SASS document continues; "[t]he panoramic views available from Olana and its grounds are similar in composition to many of Church's renowned works - vegetated foreground of great variety and interest framing, a middle ground containing open pastures and water elements such as ponds and winding creeks, and a deep background encompassing majestic rivers and mountains". "Olana itself and the surrounding landscape of the Catskill/Olana scenic area remain a living expression of the subject that preoccupied mid-19th century naturalists, artists and writers - the intricate relationship between man and the natural world."

SARATOGA ASSOCIATES

Mr. Lawrence Hermance and Mr. Thomas Alvarez

April 22, 2013

Page 3 of 5

Today, Olana is one of the most visited historic sites in the Hudson Valley, with 130,000 visitors, only 21,000 of whom take tours of the house. The rest explore the grounds, hike the 5 miles of carriage drives, picnic at various spots throughout the property and otherwise enjoy the 250 acres available to them. A study of Olana visitors showed that of the attributes visitors enjoyed most, the landscape, with its iconic views, came in second, behind only the house. These visitors go on to enjoy the restaurants in surrounding areas, stay at B&Bs and buy vegetables at the local farm stands. A recent economic impact study was conducted which showed that Olana has an economic impact of \$7.9 million and supports 267 jobs.

The proposed replacement tower will be more visible than the existing guyed units which are viewed one behind the other from Olana. The proposed "replacement tower" is actually larger in mass than the current twin guyed towers. Even considered in isolation, the "replacement" is not a substitution of the same type of tower for another, but a change in the type of tower with a larger visual impact. Physically, the proposed lattice tower would be substantially larger in mass. The width of each triangular side of each guyed tower in place now is 2'2", whereas the new tower would show a visible profile (viewed obliquely from Olana) that is about 13 feet wide at the tree line, or more than six times as wide as the profile of the existing tower. In addition, the proposed tower is designed to carry up to eighteen individual flat panel antennae that are 12" wide and 72" tall. The new tower will also accommodate multiple microwave dishes that in some cases are 8' in diameter. Additional appurtenances include mounts to accommodate whip antennas that can be 20' or more in height, and increase the mass by 4-6' in either direction where installed. Given these conditions the proposed tower would be significantly more visible in the historic south viewshed of Olana.

Of particular concern is the precedent that approval of such an incongruous intrusion into the Olana viewshed would set. Establishing Blue Hill as a communications node may encourage additional developers to capitalize on its high elevation and uninterrupted line-of-sight. While an expanded replacement tower by itself may be viewed by some as an acceptable intrusion, multiple towers would result in expanded and obvious visual clutter to this historic landscape. The simple fact that this application seeks to replace two in-line slender guyed towers with a wider self supporting structure accommodating more and larger antennae is evidence of this precedent. Moreover, project approval may encourage similar development of more distant locations under the guise of a lesser visual impact on Olana than was accepted at Blue Hill.

SARATOGA ASSOCIATES

Mr. Lawrence Hermance and Mr. Thomas Alvarez

April 22, 2013

Page 4 of 5

The applicant has provided visual simulations illustrating two views from the Olana State Historic Site. These images do not adequately or accurately represent the visual impact. According to the applicant's November 28, 2012 visual impact assessment (VIA) the base photographs used for these simulations were taken on November 22, 2011 during mostly cloudy to overcast weather conditions. Even though the applicant returned to the area on December 1, 2011 to complete field photographic work under mostly sunny conditions the overcast condition photos were used for the Olana simulations. Because cloud cover and flat light reduce visual contrast of the tower against the background sky, the applicant's simulations from Olana significantly diminish project visibility. The applicant's VIA bases the conclusion of no significant adverse impact on these poor quality simulations.

Moreover, the applicant provides just two simulations to represent the impact to the Olana State Historic Site. The Cosy Cottage view is presented as a discrete view through the trees, implying minimal visibility in this area. In the written narrative the VIA states that from Cosy Cottage the proposed tower "can be seen from certain vantage points between existing mature growth trees that surround the area". This statement is completely inaccurate. Unencumbered views of Blue Hill exist throughout the southerly slopes of Olana including the key locations around Cosy Cottage as well as the adjacent farm and orchard, the lawn and gardens at the main house where virtually all visitors stop to enjoy the majestic view of the Hudson River and distant Catskill Mountains, and an extensive portion of the site road traveled by every visitor either by car, bicycle or on foot.

To more accurately depict the impact of the proposed Eger tower on the Olana State Historic Site Saratoga Associates prepared photo simulations from three heavily visited locations; Cosy Cottage, the main house and the site access road. These simulations were prepared using a 3D modeling methodology similar to the procedure used by the applicant as described in the November 2012 VIA. Saratoga Associates took existing condition photographs from these three vantage points on April 8 at approximately 3:45 pm. Photos were taken on a bright sunny day and at a time of day when the sun was to the west to minimize glare. These photo simulations clearly demonstrate that the new tower would be much more visible than the two in-line towers that it will replace.

SARATOGA ASSOCIATES

Mr. Lawrence Hermance and Mr. Thomas Alvarez

April 22, 2013

Page 5 of 5

In conclusion, while I fully understand and support the need for high quality telecommunications services in the Hudson Valley, I ask the Town to please consider all available alternatives to prevent or minimize visual impact on this State Historic Site, National Historic Landmark and cultural jewel of Columbia County. The self supporting Eger communications tower is directly visible from numerous highly visited locations. It is front and center within Olana's cherished southerly viewshed, and clearly more conspicuous than the two narrow in-line guyed structures it will replace. As currently located, the proposed tower is both visually significant and adverse to this nationally renowned viewshed.

Very truly yours,

SARATOGA ASSOCIATES

Landscape Architects, Architects, Engineers, and Planners, P.C.



Matthew w. Allen, RLA

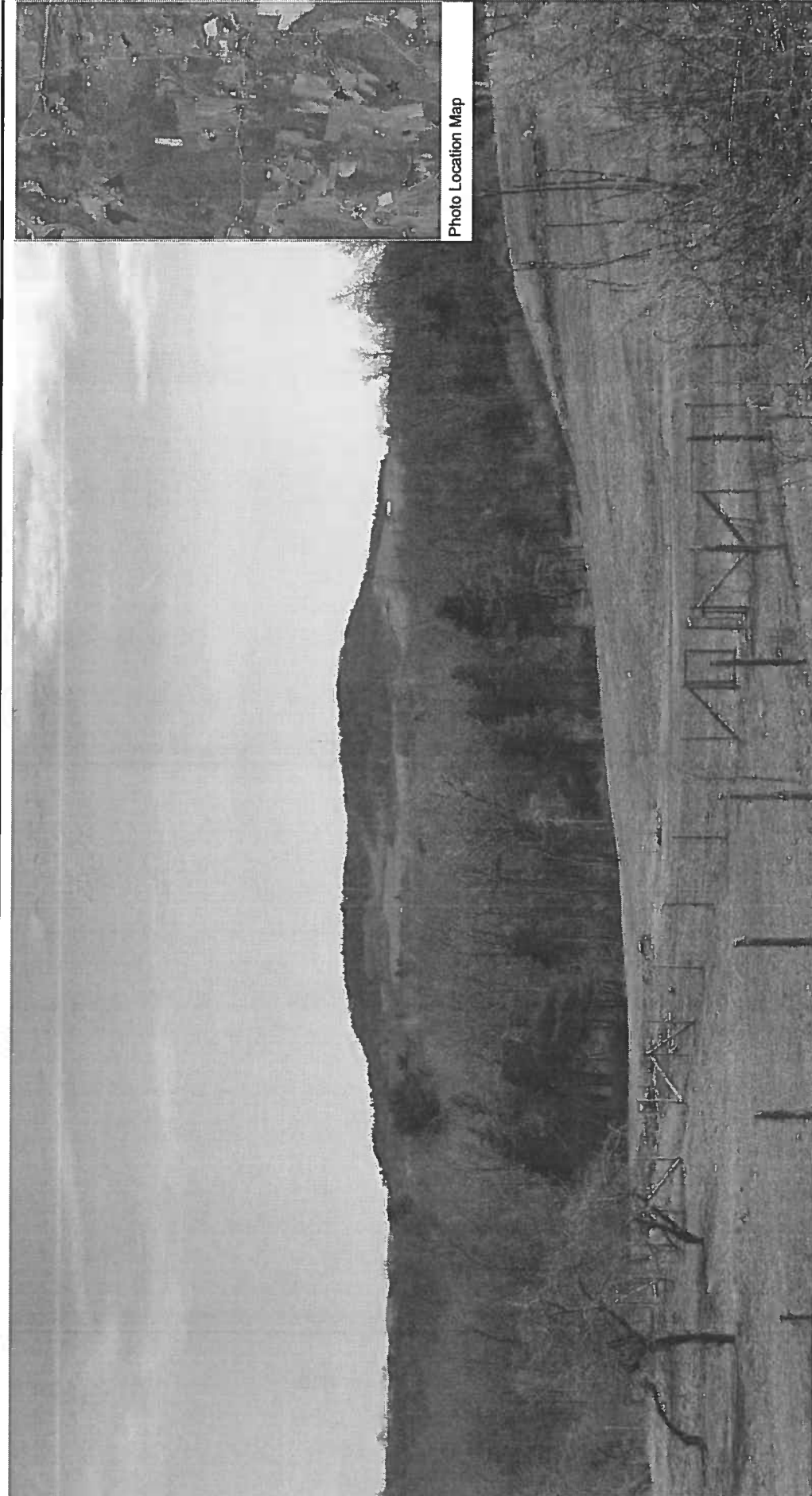
Principal

Enclosures Photo Suimulations

Matthew W. Allen resume

cc: Jeff Anzevino - Scenic Hudson

Sara Griffen - The Olana Partnership



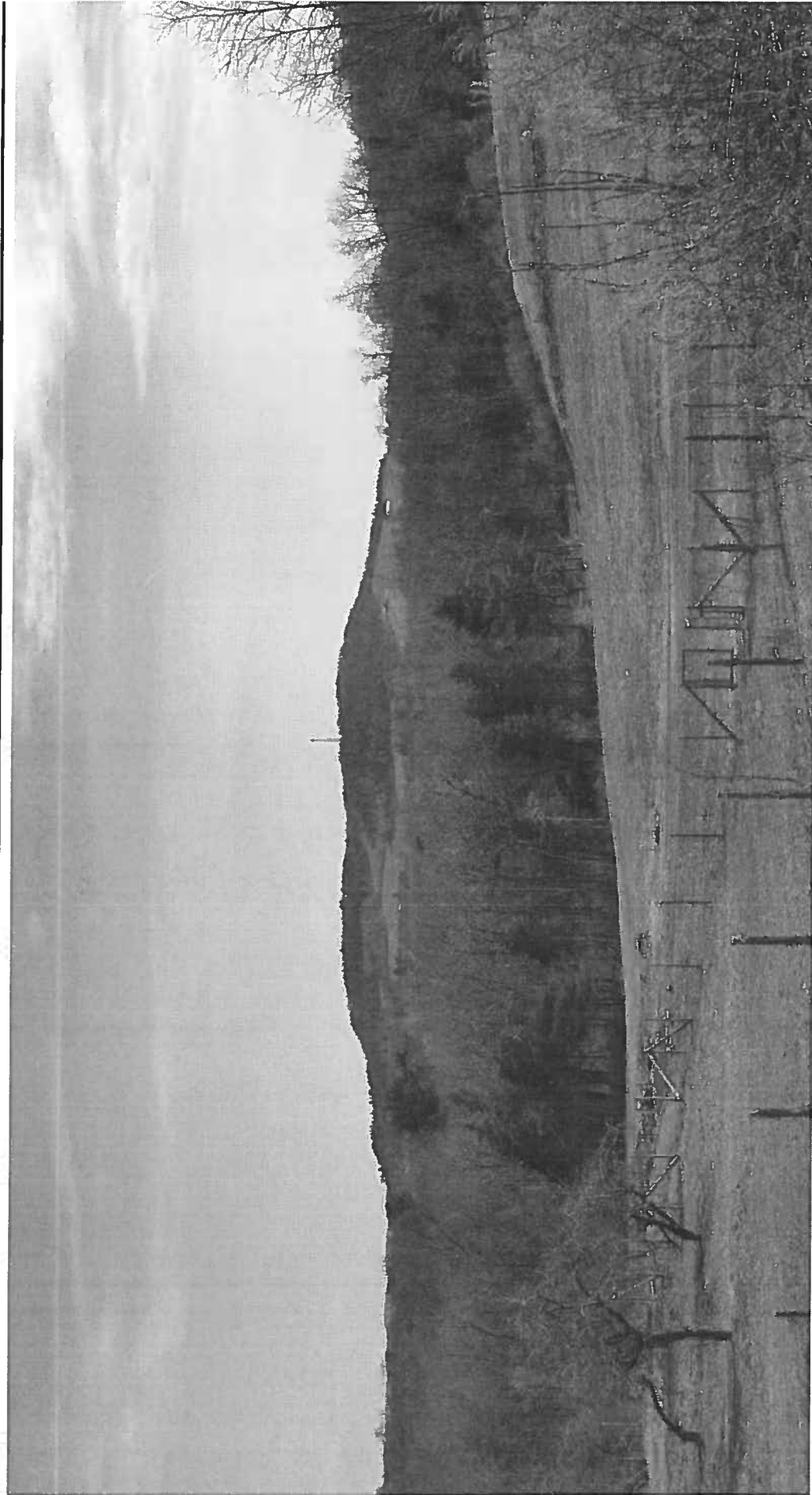
Olana State Historic Site at Cosy Cottage—Existing Condition View

Photo taken April 8, 2013, 3:26pm
 50mm (film equivalent lens)
 14.2 mega pixel Nikon 3100 DSLR camera



FIGURE 1A
 Project Visualizations
 Eger Communications—Blue Hill Tower

SARATOGA
 ASSOCIATES



Olana State Historic Site at Cosy Cottage—Proposed Condition View

11x17 " printed page should be held at approximately arm's length (22.5") so that the scene will appear the correct scale.



FIGURE 1B

Project Visualizations
Eger Communications—Blue Hill Tower



Photo Location Map

Olana State Historic Site at Mansion—Existing Condition View

Photo taken April 8, 2013, 3:59pm
 50mm (film equivalent lens)
 14.2 mega pixel Nikon 3100 DSLR camera



FIGURE 2A

Project Visualizations
 Eger Communications—Blue Hill Tower

SARATOGA
 ASSOCIATES



Olana State Historic Site at Mansion—Proposed Condition View

11x17 " printed page should be held at approximately arm's length (22.5") so that the scene will appear the correct scale.



FIGURE 2B

Project Visualizations
Eger Communications—Blue Hill Tower

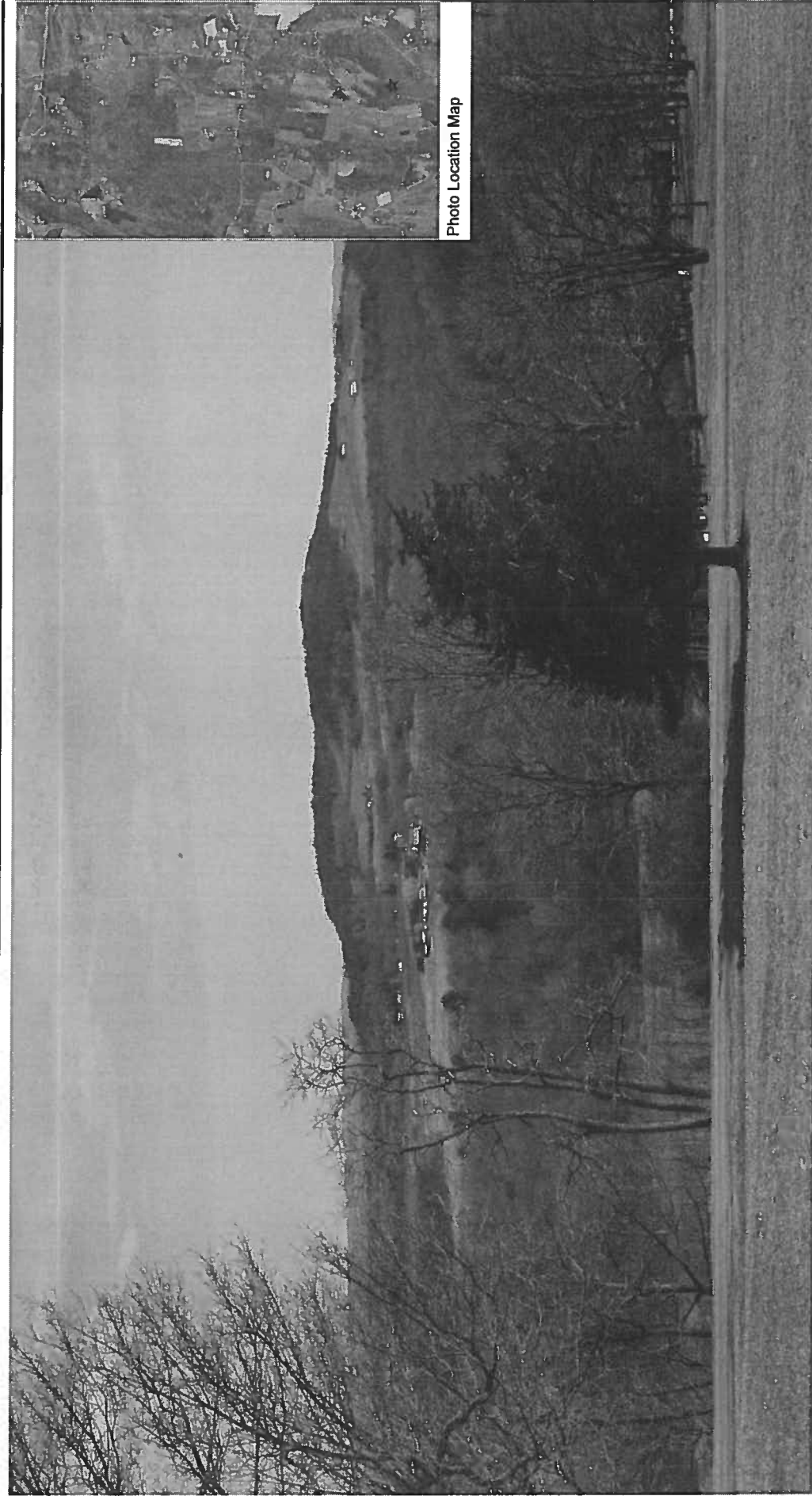


Photo Location Map

Olana State Historic Site at Site Access Road—Existing Condition View

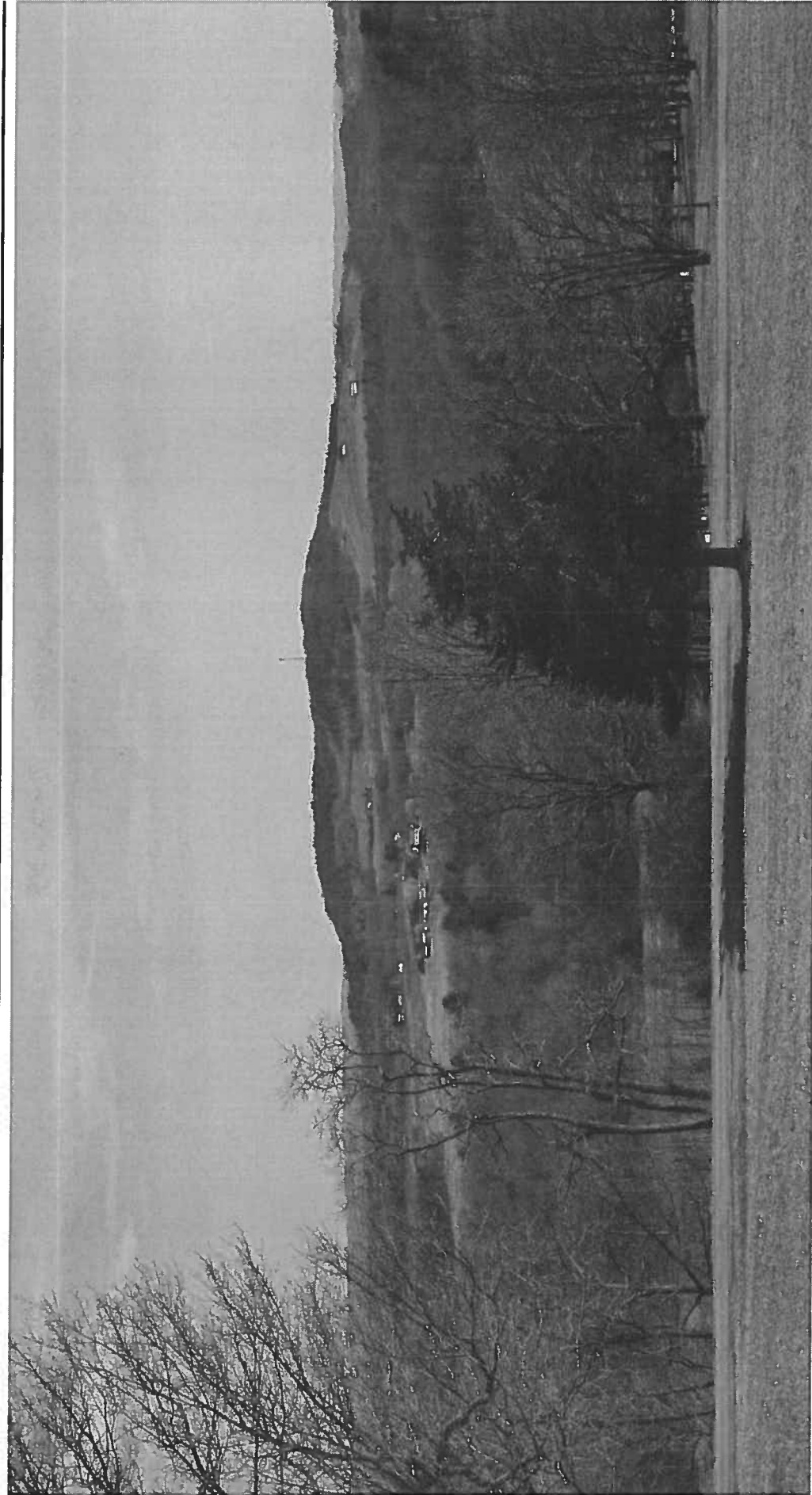
Photo taken April 8, 2013, 3:54pm
 50mm (film equivalent lens)
 14.2 mega pixel Nikon 3100 DSLR camera



FIGURE 3A

Project Visualizations
 Eger Communications—Blue Hill Tower

SARATOGA
 ASSOCIATES



Olana State Historic Site at Site Access Road—Proposed Condition View

11x17 " printed page should be held at approximately arm's length (22.5") so that the scene will appear the correct scale.



FIGURE 3B

Project Visualizations
Eger Communications—Blue Hill Tower

SARATOGA
ASSOCIATES

Matthew W. Allen, RLA
Treasurer, Principal

Project Role

Principal / Landscape Architect

Education

*Master of Science Urban and
Environmental Studies, Rensselaer
Polytechnic Institute, 1991*

*Bachelor of Landscape Architecture,
SUNY College of Environmental Science
and Forestry, 1983*

Registration /Certification

New York - License # 001087

Speaking Engagements/Publications

*"Technical Considerations in Siting Wind
Developments", National Wind Coordinating
Committee, Washington, DC, November
2005*

*"SEQRA in New York", Lorman Educational
Services, Albany, NY, February 2006, and
Poughkeepsie, NY July 2006.*

*"Visual Impact Assessment Techniques"
New York State Energy Research and
Development Authority, Albany, NY, April
2006*

*"Wind Power, Projects, Opportunities and
Challenges", NYS Bar Association,
Environmental Law Section Fall Meeting,
October 2006*

*"Visual Assessment and Application of the
NYSDEC Visual Assessment Policy"
Community Seminar, Cooperstown, NY,
April 2006*

*"Local Governments. Look at Visual
Impacts", NY Planning Federation,
Saratoga Springs, NY, October 2006.*

Professional Experience

A Registered Landscape Architect with over 25 years of experience in regional, community, and environmental planning, and regulatory permitting. Mr. Allen heads up Saratoga Associates' Visual Assessment and Scenic Resource Management studio. He is a recognized leader in the specialized discipline of visual impact assessment and aesthetic mitigation and is highly skilled in the application of advanced computer-generated visual simulation, animation and viewshed development technology. Mr. Allen served on the peer review team for the landmark 2000 NYSDEC Program Policy concerning visual impact assessment and mitigation and frequently serves as a third party advisor to the NYSDEC, helping state regulators understand and minimize aesthetic impacts associated with large and often controversial development projects. With Mr. Allen's unique expertise, Saratoga Associates is able to assist project sponsors to identify cost effective site selection and design solutions that make a project more compatible with its surroundings, and ultimately easier to permit.

Representative Experience

Visual Resource Assessment:

- > **Indian Point Energy Center Closed Cycle Cooling Feasibility Study Entergy, Buchanan, NY**
Principal-in-Charge/Project Manager for the evaluation of potential impact of two highly visible counter-flow, forced draft cooling towers on the resources of the scenic Hudson Highlands region.
- > **Hempstead Energy from Waste Facility Expansion Project, Covanta Energy, Westbury, NY**
Principal-in-Charge/Project Manager of the assessment and mitigation strategy for a proposed 35MW expansion to an existing energy-from-waste facility in suburban Long Island.
- > **Plum Creek Concept Plan, Moosehead Lake Region, ME**
Principal-in-Charge/Project Manager of addressing the potential impact on the scenic water bodies of Maine's "North Woods" associated with the rezoning of 20,000 acres of timberland for waterfront residential and resort uses. Expert testimony provided.
- > **St. Lawrence Cement Greenport Project, Hudson, NY**
Project Manager a visual impact assessment and mitigation strategy, coastal zone consistency compliance for a proposed \$300 million cement manufacturing facility. Expert testimony provided.
- > **Victor Commerce Park, Benderson Development, Victor, NY**
Principal-in-Charge/Project Manager of the aesthetic impact evaluation and mitigation plan for a 566,000 GSF retail and commercial project.
- > **Broadwater Energy, Long Island, NY**
Principal-in-Charge/Project Manager of the visual assessment and coastal consistency evaluation of a major offshore floating liquefied natural gas (LNG) terminal.

"Overview and Application of the NYSDEC Visual Impact Program Policy", Capital District Engineer's Week, Albany, NY, February, 2009

"Supporting Sustainability Through GIS", American Planning Association - Upstate Chapter, Albany, NY, October 2009

"State of the Art in Wind Siting", National Wind Coordinating Collaborative, Washington, DC, October 2009

The Mid-Atlantic/Southeast Regional Wind Energy Institute (RWEI) Annual Meeting, Baltimore, MD, November, 2009

Publications

Allen, M.W., and Guariglia, J.W., "Visual and Shadow Flicker Impacts Pose Double Treat" - published: North American Wind Power, January 2013

Allen, M. W., Benas, R. C., and Bristol, R, F., "Enforceable Sustainability: A Promise Finally Fulfilled? - Challenges faced by traditional power sources may offer insight into wind's future" - published: North American Wind Power, September 2004

Allen, M.W., and Guariglia, J.W., "Development of Advanced Viewshed Analysis to Facilitate Project Siting and Community Decision-making", poster presentation American Wind Energy Association annual conference, Chicago, IL, May 2009

- > **Safe Harbor Offshore LNG Facility, Atlantic Sea Island Group, Long Beach, NY**
Principal-in-Charge/Project Manager of the visual impact assessment for a deepwater port application of a proposed LNG facility on a man-made island off the coast of Queens, New York.
- > **Sparrows Point LNG Terminal, AES, Baltimore, MD**
Principal-in-Charge/Project Manager of project visualization services to communicate the aesthetic character of a major LNG port on the industrial waterfront in Baltimore Harbor.
- > **New Jersey Offshore Wind Farm, Deepwater Wind, Asbury Park, NJ**
Principal-in-Charge/Project Manager of project visualization services to communicate the aesthetic character of an off-shore wind energy facility on coastal resources.
- > **The Landing at Kingston and Ulster, AVR Realty, Kingston, NY**
Principal-in-Charge/Project Manager of the visual impact assessment for a 2,100-unit housing project.
- > **Hounsfield Wind Farm, Upstate NY Power Corp., Hounsfield, NY**
Project Designer for a comprehensive visual resource assessment of for a 270MW, 84-turbine wind energy project located on Galloo Island, Lake Ontario, New York.
- > **NYS Department of Environmental Conservation Expert Services, Various locations throughout New York State**
Project Manager for third-party review and expert witness services for visually sensitive and controversial projects. Projects include Sour Mountain Realty Mine Proposal, Thalle Quarry, Domain Mine, Belleayre Resort at Catskill Park, and Athens Generating Project. Expert testimony provided.
- > **Confidential Industrial Project, Upper Midwest Region, United States**
Principal-in-Charge/Project Manager of a visual resource assessment for the expansion of an existing heavy industrial facility.
- > **Confidential Off-shore Liquefied Natural Gas Terminal Eastern Seaboard, United States**
Principal-in-Charge/Project Manager of the visual assessment of a major offshore floating liquefied natural gas (LNG) terminal.
- > **Block Island Offshore Wind Farm, Deepwater Wind, Block Island, RI**
Project Advisor for visualization services to communicate the aesthetic character of an off-shore wind energy facility on coastal resources.
- > **Niagara Power Project, New York Power Authority, Niagara Falls, NY**
Project Designer for comprehensive aesthetic impact assessment and mitigation strategy.

- > **Seneca Meadows Solid Waste Management Facility, Seneca Meadows Inc., Waterloo, NY**
Project Manager for the visual assessment and mitigation plan for a proposed expansion of an existing solid waste landfill.
- > **Bethlehem Energy Center, PSEG Power NY, Bethlehem, NY**
Principal-in-Charge/Project Manager of the visual impact assessment and mitigation strategy for the repowering of a 750 MW electric generating facility.
- > **King's Park Energy Project, Town of Smithtown, NY**
Project Manager for Article X application review concerning the potential aesthetic impact of a proposed 300-megawatt simple cycle facility.
Expert testimony provided.
- > **West Hill Windfarm, Acciona Energy, Madison County, NY**
Principal-in-Charge/Project Manager of the visual impact assessment for a 25-turbine wind energy facility.
- > **St. Lawrence Wind Farm, Acciona Energy, St. Lawrence County, NY**
Principal-in-Charge/Project Manager of the visual impact assessment for a 96-turbine wind energy facility.
- > **Ramapo Energy Facility, Palisades Interstate Park Commission, Ramapo, NY**
Project Manager for an Article X application review for a major electric generating station. Expert testimony provided.
- > **Smith's Basin Mine, Jointa Galusha, LLC, Hartford, NY**
Project Manager for the visual resource assessment for a proposed 200-acre surface mine.
- > **Clinton County Solid Waste Management Facility Expansion, Casella Waste Systems, Schuyler Falls, NY**
Project Manager for the visual assessment and mitigation plan for a proposed expansion of an existing solid waste landfill.
- > **Hyland Solid Waste Management Facility Expansion, Casella Waste Systems, Angelica, NY**
Project Manager for the visual resource assessment and mitigation plan for a proposed height increase and expansion of an existing solid waste landfill.

SARATOGA ASSOCIATES

Landscape Architects, Architects,
Engineers, and Planners, P.C.

June 28, 2013

Lawrence Hermance, Chair Town of Livingston Planning Board, and
Thomas Alvarez, Chair Town of Livingston Zoning Board of Appeals
PO Box 65
Livingston, NY 12541

Re: Application of Eger Communications, Blue Hill Tower Proposal

Dear Chairmen Hermance and Alvarez:

I am writing in response to statements made in a letter dated June 11, 2013 from the Murray Law Firm (MLF) concerning Saratoga Associates April 22, 2013 letter to the Planning Board and Zoning Board of Appeals. In the June 11 letter MLF states, "Saratoga Associates' opinion also appears to lack exercise of professional judgment and objectivity because it mimics-verbatim- an earlier opinion of its client, The Olana Partnership."

Rhetoric concerning professionalism and objectivity aside, our April 2013 report restated a brief and well written summary of the physical dimension and antennae composition of the proposed tower. This summary was a simple statement of facts. As stated in our report, the proposed tower will be more than six times as wide (approximately 13 feet wide as compared to 2'-2") at the tree line than the current guyed tower. Consequently the proposed replacement tower will be more visible than the existing guyed units which are currently directly visible within Olana's renowned southern viewshed.

Olana is both a State Historic Site and a National Historic Landmark. Views from Olana were and are an essential part of its aesthetic, and any intrusions of incompatible structures into those views negatively affect that aesthetic. With over 130,000 visitors each year, New York State has invested heavily in the restoration of the State Historic Site over the past five years including renovation of the main house and major clearing initiatives to reestablish important views. The New York State Department of State (DOS) has also recognized the importance of Olana's viewshed through the creation of the Catskill-Olana Scenic Area of Statewide Significance (SASS).

SARATOGA ASSOCIATES

Mr. Lawrence Hermance and Mr. Thomas Alvarez

June 28, 2013

Page 2 of 2

The self supporting Eger communications tower is directly visible from numerous highly visited locations. It is front and center within Olana's cherished southerly viewshed, and will be more conspicuous than the two narrow in-line guyed structures it will replace. Once again I respectfully ask the Town to consider all available alternatives to prevent or minimize visual impact on this State Historic Site, National Historic Landmark and cultural jewel of Columbia County.

Very truly yours,

SARATOGA ASSOCIATES

Landscape Architects, Architects, Engineers, and Planners, P.C.



Matthew w. Allen, RLA

Principal

cc: Jeff Anzevino - Scenic Hudson
Sara Griffen - The Olana Partnership

ATTACHMENT C



NEW YORK STATE
OFFICE OF PARKS, RECREATION AND HISTORIC PRESERVATION

Andy Beers
Acting Commissioner

David A. Paterson
Governor

December 2, 2010

Mr. Kevin McDonald, Supervisor
Mr. Lawrence Hermance, Chair
Planning Board
Town of Livingston
PO Box 65
Livingston, NY 12541

Re: Proposed Communication Tower
Blue Hill
Livingston, Columbia County

Dear Supervisor McDonald and Chairman Hermance:

The Office of Parks, Recreation and Historic Preservation (OPRHP) has received several communications regarding the construction of a proposed 190' lattice communication tower on Blue Hill in the Town of Livingston. The tower would replace two existing 190' guyed towers currently at this location.

OPRHP oversees the operation of the National Historic Landmark Frederic Church home known as Olana State Historic Site. Olana is situated roughly two miles northwest of the project site in the Town of Greenport.

It is our understanding that a new application is before the Town of Livingston's Planning Board. This new plan would remove the two existing guyed 190 foot towers and replace them with a single free-standing 190 foot lattice tower. This would be the same structure as proposed in 2007 at a site near this location.

Based on the materials submitted for the 2007 plan, the newly proposed replacement unit would be significantly more visible in the historic viewshed. This observation is based on the visual simulations included in the March, 2008 reports submitted to OPRHP by Vanasse Hangen Brustlin, Inc. The density of the proposed 190 foot free-standing tower is demonstrably more visible in the landscape than the exiting guyed units which are viewed one behind the other from Olana.

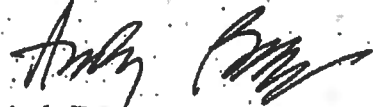
According to the Department of Environmental Conservation's SEQR Handbook, the term substantially contiguous "is intended to cover situations where a proposed activity is not directly adjacent to a sensitive resource, but is in close enough proximity that it could potentially have an impact." As noted in our comments concerning the previous tower project, it is our belief that a new tower, albeit a replacement structure, in the southern viewshed of this National Historic Landmark property should be considered substantially contiguous and therefore a Type I action under SEQR. As such, we recommend that you include OPRHP as an interested party in your SEQR review for this discretionary action on the part of your Town.

The viewshed from Olana has long been established as a significant component of the landmark character of the site. Furthermore, the significance of the views from this property and their well known influence on Church and his role as one of America's most influential landscape painters of the Hudson River School is undisputable. There are at least six known works by this American master that capture this specific vista. It is our position that this viewshed and the impact that the new communication tower will have on this legendary landscape must be afforded a "hard look" as part of the environmental review for this project. It is the responsibility of the Lead Agency to insure that the full spectrum of environmental impacts is assessed as part of this process.

As with the previous project, this undertaking will be subject to the review and approval of the Federal Communication Commission and will be subject to federal review pursuant to Section 106 of the National Historic Preservation Act. The State Historic Preservation Office within OPRHP views this new proposal as having a potential Adverse Effect on a historic resource. The National Parks Service has also requested consulting party status for the federal review.

OPRHP certainly understands the needs of the community with regard to emergency communications. However, we would strongly recommend that other more reasonable alternatives be explored including utilizing stealth technology. If you have any questions regarding our position, please do not hesitate to contact Ruth Pierpont, our Acting Deputy Commissioner for Historic Preservation, at 518-237-8643.

Sincerely,



Andy Beers
Acting Commissioner

cc: Ruth Pierpont, Acting Deputy Commissioner for Historic Preservation
Karen Kaufmann, Chief Counsel, OPRHP
Linda McLean, Site Manager, Olana
Sara Griffen, Executive Director, The Olana Partnership
Infinergy

ATTACHMENT D



**New York State Office of Parks,
Recreation and Historic Preservation**

Division for Historic Preservation
Peebles Island, PO Box 189, Waterford, New York 12188-0189
518-237-8643
www.nysparks.com

Andrew M. Cuomo
Governor

Rose Harvey
Commissioner

April 18, 2013

T. Alvarez
Town of Livingston ZBA Chair
PO Box 65
Livingston, NY 12541
(via e-mail only)

Larry Henance
Town of Livingston Planning Board Chair
PO Box 65
Livingston, NY 12541
(via e-mail only)

Re: SEQRA, FCC
New Communications Tower
Blue Hill, Livingston, Columbia County
10PR05943

Dear Messrs. Alvarez and Henance:

The Division for Historic Preservation within the Office of Parks, Recreation and Historic Preservation (OPRHP) recently received a copy of the zoning request now before your board for a variance for a new telecommunication tower to be constructed on Blue Hill. As you may know, the Division has commented to your town in the past on previous versions of this undertaking. In addition, the State Historic Preservation Office (SHPO) within OPRHP will be reviewing this project under the National Historic Preservation Act Section 106 as part of the applicant's FCC requirements.

The SHPO has been involved in the review of this proposed tower project and the assessment of its specific affects upon *Olana*, the National Historic Landmark designated home of the preeminent 19th century American artist Frederic Church, since April 2007.

Based upon our review of the previously submitted material and the most recent visual analysis (November 2012), we continue to strongly believe that the project will have a significant adverse impact on the historic viewsheds associated with this preeminent historic landmark.

Our opinion is based on the extraordinary importance associated with the setting and landscape of this National Historic Landmark. It is well established that Church used this view in several of his works and, in fact, sited his magnificent home to take full advantage of the sweeping vistas in all directions. The existing thin guyed towers currently blend well into the view from *Olana* in most atmospheric conditions. The recently provided simulations and plan depict a self supporting lattice tower of the same height as the existing with a much more pronounced silhouette in the landscape. The increased mass is then further exaggerated with the proposed new telecommunications equipment to be hung on the structure. This new very visible solid mass in the landscape clearly becomes a discordant focal point from the *Olana* vistas.

As the lead agency for this action you must take a hard look at the environmental effects of the action. Although *Olana* is physically not within your jurisdiction you are nevertheless compelled to consider the impacts of your decision on this national treasure, which will be directly affected.

We respectfully request that your agency carefully consider the direct impact to the *Olana* National Historic Landmark and explore a full spectrum of alternative options to the action. If you would like to discuss our comments in more detail, please do not hesitate to contact me at 518-237-8643.

Sincerely



Ruth L. Pierpont
Deputy Commissioner for
Historic Preservation

cc: Sara Griffen, The Olana Partnership (via e-mail)
J. Theodore Hilscher (via e-mail)

ATTACHMENT E



**New York State Office of Parks,
Recreation and Historic Preservation**

Historic Preservation Field Services Bureau • Peabees Island, PO Box 189, Waterford, New York 12188-0189

518-237-8643

www.nysparks.com

Elliot Spitzer
Governor

Carol Ash
Commissioner

May 30, 2007

Mr. Mark Eger
Eger Communications
33 Eger Road
Hudson, NY 12534

Re: 190' Self Supporting Tower
Blue Hill, Livingston, Columbia County
07PR02325

Dear Mr. Eger:

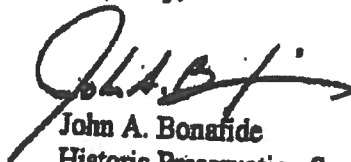
As you may be aware, our office has received several calls and letters regarding concerns over the proposed construction of a second communication tower on Blue Hill in the town of Livingston, Columbia County.

A review of the various materials provided to this office, which include the FEAF prepared for the town's SEQR process indicates that only local *Site Plan Review* and a ZBA *Special Permit* will be required for the project. This raises a concern with this office as we were also provided with a letter dated February 8, 2007 from Nicole Dentamaro of Vanasse Hangen Brustlin. The letter notes that "The new facility is necessary for emergency services within Columbia County and to improve cellular coverage within the Town of Livingston." The letter goes on to state, "Based on current plans, New York Communication Co. Omni antennae will be attached to the tower...". Based a recent conversation with Federal Communication Commission (FCC) these proposed uses would be subject to license/review by the FCC and as a result would be subject to review under the National Historic Preservation Act of 1966 (Section 106).

Under the guidelines of the current Programmatic Agreement developed by the FCC with the Advisory Council on Historic Preservation this office formally requests that the Area of Potential Effect (APE) for this project be expanded to include the viewshed from Olana, the National Historic Landmark home of American landscape painter, Frederick Church. The preeminent importance of the vistas from this home and their direct association on the work of this renowned American artist is undisputable. The primary concern that will be clearly noted by this office includes not only the construction of this new tower but also the cumulative impact the new structure will create in conjunction with the existing tower. It is our expectation that these issues will be addressed in the FCC Form 620 that will be prepared for this project.

If you should have any questions regarding the information contained in the letter I can be contacted at 518-237-8643, ext.3263.

Sincerely,



John A. Bonafide
Historic Preservation Services
Coordinator

Enc: Dentamaro Letter/2-8-07
Pierpont Letter/4-30-07

Cc: Philip Williams, Supervisor
Stephen G. DelSordo, FCC
Jeffrey Anzevino, Scenic Hudson

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of

EGER COMMUNICATIONS
PROPOSED REPLACEMENT TOWER,
COLUMBIA COUNTY, NEW YORK.

REPLY IN FURTHER SUPPORT OF
PETITION FOR RECONSIDERATION

Filed by:

The Murray Law Firm, PLLC
Jacqueline Phillips Murray, Esq., Of Counsel
10 Maxwell Drive, Suite 100
Clifton Park, NY 12065
(518) 688-0755

Attorneys for Eger Communications

Date: September 20, 2013

I. Introduction

Eger Communications¹ ("Eger") respectfully submits this Reply in further support of its Petition for Reconsideration of the Commission's August 5, 2013 letter decision on an informal complaint, requiring Eger to complete a review process pursuant to Section 106 of the National Historic Preservation Act ("NHPA") even though its proposed replacement of an existing 190-foot tower with a tower of the same height at the same site meets all of the criteria for exclusion from such review pursuant to Section III (B) of the Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Commission ("NPA").

II. Eger's Petition Should Be Granted Because It Meets The Requirements Of 47 CFR §1/106(c).

The Commission's regulations clearly state that petitions for reconsideration may be granted where (1) the Commission or designated authority determines that consideration of the facts or arguments relied on is required in the public interest; or (2) the petition relies on facts or arguments which relate to events which have occurred or circumstances which have changed

¹ "Eger Communications, Inc." is the entity named by the Commission in its August 5, 2013 letter decision. However, Eger Communications is a New York general partnership.

since the last opportunity to present such matters to the Commission.

Contrary to the opponents' claims, such facts and arguments have been presented in this Petition to warrant reconsideration.

By email dated October 7, 2011, the Commission declared that the pleading cycle on the opponents' informal complaint was complete. Eger requested an opportunity to Surreply, which resulted in the pleading cycle being completed on October 24, 2011.² After the pleading cycle was completed, the Commission received numerous letters from public safety agencies that needed the replacement tower to support upgrades to their antiquated and unreliable public safety communications systems.³ Further, on January 11, 2013 - also after the pleading cycle was completed -- such public safety agencies joined Eger's Application for the replacement tower.

Given that the public safety agencies letters and status as Co-Applicants for this project occurred after the Commission declared the pleading cycle complete, the Commission did not afford the public safety agencies an opportunity to be heard on the informal complaint and, as a result thereof, did not take

² See Exhibit A - Electronic mail From the Commission (Donald Johnson) dated October 11, 2011.

³ See Exhibit "C" to Eger's Petition for Reconsideration dated August 30, 2013.

into consideration the interests of the public safety agencies in deciding the informal complaint. This is perhaps best confirmed by the Commission's August 5, 2013 decision on the informal complaint, which makes no mention whatsoever of the public safety agencies' need for the replacement tower, their written pleas to the Commission and their status as Co-Applicants with Eger. Indeed, the Commission's August 5, 2011 decision expressly states it was made "[a]fter reviewing all of the pleadings" only.

For this reason alone, it is respectfully submitted that the instant Petition should be granted so that the Commission affords the Co-Applicant public safety agencies an opportunity to be heard, and considers the facts and arguments that may be asserted by the Co-Applicant public safety agencies.

In addition, the Commission's regulations provide another independent basis for granting this Petition: that consideration of the facts or arguments relied on in the Petition is "required in the public interest" (47 CFR §1.106[c][2]). As documented by the letters submitted to the Commission by the Co-Applicant public safety agencies after the pleading cycle ended,⁴ it is clearly in the public interest to consider the Co-Applicant

⁴ Id.

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. Indeed, the Commission and the Advisory Council on Historic Preservation intended the NPA's replacement tower exclusion to promote collocation and "facilitate the timely deployment of service."⁵

It is respectfully submitted that the Commission should grant this Petition so that it may consider the public interest in timely deploying the Co-Applicant public safety agencies' communications system upgrades and the benefit of collocating the equipment for such upgrades on the replacement tower, and the potentially dire consequences of failing to do so.

**III. The Proposed Tower Is A "Replacement Tower"
As Defined In The NPA**

The opponents erroneously claim that the NPA does not define what constitutes a "replacement tower" that is excluded from Section 106 review. Quite to the contrary, the NPA Section III (B) provides a very clear definition of what constitutes a "replacement tower":

Construction of a replacement for an existing communications tower and any associated excavation

⁵ See In the Matter of Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, FCC Report and Order adopted Sept. 9, 2004 at pg. 15.

that does not substantially increase the size of the existing tower under elements 1-3 of the definition as defined in the Collocation Agreement (see Attachment 1 of this Agreement, Stipulation 1.c.1-3) and that 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 or outside any existing access or utility easement related to this 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.⁶

Consistent with the definition provided in NPA Section III(B), Eger proposes "construction of a replacement for an existing communications tower" being the existing 190-foot twin lattice tower. Eger's proposed tower "does not substantially increase the size of the existing tower under elements 1-3 of the definition as defined in the Collocation Agreement (see Attachment 1 of this Agreement, Stipulation 1.c.1-3)" because it is the same height of the existing tower. Eger's proposed tower also "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 or outside any existing access or utility easement related to this site" because it is proposed 5 feet from the existing tower at the very same site. Finally, the existing

⁶ See NPA Section III [B] at pg. B-8.

tower was not built "after March 16, 2001" and, in any event, the New York State Historic Preservation Office has determined that the existing tower "will have No Impact upon cultural resources in or eligible for inclusion in the State or National Register of Historic Places."⁷

Insofar as Eger's proposed replacement tower falls squarely within the plain definition prescribed by NPA Section III (B), it is excluded from Section 106 review thereunder.

Although the opponents attempt to characterize the replacement tower as an "alternative" tower, there is simply no characterization of the replacement tower that can overcome its ability to meet the NPA's definition of a replacement tower. Similarly, the opponents' statement of opinion about the replacement tower's visibility is of no probative value whatsoever. Aside from being mere opinion, nothing in the NPA affords an exception from the replacement tower exclusion due to alleged visibility. Further, to the extent that the opponent's object to the replacement tower because it will have greater structural capacity and will support additional collocation, it must be noted that the Commission and Council contemplated that replacement towers would have to be stronger and would support

⁷ See NY SHPO's September 28, 1992 determination, attached as Exhibit "B" to the Petition for Reconsideration.

additional collocation and nevertheless agreed to exclude them per NPA Section III (B), reasoning as follows:

We adopt the replacement tower exclusion. Similar to collocations, strengthened structures may reduce the need for more towers by housing up to two, four or more additional antennas.⁸

In sum, Eger's proposed tower is clearly a "replacement" tower as that term is unambiguously defined in the NPA. Accordingly, we respectfully submit that the Commission should grant the Petition and decide that the Eger replacement tower is excluded from Section 106 review per NPA Section III (B).

IV. The NPA Replaces the Council's Rules

The NPA unequivocally provides that it "constitutes a substitute for the Council's rules with respect to certain Commission Undertakings."⁹ Similarly, the Council's rules provide that "[c]ompliance with the procedures established by an approved programmatic agreement satisfies the agency's section 106 responsibilities for all individual undertakings of the program covered by the agreement until it expires or is terminated...."¹⁰ Here, the opponents do not dispute Eger's

⁸ See In the Matter of Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, FCC Report and Order adopted Sept. 9, 2004 at pg.18.

⁹ See NPA at pg. B-2.

¹⁰ See 36 CFR §800.14(b)(2)(iii).

compliance with the NPA procedures, because they cannot. Rather, the FCC/NEPA Screening Report¹¹ prepared by Eger's professional consultant documents that Eger fully complied with NPA procedures in determining that the replacement tower is excluded from Section 106 review per NPA Section III(B).

To somehow avoid the NPA and the regulations pursuant to which it was executed, the opponents cite a separate and distinct section of the Council's regulations that sets forth a process for "exempted categories."¹² Review of Section 800.14 of the Council's regulations in its entirety demonstrates that each subsection thereof establishes six (6) mutually exclusive "federal agency program alternatives" at subsections (a), (b), (c), (d), (e) and (f), each with their own procedures for implementation. The NPA expressly states that it was implemented pursuant to subsection (b) of Section 800.14.¹³ As such, the provisions of subsection (c) of Section 800.14 cited by the opponents are inapplicable because that subsection implements a different independent "federal agency program alternative." This regulatory framework is further confirmed by the Council's explanation of Section 800.14:

¹¹ See The FCC/NEPA Screening Report is at Exhibit "A" to Eger's Petition for Reconsideration.

¹² See 36 CFR 800.14(c).

¹³ See NPA at pg. B-2.

Section 800.14 of the ACHP's regulations lays out a variety of methods available to federal agencies to meet their Section 106 obligations. *Each of these alternatives allows federal agencies to tailor the Section 106 process to meet their needs.*¹⁴

Finally, the opponents' callously claim that the input of Columbia County's public safety agencies "is not necessary." In its Report and Order on the NPA, the Commission made it clear that the interests of public safety are absolutely relevant, finding as follows:

[W]e find, on balance, that the measures described herein will relieve unnecessary regulatory burdens and therefore will promote public safety and consumer interests, consistent with our deregulatory initiatives.¹⁵

The Commission further determined that "the standard of review the [NPA] must provide is not one of perfection but one of reasonableness, taking into account both the likelihood that adverse effects will not be considered in some instances and the overall benefits to be obtained from streamlining measures."¹⁶ Consistent with the NPA's intent, the overall benefits to be

¹⁴ See The Council's website at <http://www.achp.gov/progalt/>.

¹⁵ See In the Matter of Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, FCC Report and Order adopted Sept. 9, 2004 at pg.9, paragraph 20.

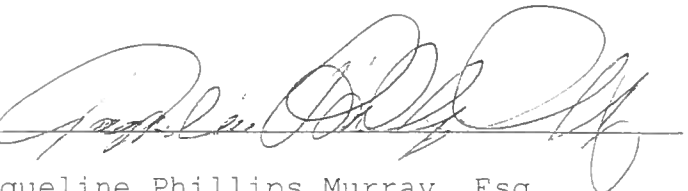
¹⁶ Id. at pg. 10, paragraph 21

obtained from the NPA's streamlining measures can only be fully considered upon affording Columbia County an opportunity to be heard and gathering input from Columbia County's public safety agencies about their imminent need for the replacement tower.

V. Conclusion

For the reasons set forth above, Eger respectfully requests that the Commission grant its Petition and, upon reconsideration, determine that the Eger replacement tower is excluded from Section 106 review pursuant to NPA §III (B).

Respectfully submitted,

By: 

Jacqueline Phillips Murray, Esq.
The Murray Law Firm, PLLC
10 Maxwell Drive, Suite 100
Clifton Park, NY 12065
(518) 688-0755

Attorneys for Eger Communications, Inc.

Date: September 20, 2013

Exhibit A: Electronic Mail dated 10/7/11
from FCC (D. Johnson)

EXHIBIT A

Jacqueline Murray

From: Donald Johnson <Donald.Johnson@fcc.gov>
Sent: Tuesday, October 11, 2011 2:38 PM
To: bob gagen; John W. Caffry; Dan Abeyta
Cc: Stephen Delsordo; sgriffen@olana.org; Sarah Price; Janzevino@scenichudson.org; Jacqueline Murray
Subject: RE: Eger Tower Project, Town of Livingston, New York

Thank you for your e-mail. Your response limited to new issues is due October 24, 2011.

FCC Spectrum Competition and Policy Division

From: bob gagen [mailto:bgagen@yahoo.com]
Sent: Tuesday, October 11, 2011 2:19 PM
To: Donald Johnson; John W. Caffry; Dan Abeyta
Cc: Stephen Delsordo; sgriffen@olana.org; Sarah Price; Janzevino@scenichudson.org; Jacqueline Phillips Murray
Subject: RE: Eger Tower Project, Town of Livingston, New York

Dear Mr. Johnson:

Please accept this email as confirmation of your conversation with Jacqueline Murray of this date. You agreed to grant our client, Eger Communications, until October 24, 2011 within which to submit a Sur Reply to the Reply letter of Caffry & Flowers dated 10/07/11. We will be responding only to new issues raised in their reply.

By a copy of this email I am notifying all parties.

Very truly yours,

Robert J. Gagen, Esq.
424 Warren St.
Hudson, NY 12534
518-828-5554
fax: 518-828-2685

This e-mail transmission and/or documents accompanying it may contain confidential information belonging to Robert J. Gagen, which is protected by the attorney-client or work-product privileges. The information is intended only for the use of the individual or entity named on this sheet. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution, or the taking of any action in reliance on the contents of this information is strictly prohibited. I have taken precautions to minimize the risk of transmitting software viruses, but I advise you to carry out your own virus checks on any attachment to this message. I cannot accept liability for any loss or damage caused by software viruses. If you have received this transmission in error, please immediately notify us by telephone to arrange for return of the documents.

--- On Fri, 10/7/11, Donald Johnson <Donald.Johnson@fcc.gov> wrote:

From: Donald Johnson <Donald.Johnson@fcc.gov>
Subject: RE: Eger Tower Project, Town of Livingston, New York
To: "John W. Caffry" <jcaffry@caffrylawoffice.com>, "Dan Abeyta" <Dan.Abeyta@fcc.gov>
Cc: "Stephen Delsordo" <stephen.delsordo@fcc.gov>, sgriffen@olana.org, "Sarah Price" <SPrice@olana.org>, Janzevino@scenichudson.org, bgagen@yahoo.com
Date: Friday, October 7, 2011, 4:47 PM

The FCC received your response to the opposition. The pleading cycle is complete.



Don Johnson
202-418-7444

From: John W. Caffry [<mailto:jcaffry@caffrylawoffice.com>]
Sent: Friday, October 07, 2011 4:36 PM
To: Dan Abeyta
Cc: Donald Johnson; Stephen Delsordo; sgriffen@olana.org; Sarah Price; Janzevino@scenichudson.org; bgagen@yahoo.com
Subject: Eger Tower Project, Town of Livingston, New York

Dear Mr. Abeyta:

Attached is the Reply of Scenic Hudson, Inc. and The Olana Partnership in the above-referenced matter, together with the two attachments thereto.

Hard copies are being mailed to you and to Mr. Gagen, and to other interested parties.

Sincerely,

John W. Caffry

This e-mail is sent by a law firm and may contain information that is privileged or confidential. If you are not the intended recipient, please delete the e-mail and any attachments and notify us immediately.

John W. Caffry
Attorney at Law
Caffry & Flower
100 Bay Street
Glens Falls, NY 12801
518-792-1582
Fax: 518-793-0541

jcaffry@caffrylawoffice.com

To ensure compliance with requirements imposed by the IRS, we inform you, that unless otherwise indicated, any tax advice contained in this communication (including any attachments) was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding tax-related penalties under the Internal Revenue Code, or (ii) promoting, marketing, or recommending to another party any tax -related matter addressed herein.

No virus found in this message.

Checked by AVG - www.avg.com

Version: 2012.0.1831 / Virus Database: 2090/4546 - Release Date: 10/11/11

00064

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF COLUMBIA

COPY

-----X
SCENIC HUDSON, INC., THE SCENIC HUDSON
LAND TRUST, INC., and THE OLANA PARTNERSHIP,

Petitioners,

DECISION/ORDER

-against-

Index No. 6454-13
R.J.L. No. 10-13-0493
Richard Mott, J.S.C.

TOWN OF LIVINGSTON PLANNING BOARD, EGER
COMMUNICATIONS, and BLUE HILL FRUIT FARMS,
INC.,

Respondents.

-----X
Motion Return Date: Final submission July 10, 2014

APPEARANCES:

Petitioners:

Claudia K. Braymer, Esq.
Caffry & Flower
100 Bay Street
Glens Falls, NY 12801

Respondents:

Jacqueline Phillips Murray, Esq.
The Murray Law Firm, PLLC
10 Maxwell Drive, Suite 100
Clifton Park, NY 12065
For Eger Communications and Blue
Hill Fruit Farms, Inc.

J. Theodore Hilscher, Esq.
Hilscher & Hilscher
The 1813 Courthouse
2 Franklin Street
Catskill, NY 12414
For Town of Livingston Planning Board

FILED
2014 AUG 29 P 12:44
COLUMBIA COUNTY
CLERK'S OFFICE

Mott, J.

Petitioners Scenic Hudson, Inc., Scenic Hudson Land Trust, Inc. and the OJana Partnership (Petitioners) challenge the Town of Livingston Planning Board's ("the Town") decision granting site plan approval and a special use permit authorizing Respondent Eger Communications (Eger) to replace an existing 190-foot tall, guyed lattice tower with a single, wider¹, self-supporting lattice tower of the same height at 170 Eger Road, Town of Livingston, Columbia County.

By Decision/Order dated March 20, 2014, the Court denied Eger and the Town's motions to dismiss.

Statute of Limitations

Eger and the Town assert that the thirty day statute of limitations in Town Law §274-a(11) bars Petitioners' first cause of action. They argue that the negative State Environmental Quality Review (SEQR) declaration was issued on June 12, 2013, and, therefore, that the present action, filed on August 15, 2013, was not commenced within thirty days.

Petitioners argue that since the Planning Board issued the negative declaration, the site plan and special use approvals, the statute did not begin to run until July 19, 2013, because the site plan and special use approvals were not filed until then and that this

¹The proposed replacement tower is to be 11 feet wider at the base and 2.3 feet wider at the top.

action was therefore timely commenced.

In *North Country Citizens for Responsible Growth, Inc. v. Town of Potsdam Planning Board*, 39 A.D.3d 1098, 1103 (3d Dept. 2007), the Third Department wrote that since, as in this case, the same agency first made a negative SEQRA declaration² and then granted site plan approval, which were both steps in an integrated process, there was no concrete injury to petitioners until the site plan and special use permits were approved and the statute of limitations began to run upon the granting of the latter. Here, because this action was commenced within thirty days of the filing of the special use permit and the site plan approval, it was timely commenced.

The application to dismiss the first cause of action is hereby denied.

SEQRA

Petitioners' Arguments

Petitioners assert that the Planning Board failed to take a "hard look" at or make a rational decision about the proposed tower's visual impacts upon Olana's viewshed. Specifically, Petitioners state that the Town relied upon a 1992 letter from New York State Office of Parks, Recreation and Historic Preservation(OPRHP) finding that a single guyed tower would "have No Impact upon cultural resources in or eligible for inclusion in the State and National Registers of Historic Places", but ignored OPRHP letters sent in 2010 and 2013 that the current proposed tower would be more visible than the existing towers.

²Although the SEQRA determination preceded the other approvals, it remained subject to further administrative review and was not final until the other approvals were filed.

and "will have a significant adverse impact on the historic viewsheds associated with" Olana, and thereby "cut short" a proper environmental review when it found that the proposed tower would "not have an adverse impact."

Further, Petitioners argue that because the proposed tower is structurally different from the existing ones and has a different visual impact, it was irrational for the Town, relying upon the 1992 letter, to determine that the proposed tower had "no impact greater than that of the existing towers" and that its impact was "minimal." They assert that their visual impact assessments show that the proposed tower would be more visible than the existing ones.

Petitioners also argue that because the increased visibility of the proposed tower had "potential" to cause a "significant adverse [visual] impact", the Town should have adopted a positive declaration and required an Environmental Impact Statement (EIS). Moreover, Petitioners assert that the Town failed to specify in the Environmental Assessment Form (EAF) whether the impact to Olana was potentially significant, thereby violating the letter and spirit of SEQR.

Further, Petitioners argue that the Town violated SEQR by failing to consider future impacts on the viewshed as a result of the approval in this case, by failing to follow the requirements of the Town Zoning Law pertaining to alternative color schemes and tower designs, by misinterpreting the importance of Olana as a designated State Area of Statewide Significance (SASS), thereby too narrowly defining the zone of impact, and reliance upon generalized community support for the project.

Finally, Petitioners argue that appropriate mitigation of the towers impacts were

not considered.

Eger's Response

Eger asserts that the Town's June 12, 2013 Resolution demonstrates that it identified all of the environmental concerns raised by Petitioners, took the required "hard look" and made a satisfactory explanation of the reasons for its determination when it decided that the proposed replacement tower would not cause a significant adverse impact to Olana's viewshed. Eger states that the Resolution was supported by substantial evidence, including the visual analyses and photographic simulations of both sides and an expert professional opinion. Further, Eger asserts that the Town's choices between expert opinions are within its discretion and that they were rational. Further, Eger avers that Petitioners have misstated the record, in particular, with regard to submissions from OPRHP. Finally, Eger asserts that the Town's conclusions were based on substantial and objective evidence and must be upheld.

Eger argues that the Town reviewed a visual impact addendum, that it properly considered OPRHP's 1992 letter and did not ignore the April 18, 2013 letter. Eger denies that an EIS was required despite the Town's classifying the application as a Type I action and the 2013 OPRHP letter. Eger also denies that the Town was required to consider the future impact on the viewshed of an approval in this case or that it misinterpreted the importance of Olana as a SASS, noting that the Tower was not in the SASS. Eger further denies that the Town succumbed to comments by local residents.

The Town's Response

The Town asserts that it complied fully with SEQRA and that its decision was neither arbitrary nor capricious and had a rational basis. Specifically, the Town states that it created a sufficient record for its determination and that the Court must defer to its conclusions.

Discussion

"Judicial review of a lead agency's SEQRA determination is limited to whether the determination was made in accordance with lawful procedure and whether, substantively, the determination 'was affected by an error of law or was arbitrary and capricious or an abuse of discretion' (CPLR §7803(d), *Chinese Staff & Workers Assn. v. City of New York*, 68 N.Y.2d 359, 363; *Matter of Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 416 (1986)." *Akpan v. Koch*, 75 N.Y.2d 561, 570 (1990). The Court is required to "review the record to determine whether the agency identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination. *Id.*, citing *Matter of Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d at 417. Further, an agency's compliance with its substantive SEQRA obligations is governed by a rule of reason and the extent to which particular environmental factors are to be considered varies in accordance with the circumstances and nature of particular proposals. *Id.*

As the Court of Appeals explained in *Matter of Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d at 417, the lead agency need not identify and address every conceivable

environmental impact, mitigating measure or alternative to satisfy SEQRA's substantive requirements and agencies have considerable latitude in evaluating environmental effects and choosing among alternatives. The Court is not permitted to second-guess the agency's choice, which can be annulled only if it is arbitrary, capricious or unsupported by substantial evidence.

Here the record amply demonstrates that the Town identified Petitioners' particular environmental concerns about the impact of the replacement antenna on Olana's viewshed. The Planning Board's June 12, 2013 Resolution specifically noted the "potential area of environment concern was injury to the Olana viewshed." In fact, the June 12, 2013 Resolution makes it abundantly clear that the Planning Board took the required "hard look" at the impact of the replacement tower on Olana's viewshed. Hence, the Resolution specifically states in relevant part:

4. The current application seeks the replacement of the two existing towers with one tower and so represents lowering the number of towers.

* 5. According to both visual impact studies received, the existing towers are visible today from Olana. The Planning Board finds this visual impact from Olana to be minimal. The new tower will have a similar minimal visual impact. The proposed tower location is of the same height as the existing towers and in the same location as the existing towers. It has been suggested by those speaking on behalf of the Olana Historic Site that because the proposed tower is about 13 feet wide at the tree line (which is about 40 feet high), while the existing towers are each about 2 feet wide, therefore, the visual impact of the proposed tower would be greater than the visual impact of the existing tower. However, the difference of less than 11 feet in width is not discernible at the distance of about 2 miles away from the site to Olana...

width

7. The Planning Board takes notice that the proposed tower would be one of many twentieth and twenty-first century additions to the Olana viewshed made since Frederic Church's lifetime, and because there are already two towers at the location, does not represent an increase in the number of such

additions. There are, in the same viewshed, three radio towers. These towers are taller than the existing/proposed towers here under review. They are much closer to Olana, about ½ mile away. They carry lights which blink at night. The three towers are visible to a much greater degree than the proposed tower.

These and other portions of the Resolution adequately demonstrate that the Town took the requisite "hard look" at whether the replacement of the existing towers would cause injury to the Olana viewshed. Further, the Town's determination was supported by substantial evidence that included visual analyses and photographic simulations submitted by both parties and professional opinion. The Town was entitled in its discretion to choose between the conflicting expert opinions it received³. See, e.g., *Matter of Brooklyn Bridge Park Legal Defense Fund, Inc. v. New York State Urban Dev. Corp.*, 50 A.D.3d 1029 (2d Dept. 2008) citing *Matter of Ball v. New York State Dept. Of Env'tl. Conservation*, 35 A.D.3d 732, 733 (2d Dept. 2006) and *Matter of Winston v. Freshwater Wetlands Appeals Bd.*, 254 A.D.2d 363, 364 (2d Dept. 1998). In fact, the Town was required to make the determination about the significance of the visual impact of the replacement tower, and this Court is constrained not to second-guess its choice. See, 6 N.Y.C.R.R. 617.7; *Matter of Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d at 417, *Akpan v. Koch*, 75 N.Y.2d at 571.

Petitioners' arguments concerning the reference in the Resolution to the OPRHP's 1992 but not its subsequent, 2013 letters are misplaced. As the Town points out, the New York State Department of Environmental Conservation (NYSDEC) SEQRA Handbook encourages review of previous significance determinations like the 1992 letter. Further,

³Nothing in the record suggests that the Town's choice to credit one expert rather than another was irrational in any respect.

the record demonstrates that the Town did not ignore OPRHP's 2013 letter. The Town actually reviewed the letter at its April 22, 2013 meeting and was subsequently informed in a June 11, 2013 letter that OPRHP had made a factual error by believing that the proposed Tower was to be a "solid mass." Regardless, the April, 2013 letter was submitted prior to the visual analyses and photographic simulations the Town later received and it was weighed in making the determination.

The Court rejects Petitioners other arguments. Contrary to Petitioners' contentions, the Town received and viewed a Visual EAF Addendum both in 2010 and 2013. Further, the Town was not required to mandate that an EIS be completed because it took a hard look at the relevant environmental concerns, determined that the project would have no significant adverse impact and issued a negative declaration. *Village of Poquott v. Cahill*, 11 A.D.3d 536, 540 (2d Dept. 2004) and cases cited. In addition, the Town was not required to assess the future impact on Olana's viewshed of the approval in this case of the replacement tower (See, 6 N.Y.C.R.R. 617.7), nor was its review deficient because of an alleged failure to consider the importance of Olana's being an SASS. To the contrary, the Town reviewed and relied upon a 5-mile visual analysis that included the SASS. Moreover, the Town's decision was not improperly influenced by citizen comments. The Town received letters in support of both Petitioners and the project. It held appropriate public hearings. Nothing in the record supports the view that the comments improperly influenced the Town's decision that the replacement tower would have a minimal visual impact. Finally, the record shows that mitigation measures and alternatives were considered as the Town received the Visual Impact Assessment Report of Tectonic

Engineering, requested that the applicant provide an explanation of alternative colors and tower designs, considered the applicant's responses to those requests, and reviewed the visual analysis of June 11, 2013.

Clearly, the Town met all of its SEQRA obligations.

Zoning Law

Petitioners argue that the Town violated its Zoning Code because the applicant did not submit all of the necessary materials to obtain an approval. Specifically, Petitioners' assert that the applicant did not establish that the color of the tower "minimizes degree of visual impact" (Zoning Code 4.7(11)(a)(i)), that the Town failed to consider alternative tower designs (Zoning Code 4.7(10), (11)), and that the applicant failed to provide confirmation that the new antennas would be in compliance with federal guidelines for electromagnetic emissions (Zoning Code 4.7(8)(g))). Eger and the Town disagree.

The record compels the conclusion that the Town followed its own Zoning Law. With regard to the color of the tower, the applicant wrote that the same color gray was being used so that "there will be no discernible change in the structure color already present in the view shed, thereby resulting in no significant visual impact due to structure color." Further, the Supplemental Visual Analysis of June 11, 2013 reached the conclusion that an alternate color was likely to be more visible and would attract viewers.

With regard to lack of consideration of alternative designs, the same Supplemental Visual Analysis considered monopole, flagpole and simulated tree tower designs and concluded that these would result in greater visibility.

Finally, with regard to electromagnetic emissions, the replacement tower does not

emit electromagnetic emissions. Rather, those are emitted by the collocators' antennas. Petitioners have repeatedly noted that in this proceeding they were not challenging the approvals granted to Collocators to place their antennas on the replacement tower. Regardless, the application confirmed that the replacement tower would comply with federal guidelines for electronic emissions.


Petitioners' claims with regard to the Town Zoning law are denied.

The Petition is hereby dismissed.

This constitutes the Decision and Order of this Court. The Court is forwarding the original Decision and Order directly to Respondent Eger's counsel, who is required to comply with the provisions of CPLR §2220 with regard to filing and entry thereof. A photocopy of the Decision and Order is being forwarded to all other parties who appeared in the action. All original motion papers are being delivered by the Court to the Supreme Court Clerk for transmission to the County Clerk.

Dated: Claverack, New York
August 26, 2014

ENTER



RICHARD MOTT, J.S.C.

Documents Considered:

1. Notice of Petition, dated August 15, 2013, Petition, dated August 15, 2013 with Exhibit A, Petitioners' Memorandum of Law, dated October 22, 2013;
2. Respondent Eger's Answer, dated May 8, 2014, Memorandum of Law, dated May 8, 2014, Affidavit of Eileen Yandik, dated May 7, 2014 with Exhibit A, Affidavit of Peter

- T. Sutherland, dated May 7, 2014, Affidavit of Tammy Molinski, dated May 7, 2014 with Exhibit A,
3. Respondent Town of Livingston's Answer, dated May 9, 2014, Memorandum of Law of Livingston Planning Board, dated May 9, 2014, Affidavit of Philip Schmidt, dated May 9, 2014 with Exhibits A-C,,
 4. Petitioners' Reply, dated June 6, 2014, Petitioner's Reply Memorandum of Law, dated June 6, 2014;
 5. Letter of Jacqueline Phillips Murray, Esq., dated June 18, 2014;
 6. Letter of Claudia K. Braymer, Esq., dated July 7, 2014;
 7. Sur-Reply Affidavit of Jacqueline Phillips Murray, Esq., dated July 2, 2014;
 8. Letter of Jacqueline Phillips Murray, Esq., dated July 8, 2014 with attachment (Record Item 20);
 9. Letter of Claudia K. Braymer, Esq., dated July 9, 2014;
 10. Letter of J. Theodore Hilscher, Esq., dated July 22, 2014.



THE MURRAY LAW FIRM^{PC}

10 Maxwell Drive, Suite 100 • Clifton Park, NY 12065

Tel: (518) 688-0755 • Fax: (518) 688-0297

www.themurraylawfirm.com

Received & inspected

OCT 27 2014

FCC Mail Room

October 24, 2014

VIA UPS COURIER

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
9300 East Hampton Drive
Capitol Heights, MD 20743

Re: Application for Leave to Amend Petition for Reconsideration
Eger Communications, Inc.
Proposed Replacement Tower, Columbia County, New York

Dear Ms. Dortch:

On behalf of Eger Communications, Inc., please find enclosed for filing an original and four (4) copies of the Application for Leave to Amend Petition for Reconsideration.

Should you have any questions or comments, please do not hesitate to contact me.
Thank you for your attention to this matter.

Very truly yours,

THE MURRAY LAW FIRM, PLLC

Jacqueline Phillips Murray
jpm@themurraylawfirm.com

JPM/lb

Enclosure

cc (w/ encl.): Mark Eger
John Bonafide
John Caffry, Esq.
Donald Johnson
Jeffrey Steinberg
Daniel Abeyta
Stephen Delsordo

Received & Inspected

OCT 27 2014

STATE OF NEW YORK)
) ss.:
COUNTY OF SARATOGA)

FCC Mail Room

Lisa M. Baehr, being duly sworn, deposes and says that she is over the age of eighteen (18) years and resides in Delanson, New York; that she served the Petition for Reconsideration upon the following on October 24, 2014, at following place in the following manner:

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
9300 East Hampton Drive
Capitol Heights, MD 20743

by depositing a true and correct original of the same properly enclosed in a post-paid wrapper in the official depository maintained and exclusively controlled by United Parcel Service at 10 Maxwell Drive, Clifton Park, New York, directed to said person, and said person not appearing by attorneys, at said address mentioned above, that being the address designated for that purpose upon the last papers served in this action or the place where the above then resided or kept offices, according to the best information which can be conveniently obtained.



Lisa M. Baehr

Sworn to before me this
24th day of October, 2014.



Notary Public

JANE E. CORBEIL
Notary Public, State of New York
Qualified in Saratoga County
No. 4962014
Commission Expires 5/28/2015

OCT 27 2014

STATE OF NEW YORK }
) ss.:
COUNTY OF SARATOGA }

FCC Mail Room

LISA M. BAEHR, being duly sworn, deposes and says that she is over the age of eighteen (18) years and resides in Delanson, New York; that she served the Petition for Reconsideration upon the following on October 24, 2014, at following place in the following manner:

John A. Bonafide, Director
Division for Historic Preservation
New York State Dept of Parks and Recreation
P.O. Box 189
Waterford, NY 12188-0189

John W. Caffry, Esq.
Caffry & Flower
100 Bay Street
Glens Falls, NY 12801

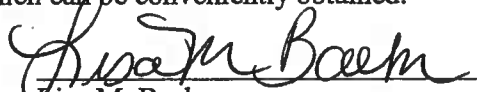
Jeffrey S. Steinberg, Deputy Chief
Spectrum and Competition Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Daniel Abeyta, Assistant Chief
Spectrum and Competition Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

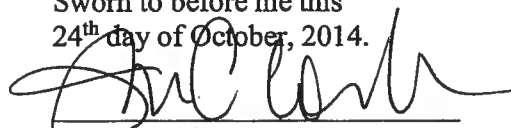
Stephen Delsordo
Spectrum and Competition Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Donald Johnson
Spectrum and Competition Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

by depositing a true and correct copy of the original of the same properly enclosed in a post-paid wrapper in the official depository maintained and exclusively controlled by the United States Postal Service at 10 Maxwell Drive, Clifton Park, New York, directed to said persons, at said addresses respectively mentioned above, that being the addresses within designated for that purpose upon the last papers served in this action or the place where the above then resided or kept offices, according to the best information which can be conveniently obtained.


Lisa M. Baehr

Sworn to before me this
24th day of October, 2014.


Notary Public

JANE E. CORBEIL
Notary Public, State of New York
Qualified for Saratoga County
No. 4962014
Commission Expires 5/28/2015

 COPY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Received & Inspected

OCT 27 2014

FCC Mail Room

In the Matter of

EGER COMMUNICATIONS
PROPOSED REPLACEMENT TOWER,
COLUMBIA COUNTY, NEW YORK.

APPLICATION FOR LEAVE TO AMEND
PETITION FOR RECONSIDERATION

Filed by:

The Murray Law Firm, PLLC
Jacqueline Phillips Murray, Esq., Of Counsel
10 Maxwell Drive, Suite 100
Clifton Park, NY 12065
(518) 688-0755

Attorneys for Eger Communications

Date: October 24, 2014

I. Introduction

By Decision/Order dated August 26, 2014 (the "State Court Decision"), New York State Supreme Court, Columbia County, dismissed a proceeding by Scenic Hudson, Inc., The Scenic Hudson Land Trust, Inc. and The Olana Partnership (collectively, the "Opponents") against the Town of Livingston Planning Board, Eger Communications ("Eger"), and Blue Hills Fruit Farms, Inc., challenging certain municipal approvals awarded to Eger to replace two (2) 190-foot guyed lattice towers with a single self-supporting lattice tower of the same height and at the same site (the "Replacement Tower"). A copy of the State Court Decision is attached hereto as Exhibit "A".

Pursuant to 47 CFR §1.106(f), Eger respectfully requests that the Commission grant Eger leave to supplement its Petition for Reconsideration dated August 30, 2013 (the "Petition") to include the State Court Decision.

II. Procedural History

By letter dated April 5, 2011, the Opponents filed an informal complaint with the Federal Communications Commission (the "Commission") against Eger seeking a determination by the Commission that Eger's proposed Replacement Tower is subject to

Section 106 review of the National Historic Preservation Act ("NHPA").

By letter dated August 29, 2011, Eger opposed the informal complaint, explaining that the proposed Replacement Tower is expressly excluded from Section 106 review pursuant to Section III (B) of the Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Commission ("NPA"). Specifically, NPA Section III (B) provides that replacement towers falling within the below criteria are "excluded from Section 106 review by the SHPO/THPO, the Commission and the Council and, accordingly, shall not be submitted to the SHPO/THPO for 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 (see Attachment 1 of this Agreement, Stipulation 1.c.1-3) and that 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 or outside any existing access or utility easement related to this 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.¹

¹ See NPA Section III [B] at pg. B-8.

By letter dated August 5, 2013 (the "FCC decision"), the Commission directed Eger to complete a Section 106 review process for the Replacement Tower, without resolving whether the proposed Replacement Tower falls within the NPA's replacement tower exclusion. Rather, the Commission cited "unique circumstances" as rendering Section 106 review necessary in respect to the Replacement Tower.

On August 30, 2013, Eger filed a Petition for Reconsideration seeking reversal of the FCC decision.

Just prior to the issuance of the FCC decision, on July 12, 2013, the Town of Livingston awarded Eger with the municipal approvals necessary to install the Replacement Tower. The Opponents challenged such approvals by filing an Article 78 Petition (the "State Court Petition") in New York State Supreme Court, Columbia County, naming Eger as a Respondent as well. At issue in the State Court Petition, was whether the Town of Livingston failed to "take a hard look" at or make a rational decision about the Replacement Tower's visual impact upon the viewshed of the Olana State Historic Site ("Olana"), located approximately 2 miles from the existing 190-foot towers where the Replacement Tower of the same height is proposed.

In the State Court Decision, New York State Supreme Court made the following findings: (1) that the Town of Livingston Planning Board did indeed take a "hard look" at the potential impact of Eger's proposed Replacement Tower upon the Olana viewshed; and (2) that said Planning Board was justified in making a determination that the proposed Replacement Tower would not have an adverse impact on the Olana viewshed. Based upon such findings, the Court dismissed the Opponents' State Court Petition, thereby upholding the Planning Board's determination that Eger's proposed Replacement Tower would have no adverse impact upon the Olana viewshed.

III. The State Court Decision Is A New Fact That Merits Inclusion In The Record On Eger's Petition For Reconsideration

A supplemental and/or amended petition may be filed greater than 30 days after the FCC Decision upon an application for leave to file setting forth the grounds therefore. 47 CFR § 1.106(f). In the present case, leave to file a supplemental and/or amended petition to include the recent State Court Decision is warranted for a number of reasons. First, the State Court Decision answers the question of whether the Replacement Tower will have an adverse impact upon the Olana viewshed. This issue was raised in the FCC Decision where the Commission stated

that the potential risk that the proposed Replacement Tower would have a "significantly greater visual intrusion than the existing guyed towers" was a unique circumstance giving rise to the Commission's decision to require a Section 106 review of the Replacement Tower. On this point, however, the State Court Decision is instructive. In upholding the Town of Livingston's determination that the Replacement Tower would not have a discernible impact upon the Olana viewshed, the State Court held that the Town of Livingston Planning Board's findings were supported by "substantial evidence that included expert opinions, visual analyses and photographic simulations submitted by both parties." As such, the State Court Decision assesses and, more importantly, negates based on "substantial evidence" any potential risk of visual impact cited in the FCC Decision.

Second, the State Court Decision was issued just recently and, therefore, was not available at the time Eger's Petition for Reconsideration was filed. Notably, the Opponents opposed the initial Petition for Reconsideration, in part, on grounds that no new facts were alleged that were not present at the time of the FCC's Decision.² Clearly, the State Court Decision holding that there is substantial evidence that the proposed

² See Opponents' Opposition to Petition for Reconsideration dated September 12, 2013 at page 4, stating that "Eger's Petition relies upon old facts and arguments that were, or could have been brought before the FCC".

Replacement Tower will not have an adverse visual impact on Olana constitutes exactly such a new fact.

IV. Conclusion

For the reasons set forth above, Eger respectfully requests that the Commission grant Eger leave to supplement its Petition for Reconsideration with the recent State Court Decision.

Respectfully submitted,

By: 

Jacqueline Phillips Murray, Esq.
The Murray Law Firm, PLLC
10 Maxwell Drive, Suite 100
Clifton Park, NY 12065
(518) 688-0755

Attorneys for Eger Communications

Date: October 24, 2014

APPLICATION FOR LEAVE TO AMEND
PETITION FOR RECONSIDERATION

EXHIBIT "A"

00064

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF COLUMBIA

COPY

-----X
SCENIC HUDSON, INC., THE SCENIC HUDSON
LAND TRUST, INC., and THE OLANA PARTNERSHIP,

Petitioners,

DECISION/ORDER

-against-

Index No. 6454-13
R.J.I. No. 10-13-0493
Richard Mott, J.S.C.

TOWN OF LIVINGSTON PLANNING BOARD, EGER
COMMUNICATIONS, and BLUE HILL FRUIT FARMS,
INC.,

Respondents.

-----X
Motion Return Date: Final submission July 10, 2014

APPEARANCES:

Petitioners:

Claudia K. Braymer, Esq.
Caffry & Flower
100 Bay Street
Glens Falls, NY 12801

Respondents:

Jacqueline Phillips Murray, Esq.
The Murray Law Firm, PLLC
10 Maxwell Drive, Suite 100
Clifton Park, NY 12065
For Eger Communications and Blue
Hill Fruit Farms, Inc.

J. Theodore Hilscher, Esq.
Hilscher & Hilscher
The 1813 Courthouse
2 Franklin Street
Catskill, NY 12414
For Town of Livingston Planning Board

2014 AUG 29 P 12:44
COLUMBIA COUNTY
CLERK'S OFFICE

FILED

Mott, J.

Petitioners Scenic Hudson, Inc., Scenic Hudson Land Trust, Inc. and the Olana Partnership (Petitioners) challenge the Town of Livingston Planning Board's ("the Town") decision granting site plan approval and a special use permit authorizing Respondent Eger Communications (Eger) to replace an existing 190-foot tall, guyed lattice tower with a single, wider¹, self-supporting lattice tower of the same height at 170 Eger Road, Town of Livingston, Columbia County.

By Decision/Order dated March 20, 2014, the Court denied Eger and the Town's motions to dismiss.

Statute of Limitations

Eger and the Town assert that the thirty day statute of limitations in Town Law §274-a(11) bars Petitioners' first cause of action. They argue that the negative State Environmental Quality Review (SEQR) declaration was issued on June 12, 2013, and, therefore, that the present action, filed on August 15, 2013, was not commenced within thirty days.

Petitioners argue that since the Planning Board issued the negative declaration, the site plan and special use approvals, the statute did not begin to run until July 19, 2013, because the site plan and special use approvals were not filed until then and that this

¹The proposed replacement tower is to be 11 feet wider at the base and 2.3 feet wider at the top.

action was therefore timely commenced.

In *North Country Citizens for Responsible Growth, Inc. v. Town of Potsdam Planning Board*, 39 A.D.3d 1098, 1103 (3d Dept. 2007), the Third Department wrote that since, as in this case, the same agency first made a negative SEQRA declaration² and then granted site plan approval, which were both steps in an integrated process, there was no concrete injury to petitioners until the site plan and special use permits were approved and the statute of limitations began to run upon the granting of the latter. Here, because this action was commenced within thirty days of the filing of the special use permit and the site plan approval, it was timely commenced.

The application to dismiss the first cause of action is hereby denied.

SEQRA

Petitioners' Arguments

Petitioners assert that the Planning Board failed to take a "hard look" at or make a rational decision about the proposed tower's visual impacts upon Olana's viewshed. Specifically, Petitioners state that the Town relied upon a 1992 letter from New York State Office of Parks, Recreation and Historic Preservation (OPRHP) finding that a single guyed tower would "have No Impact upon cultural resources in or eligible for inclusion in the State and National Registers of Historic Places", but ignored OPRHP letters sent in 2010 and 2013 that the current proposed tower would be more visible than the existing towers.

²Although the SEQRA determination preceded the other approvals, it remained subject to further administrative review and was not final until the other approvals were filed.

and "will have a significant adverse impact on the historic viewsheds associated with" Olana, and thereby "cut short" a proper environmental review when it found that the proposed tower would "not have an adverse impact."

Further, Petitioners argue that because the proposed tower is structurally different from the existing ones and has a different visual impact, it was irrational for the Town, relying upon the 1992 letter, to determine that the proposed tower had "no impact greater than that of the existing towers" and that its impact was "minimal." They assert that their visual impact assessments show that the proposed tower would be more visible than the existing ones.

Petitioners also argue that because the increased visibility of the proposed tower had "potential" to cause a "significant adverse [visual] impact", the Town should have adopted a positive declaration and required an Environmental Impact Statement (EIS). Moreover, Petitioners assert that the Town failed to specify in the Environmental Assessment Form (EAF) whether the impact to Olana was potentially significant, thereby violating the letter and spirit of SEQR.

Further, Petitioners argue that the Town violated SEQR by failing to consider future impacts on the viewshed as a result of the approval in this case, by failing to follow the requirements of the Town Zoning Law pertaining to alternative color schemes and tower designs, by misinterpreting the importance of Olana as a designated State Area of Statewide Significance (SASS), thereby too narrowly defining the zone of impact, and reliance upon generalized community support for the project.

Finally, Petitioners argue that appropriate mitigation of the towers impacts were

not considered.

Eger's Response

Eger asserts that the Town's June 12, 2013 Resolution demonstrates that it identified all of the environmental concerns raised by Petitioners, took the required "hard look" and made a satisfactory explanation of the reasons for its determination when it decided that the proposed replacement tower would not cause a significant adverse impact to Olana's viewshed. Eger states that the Resolution was supported by substantial evidence, including the visual analyses and photographic simulations of both sides and an expert professional opinion. Further, Eger asserts that the Town's choices between expert opinions are within its discretion and that they were rational. Further, Eger avers that Petitioners have misstated the record, in particular, with regard to submissions from OPRHP. Finally, Eger asserts that the Town's conclusions were based on substantial and objective evidence and must be upheld.

Eger argues that the Town reviewed a visual impact addendum, that it properly considered OPRHP's 1992 letter and did not ignore the April 18, 2013 letter. Eger denies that an EIS was required despite the Town's classifying the application as a Type I action and the 2013 OPRHP letter. Eger also denies that the Town was required to consider the future impact on the viewshed of an approval in this case or that it misinterpreted the importance of Olana as a SASS, noting that the Tower was not in the SASS. Eger further denies that the Town succumbed to comments by local residents.

The Town's Response

The Town asserts that it complied fully with SEQRA and that its decision was neither arbitrary nor capricious and had a rational basis. Specifically, the Town states that it created a sufficient record for its determination and that the Court must defer to its conclusions.

Discussion

"Judicial review of a lead agency's SEQRA determination is limited to whether the determination was made in accordance with lawful procedure and whether, substantively, the determination 'was affected by an error of law or was arbitrary and capricious or an abuse of discretion' (CPLR §7803(d), *Chinese Staff & Workers Assn. v. City of New York*, 68 N.Y.2d 359, 363; *Matter of Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 416 (1986)." *Akpan v. Koch*, 75 N.Y.2d 561, 570 (1990). The Court is required to "review the record to determine whether the agency identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination. *Id.*, citing *Matter of Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d at 417. Further, an agency's compliance with its substantive SEQRA obligations is governed by a rule of reason and the extent to which particular environmental factors are to be considered varies in accordance with the circumstances and nature of particular proposals. *Id.*

As the Court of Appeals explained in *Matter of Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d at 417, the lead agency need not identify and address every conceivable

environmental impact, mitigating measure or alternative to satisfy SEQRA's substantive requirements and agencies have considerable latitude in evaluating environmental effects and choosing among alternatives. The Court is not permitted to second-guess the agency's choice, which can be annulled only if it is arbitrary, capricious or unsupported by substantial evidence.

Here the record amply demonstrates that the Town identified Petitioners' particular environmental concerns about the impact of the replacement antenna on Olana's viewshed. The Planning Board's June 12, 2013 Resolution specifically noted the "potential area of environment concern was injury to the Olana viewshed." In fact, the June 12, 2013 Resolution makes it abundantly clear that the Planning Board took the required "hard look" at the impact of the replacement tower on Olana's viewshed. Hence, the Resolution specifically states in relevant part:

4. The current application seeks the replacement of the two existing towers with one tower and so represents lowering the number of towers.

5. According to both visual impact studies received, the existing towers are visible today from Olana. The Planning Board finds this visual impact from Olana to be minimal. The new tower will have a similar minimal visual impact. The proposed tower location is of the same height as the existing towers and in the same location as the existing towers. It has been suggested by those speaking on behalf of the Olana Historic Site that because the proposed tower is about 13 feet wide at the tree line (which is about 40 feet high), while the existing towers are each about 2 feet wide, therefore, the visual impact of the proposed tower would be greater than the visual impact of the existing tower. However, the difference of less than 11 feet in width is not discernible at the distance of about 2 miles away from the site to Olana...

7. The Planning Board takes notice that the proposed tower would be one of many twentieth and twenty-first century additions to the Olana viewshed made since Frederic Church's lifetime, and because there are already two towers at the location, does not represent an increase in the number of such

additions. There are, in the same viewshed, three radio towers. These towers are taller than the existing/proposed towers here under review. They are much closer to Olana, about ½ mile away. They carry lights which blink at night. The three towers are visible to a much greater degree than the proposed tower.

These and other portions of the Resolution adequately demonstrate that the Town took the requisite "hard look" at whether the replacement of the existing towers would cause injury to the Olana viewshed. Further, the Town's determination was supported by substantial evidence that included visual analyses and photographic simulations submitted by both parties and professional opinion. The Town was entitled in its discretion to choose between the conflicting expert opinions it received³. See, e.g., *Matter of Brooklyn Bridge Park Legal Defense Fund, Inc. v. New York State Urban Dev. Corp.*, 50 A.D.3d 1029 (2d Dept. 2008) citing *Matter of Ball v. New York State Dept. Of Env'tl. Conservation*, 35 A.D.3d 732, 733 (2d Dept. 2006) and *Matter of Winston v. Freshwater Wetlands Appeals Bd.*, 254 A.D.2d 363, 364 (2d Dept. 1998). In fact, the Town was required to make the determination about the significance of the visual impact of the replacement tower, and this Court is constrained not to second-guess its choice. See, 6 N.Y.C.R.R. 617.7; *Matter of Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d at 417, *Akpan v. Koch*, 75 N.Y.2d at 571.

Petitioners' arguments concerning the reference in the Resolution to the OPRHP's 1992 but not its subsequent, 2013 letters are misplaced. As the Town points out, the New York State Department of Environmental Conservation (NYSDEC) SEQRA Handbook encourages review of previous significance determinations like the 1992 letter. Further,

³Nothing in the record suggests that the Town's choice to credit one expert rather than another was irrational in any respect.

the record demonstrates that the Town did not ignore OPRHP's 2013 letter. The Town actually reviewed the letter at its April 22, 2013 meeting and was subsequently informed in a June 11, 2013 letter that OPRHP had made a factual error by believing that the proposed Tower was to be a "solid mass." Regardless, the April, 2013 letter was submitted prior to the visual analyses and photographic simulations the Town later received and it was weighed in making the determination.

The Court rejects Petitioners other arguments. Contrary to Petitioners' contentions, the Town received and viewed a Visual EAF Addendum both in 2010 and 2013. Further, the Town was not required to mandate that an EIS be completed because it took a hard look at the relevant environmental concerns, determined that the project would have no significant adverse impact and issued a negative declaration. *Village of Poquott v. Cahill*, 11 A.D.3d 536, 540 (2d Dept. 2004) and cases cited. In addition, the Town was not required to assess the future impact on Olana's viewshed of the approval in this case of the replacement tower (See, 6 N.Y.C.R.R. 617.7), nor was its review deficient because of an alleged failure to consider the importance of Olana's being an SASS. To the contrary, the Town reviewed and relied upon a 5-mile visual analysis that included the SASS. Moreover, the Town's decision was not improperly influenced by citizen comments. The Town received letters in support of both Petitioners and the project. It held appropriate public hearings. Nothing in the record supports the view that the comments improperly influenced the Town's decision that the replacement tower would have a minimal visual impact. Finally, the record shows that mitigation measures and alternatives were considered as the Town received the Visual Impact Assessment Report of Tectonic

Engineering, requested that the applicant provide an explanation of alternative colors and tower designs, considered the applicant's responses to those requests, and reviewed the visual analysis of June 11, 2013.

Clearly, the Town met all of its SEQRA obligations.

Zoning Law

Petitioners argue that the Town violated its Zoning Code because the applicant did not submit all of the necessary materials to obtain an approval. Specifically, Petitioners' assert that the applicant did not establish that the color of the tower "minimizes degree of visual impact" (Zoning Code 4.7(11)(a)(i)), that the Town failed to consider alternative tower designs (Zoning Code 4.7(10), (11)), and that the applicant failed to provide confirmation that the new antennas would be in compliance with federal guidelines for electromagnetic emissions (Zoning Code 4.7(8)(g)). Eger and the Town disagree.

The record compels the conclusion that the Town followed its own Zoning Law. With regard to the color of the tower, the applicant wrote that the same color gray was being used so that "there will be no discernible change in the structure color already present in the view shed, thereby resulting in no significant visual impact due to structure color." Further, the Supplemental Visual Analysis of June 11, 2013 reached the conclusion that an alternate color was likely to be more visible and would attract viewers.

With regard to lack of consideration of alternative designs, the same Supplemental Visual Analysis considered monopole, flagpole and simulated tree tower designs and concluded that these would result in greater visibility.

Finally, with regard to electromagnetic emissions, the replacement tower does not

emit electromagnetic emissions. Rather, those are emitted by the collocators' antennas. Petitioners have repeatedly noted that in this proceeding they were not challenging the approvals granted to Collocators to place their antennas on the replacement tower. Regardless, the application confirmed that the replacement tower would comply with federal guidelines for electronic emissions.


Petitioners' claims with regard to the Town Zoning law are denied.

The Petition is hereby dismissed.

This constitutes the Decision and Order of this Court. The Court is forwarding the original Decision and Order directly to Respondent Eger's counsel, who is required to comply with the provisions of CPLR §2220 with regard to filing and entry thereof. A photocopy of the Decision and Order is being forwarded to all other parties who appeared in the action. All original motion papers are being delivered by the Court to the Supreme Court Clerk for transmission to the County Clerk.

Dated: Claverack, New York
August 26, 2014

ENTER



RICHARD MOTT, J.S.C.

Documents Considered:

1. Notice of Petition, dated August 15, 2013, Petition, dated August 15, 2013 with Exhibit A, Petitioners' Memorandum of Law, dated October 22, 2013;
2. Respondent Eger's Answer, dated May 8, 2014, Memorandum of Law, dated May 8, 2014, Affidavit of Eileen Yandik, dated May 7, 2014 with Exhibit A, Affidavit of Peter

- T. Sutherland, dated May 7, 2014, Affidavit of Tammy Molinski, dated May 7, 2014 with Exhibit A,
3. Respondent Town of Livingston's Answer, dated May 9, 2014, Memorandum of Law of Livingston Planning Board, dated May 9, 2014, Affidavit of Philip Schmidt, dated May 9, 2014 with Exhibits A-C,,
 4. Petitioners' Reply, dated June 6, 2014, Petitioner's Reply Memorandum of Law, dated June 6, 2014;
 5. Letter of Jacqueline Phillips Murray, Esq., dated June 18, 2014;
 6. Letter of Claudia K. Braymer, Esq., dated July 7, 2014;
 7. Sur-Reply Affidavit of Jacqueline Phillips Murray, Esq., dated July 2, 2014;
 8. Letter of Jacqueline Phillips Murray, Esq., dated July 8, 2014 with attachment (Record Item 20);
 9. Letter of Claudia K. Braymer, Esq., dated July 9, 2014;
 10. Letter of J. Theodore Hilscher, Esq., dated July 22, 2014.

Caffry & Flower

ATTORNEYS AT LAW

100 BAY STREET
GLENS FALLS, NEW YORK 12801
(518) 792-1582 • FAX: 793-0541

JOHN W. CAFFRY

CLAUDIA K. BRAYMER

KRISTINE K. FLOWER

November 5, 2014

VIA UPS COURIER

Marlene H. Dortch, Secretary
Federal Communications Com.
Office of the Secretary
9300 East Hampton Drive
Capitol Heights, MD 20743

Re: Application for Leave to Amend Petition for
Reconsideration by Eger Communications:
New Communications Tower, Columbia County, New York

Dear Ms. Dortch:

On behalf of Scenic Hudson, Inc. and The Olana Partnership,
enclosed please find for filing the original and four (4) copies
of our Opposition to the Application for Leave to Amend Petition
for Reconsideration, by Eger Communications.

Thank you for your attention to this matter.

Sincerely,


John W. Caffry
jcaffry@caffrylawoffice.com

JWC/ljs

enc.

cc: John Bonafide, SHPO
Donald Johnson, FCC
Jeffrey Steinberg, FCC
Daniel Abeyta, FCC
Stephen Delsordo, FCC
Scenic Hudson, Inc.
The Olana Partnership
Jacqueline P. Murray, Esq.
(all w/enc.) (all via e-mail)

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of

EGER COMMUNICATIONS
PROPOSED TOWER PROJECT
COLUMBIA COUNTY, NEW YORK.

**OPPOSITION TO APPLICATION
FOR LEAVE TO AMEND
PETITION FOR
RECONSIDERATION**

Filed by:

Caffry & Flower
John W. Caffry, of Counsel
100 Bay Street
Glens Falls, New York 12801
(518)792-1582
Attorneys for Scenic Hudson, Inc.
and The Olana Partnership

Date: November 4, 2014

This firm represents Scenic Hudson, Inc. ("Scenic Hudson") and The Olana Partnership ("TOP") in this matter. Scenic Hudson and TOP were granted "consulting party" status (16 U.S.C. § 800.2) in this matter pursuant to a determination by the Federal Preservation Officer for the Federal Communications Commission ("FCC") dated August 27, 2013. Eger Communications ("Eger") is the current owner and operator of two 190 foot tall guyed communications towers located on Blue Hill in the Town of Livingston, Columbia County, New York and seeks to construct a new tower at that location, while removing the existing towers.

Scenic Hudson and TOP oppose Eger's Application (dated October 24, 2014) to be allowed to amend its pending Petition for Reconsideration (dated August 30, 2013) of the FCC's August 5, 2013 decision determining that the Eger tower project should be reviewed pursuant to Section 106 of the National Historic Preservation Act ("NHPA"). Eger argues in its Application that the August 26, 2014 decision¹ of New York Supreme Court,² in Columbia County, in the civil lawsuit filed by Scenic Hudson and TOP against the Town of Livingston Planning Board and Eger, is somehow relevant to the Petition, such that the state court decision should be made part of the Petition. Said decision is

¹ A copy of this decision is attached to the Application.

² Supreme Court is New York's trial level state court of general jurisdiction.

not relevant to the FCC's administration of NHPA § 106, and Eger's Application should be denied.

The state court determined that the Town of Livingston Planning Board met its obligations under New York's State Environmental Quality Review Act ("SEQRA")³, including when it determined that the proposed project would not have a "significant adverse impact" on the historic viewshed of the Olana State Historic Site, so that an environmental impact statement was not required to be prepared for the project.

This ruling has no bearing on the administration of NHPA § 106. Under § 106, the FCC must determine whether a project may have an "adverse effect". Adverse effect is defined as:

An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative. 36 CFR § 800.5(a)(1).

By contrast, under SEQRA, a "significant adverse impact" is not specifically defined in either the statute or its

³ SEQRA, Environmental Conservation Law Article 8, is New York's equivalent of NEPA.

implementing regulations. Instead, the determination of the significance of an adverse impact is made on a case-by-case basis by the lead agency for the action in question, applying a multitude of factors. See 6 New York Code, Rules, and Regulations § 617.7(c). This analysis required under SEQRA is somewhat similar to the application of the federal definition of adverse effect in some respects, but quite different in others. Among other things, 36 CFR § 800.5(a) does not require that an adverse effect be "significant" in order to trigger a NHPA § 106 review.

Therefore, the state court's ruling upholding the local planning board's decision that the project would not have a significant adverse impact pursuant to SEQRA is not at all relevant to the FCC's administration of the NHPA and the FCC's determination regarding the project's adverse effect.

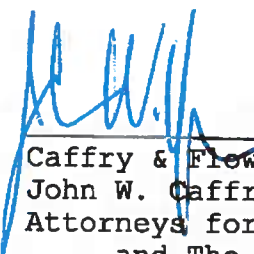
It is also worth noting that state court did not itself rule upon the issue of whether or not Eger's project would have a significant adverse impact under SEQRA. It merely held that the planning board's decision was supported by substantial evidence⁴ and that the board properly exercised its discretion. With all due respect to the Town of Livingston Planning Board, its

⁴ "The substantial evidence standard is a minimal standard." FMC Corp. V. Unmack, 92 N.Y.2d 179, 188 (1998). It requires less proof than clear and convincing evidence, preponderance of the evidence, overwhelming evidence, or evidence beyond a reasonable doubt. Id.

decision applying state law can not supercede the August 5, 2013 determination of the FCC. Therefore, the state court decision is completely irrelevant to the FCC's administration of the NHPA § 106 process.

For the foregoing reasons Eger's October 23, 2014 Application for Leave to Amend should be denied. Likewise, the Petition for Reconsideration should be denied, so that the parties may commence the Section 106 consultation process.

Dated: November 4, 2014



Caffry & Flower
John W. Caffry, of Counsel
Attorneys for Scenic Hudson, Inc.
and The Olana Partnership
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November 20, 2014

VIA UPS COURIER

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
9300 East Hampton Drive
Capitol Heights, MD 20743

Re: Reply in further support of Application for
Leave to Amend Petition for Reconsideration
Eger Communications, Inc.
Proposed Replacement Tower, Columbia County, New York

Dear Ms. Dortch:

On behalf of our client, Eger Communications, Inc., please find enclosed for filing an original and four (4) copies of our Reply in further support of Application for Leave to Amend Petition for Reconsideration.

Should you have any questions or comments, please do not hesitate to contact me. Thank you for your attention to this matter.

Very truly yours,

THE MURRAY LAW FIRM, PLLC

Jacqueline Phillips Murray

jpm@themurraylawfirm.com

JPM

Enclosure

cc (w/ encl., via email and US Mail):

Mark Eger
John Caffry, Esq.
Donald Johnson
Jeffrey Steinberg
Daniel Abeyta
Stephen Delsordo

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of

EGER COMMUNICATIONS
PROPOSED REPLACEMENT TOWER,
COLUMBIA COUNTY, NEW YORK.

APPLICATION FOR LEAVE TO AMEND
PETITION FOR RECONSIDERATION

REPLY

Filed by:

The Murray Law Firm, PLLC
Jacqueline Phillips Murray, Esq., Of Counsel
10 Maxwell Drive, Suite 100
Clifton Park, NY 12065
(518) 688-0755

Attorneys for Eger Communications

Date: November 20, 2014

Eger Communications ("Eger") respectfully submits this Reply in response to opposition papers filed by Scenic Hudson, Inc. and The Olana Partnership (collectively, the "Opponents") in respect to Eger's Application for Petition for Leave to Amend its Petition for Reconsideration to the Federal Communications Commission ("Commission").

In its instant application, Eger seeks to amend its Petition for Reconsideration to add the August 26, 2014 Decision/Order of New York State Supreme Court holding that the Town of Livingston Planning Board correctly determined that Eger's proposed Replacement Tower would not have an adverse impact on the Olana viewshed (the "State Court Decision").

In an attempt to prevent the Commission from considering the State Court Decision, the Opponents misapprehend the Commission's determination from which Eger seeks relief in its Petition for Reconsideration. Eger's Petition for reconsideration seeks relief from the Commission's August 5, 2013 letter directing Eger to complete a Section 106 review process for the Replacement Tower, without resolving whether the proposed Replacement Tower falls within the replacement tower exclusion from Section 106 review pursuant to Nationwide Programmatic Agreement ("NPA") Section III(B). In its August 5,

2013 letter, the Commission stated that the potential risk that the proposed Replacement Tower would have a "significantly greater visual intrusion than the existing guyed towers" was a unique circumstance giving rise to the Commission's decision to require Section 106 review of the Replacement Tower. On this point, the State Court Decision is, indeed, relevant because it negates the potential risk of visual impact cited by the FCC in its August 5, 2013 letter as the basis for requiring Section 106 review of the Replacement Tower even though the Replacement Tower meets all of the criteria set forth in NPA Section III(B) for exclusion from Section 106 review.¹

The Opponents' erroneously allege that the State Court Decision "has no bearing" on how the Commission determines an "adverse effect" under the NHPA Section 106 review process. However, the Opponents' allegation is irrelevant because Eger does not seek reconsideration of any Commission determination of

¹ It is indisputable that, in accordance with NPA Section III (B), the Eger Replacement Tower is the same height as the existing tower it will replace; it is at the same site and does not expand its boundaries or require any excavation outside any existing access or utility easements related to the site; and it was constructed prior to March 16, 2001. Moreover, in excess of the NPA exclusion criteria, the NY SHPO already completed a Section 106 review for the existing tower to be replaced and determined by letter dated September 28, 1992 that it has No Effect on historic or cultural resources.

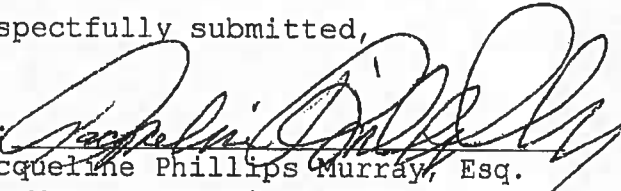
"adverse effect" in a Section 106 review of Eger's proposed Replacement Tower. This is by virtue of the simple fact that Eger has not commenced or completed any such Section 106 review process and, as a result, the FCC has made no such determination. Rather, Eger's Petition for Reconsideration seeks review of the Commission's August 5, 2013 letter about whether any Section 106 review of the Replacement Tower should be required at all. As fully explained in Eger's Petition for Reconsideration dated August 30, 2013, it is respectfully submitted that the Commission should grant the Petition to reconsider its August 5, 2013 letter and determine that the Replacement Tower is excluded from Section 106 review pursuant to the plain language of NPA Section III (B).

IV. Conclusion

For the reasons set forth above, Eger respectfully requests that the Commission grant Eger leave to supplement its Petition for Reconsideration with the recent State Court Decision.

Date: November 20, 2014

Respectfully submitted,

By: 
Jacqueline Phillips Murray, Esq.
The Murray Law Firm, PLLC
10 Maxwell Drive, Suite 100
Clifton Park, NY 12065
(518) 688-0755
Attorneys for Eger Communications



United States Department of the Interior

NATIONAL PARK SERVICE
Northeast Region
United States Custom House
200 Chestnut Street
Philadelphia, PA 19106

IN REPLY REFER TO:

A.1.2.(NER-PA)

JAN 06 2015

Received & Inspected

JAN 28 2015

FCC Mail Room

Mr. Mark Eger
Eger Communications
33 Eger Road
Hudson, NY 12534

Dear Mr. Eger:

We are writing to follow-up on our letter dated October 19, 2010, regarding the proposed telecommunications tower to be located at Blue Hill, Columbia County, NY, which will require a permit from the Federal Communications Commission (FCC). The National Park Service, on behalf of the Secretary of the Interior, in accordance with 36 CFR Section 800.10(c) of the Advisory Council on Historic Preservation's "Protection of Historic Properties" regulations pursuant to Section 106 of the National Historic Preservation Act, is requesting to be a consulting party in your Section 106 consultations.

The proposed tower would be in the viewshed of the Frederic E. Church House (Olana), a National Historic Landmark (NHL) in Columbia County, NY. Olana was designated an NHL by the Secretary of the Interior on June 22, 1965, for its significance as the home and studio of Frederic E. Church, one of the leading American Landscape artists of the Hudson River School. The picturesque estate, which was designed by Church, dominates a hilltop on the east bank of the Hudson River with views west to the Catskill Mountains and east to the Berkshires. Few estates with existing artist studios of such authenticity remain in existence.

If you have any questions regarding the NPS participation in the Section 106 process for this project, please contact Bonnie Halda, Chief, Preservation Assistance at 215-597-5028 or by e-mail at bonnie_halda@nps.gov.

Sincerely,

Maryanne Gerbauckas

Associate Regional Director, Resource Stewardship

Stephen DelSordo, Federal Communications Commission

Ruth Pierpont, New York State Historic Preservation Office

Charlene Dwin Vaughn, Advisory Council on Historic Preservation

Jeffrey Anzevino, Scenic Hudson

Sara J. Griffen, The Olana Partnership

Sara Olson, Roosevelt-Vanderbilt National Historic Site

Columbia County 911

EMERGENCY COMMUNICATIONS DEPARTMENT

85 Industrial Tract
Hudson, New York 12534

Robert C. Lopez
Director

Office: 518-828-1263
Fax: 518-828-9088

September 8, 2015

Via U.S. Postal Service Express Mail

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, DC 20554

Re: Proposed Replacement Tower by Eger Communications et al.

Dear Ms. Dortch:

We recently received a copy of the Competition and Infrastructure Policy Division's ("Division") July 27, 2015 Order on Reconsideration ("Order"), DA 15-862, concerning the above public safety replacement tower project. The Order dismissed a petition for reconsideration of a 2013 Letter Ruling by the Division, which in turn responded to an informal complaint filed in 2011. We understand that Eger Communications recently filed an Application for Review of the Order, and we urge the Commission to grant the Application for Review and, after four years, finally afford Columbia County the opportunity to be heard that it previously requested by letter to the Division on September 19, 2013.

The Division Never Responded To Columbia County's Request For An Opportunity To Be Heard

It is difficult to comprehend why the Division ignored Columbia County's September 19, 2013 written request for an opportunity to be heard, given that the replacement tower is desperately needed to support upgrades to Columbia County's antiquated and failing public safety communications system. At the very least, Columbia County requests a direct reply from the Commission to its September 19, 2013 request.

The Division Has Repeatedly Ignored Columbia County's Public Safety Needs

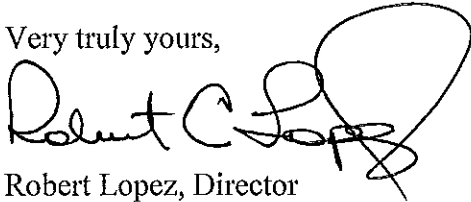
To date, the Division has failed to consider -- much less address -- the dire consequences to first responders and the public that they serve as result of the Division's protracted four-year delay concerning this replacement tower. Columbia County's first responders and their advocates notified the Division by their letters between 2011 and 2013, expressing their imminent need for the replacement tower to upgrade and improve their failing and antiquated public safety communications system. The Division was also made aware that Columbia County's public

Marlene H. Dortch, Secretary
September 8, 2015
Page 3

Columbia County Urges The Commission To Grant Eger's Application For Review

Given the public safety interests are directly impacted by the Division's Order, we respectfully request that the Commission grant Eger's Application For Review. Columbia County's need to upgrade its public safety radio system is as clear and imminent as the risk presented to our first responders and the public as a direct consequence of the indefinite delay that will unquestionably result from the Division's Order.

Very truly yours,

A handwritten signature in black ink, appearing to read "Robert Lopez", with a large, stylized loop at the end.

Robert Lopez, Director
Columbia County 911

cc: Jeffrey Steinberg
Deputy Chief
Competition and Infrastructure Policy Competition Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

David Furth
Deputy Bureau Chief
Public Safety and Homeland Security Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

**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 Rules⁵ and also dismiss Eger's Application for Leave as moot.

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

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 DeSordo, 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

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

(continued....)

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

(...continued from previous page)

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,

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

Jeffrey S. Steinberg
Deputy Chief, Competition and Infrastructure Policy Division
Wireless Telecommunications Bureau

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

STAMP AND RETURN

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Eger Communications

Proposed Replacement Tower
170 Eger Road, Town of Livingston,
Columbia County, New York

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DA 15-862

Accepted / Filed

AUG 26 2015

To: The Commission

Federal Communications Commission
Office of the Secretary

APPLICATION FOR REVIEW

Eger Communications

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August 26, 2015

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Eger Communications	)	DA 15-862
)	
Proposed Replacement Tower)	
170 Eger Road, Town of Livingston,)	
Columbia County, New York)	

APPLICATION FOR REVIEW

Eger Communications (“Eger”), pursuant to Section 1.115 of the Commission’s rules, submits this application for review in response to the recent *Reconsideration Order* issued in this matter by the Deputy Chief of the Wireless Telecommunications Bureau’s Competition and Infrastructure Policy Division (“Division”).¹ As discussed below, the Division erred in dismissing Eger’s petition for reconsideration of the Division’s 2013 *Letter Ruling*, which required Eger to perform a full Section 106 historic preservation review for a proposed replacement tower that will support critical public safety communications upgrades in Livingston, Columbia County, New York.² On review, the Commission should vacate the *Reconsideration Order* and reach the merits to confirm that the proposed tower is a replacement tower that is excluded from Section 106 review under Section III.B of the 2004 Nationwide Programmatic Agreement (“2004 NPA”).³

¹ *Eger Communications*, Order on Reconsideration, DA 15-862 (WTB/CIPD rel. July 27, 2015) (“*Reconsideration Order*”), dismissing Petition for Reconsideration of Eger Communications (filed Aug. 30, 2013) (“*Petition*”).

² Letter from Jeffrey S. Steinberg, Deputy Chief, Spectrum and Competition Policy Division, to Jacqueline P. Murray, Counsel for Eger Communications (Aug. 5, 2013) (“*Letter Ruling*”).

³ Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Commission, § III.B (2004), 47 C.F.R. Pt. 1, App. C.

I. INTRODUCTION AND SUMMARY

This case presents critical public safety concerns that merit immediate Commission review. In 2010, Eger filed an application with the Town of Livingston, New York for approval to replace an existing twin 190-foot guyed tower structure used to support public safety services with a single self-supporting lattice tower of the same height at the same location.⁴ The record amply shows that the replacement tower is essential to support needed upgrades to Columbia County's public safety communications systems⁵ – so essential, in fact, that the County's public safety agencies and departments became co-applicants to Eger's local siting application.⁶ The Town of Livingston approved the replacement tower, after taking into account concerns about impacts to historic properties.⁷ Indeed, the existing tower structure was completed after the NY

⁴ *Reconsideration Order* at ¶ 2; Petition at 2.

⁵ See Petition at 5-7 & Ex. C (appending letters from Columbia County 911 Emergency Communications Department, County of Columbia – Emergency Medical Services, Columbia County Office of Fire Coordinator, NDP Emergency Medical Services, Lebanon Valley Protective Association, Livingston Fire District Board of Fire Commissioners, Greenport Rescue Squad, and Hillsdale Fire Company No. 1 – all explaining their imminent need for the replacement tower); see also Letter from the Honorable Chris Gibson, Representative, United States House of Representatives, to Daniel Abeyta, Assistant Chief, Spectrum and Competition Policy Division (Jun. 24, 2013) (“Rep. Gibson Letter”); Letter from the Honorable Kathleen A. Marchione, State Senator, New York State Senate, to Jeffrey S. Steinberg, Deputy Chief, Spectrum and Competition Policy Division (Nov. 14, 2013) (“Sen. Marchione Letter”).

⁶ See Letter from Andrew B. Howard, Deputy County Attorney, Columbia County, to Jeffrey S. Steinberg, Deputy Chief, Spectrum and Competition Policy Division (Sept. 19, 2013) (“Columbia County Attorney Letter”); Petition at 5-6, 11; Reply in Further Support of Petition for Reconsideration of Eger Communications, at 3 (filed Sept. 20, 2013) (“Reply”).

⁷ See *Reconsideration Order* at ¶ 2 n.6; *Scenic Hudson, Inc. et al. v. Town of Livingston Planning Board et al.*, Decision/Order, Index No. 6454-13, R.J.I. No. 10-13-0493 (N.Y. Sup. Ct. Aug. 26, 2014) (“*Scenic Hudson*”), appended as App. A to Application for Leave to Amend Petition for Reconsideration of Eger Communications (Oct. 24, 2014).

SHPO determined in 1992 that it would have no impact on historic properties,⁸ and the proposed replacement unquestionably meets the criteria for exclusion in the 2004 NPA.⁹

Nevertheless, Scenic Hudson, Inc. and Olana Partnership filed an informal complaint with the Division on April 5, 2011, alleging that the proposed replacement tower would have an impact on the Olana House State Historic Site ("Olana") located approximately two miles away.¹⁰ *More than two years later*, the Division issued its *Letter Ruling*, which declined to address the applicability of the replacement tower exclusion, directed Eger to conduct a full Section 106 review, and ignored immediate public safety needs for sorely needed upgrades to antiquated and failing systems.¹¹ Eger promptly filed a petition for reconsideration, stressing the applicability of the 2004 NPA replacement tower exclusion and the need for public safety to be heard before finally deciding the informal complaint.¹² Public safety advocates also warned of the dangers of further delay, highlighting "near misses" attributable to the antiquated radio system that have put the lives of first responders at risk during emergencies.¹³ Yet, it took the

⁸ Letter from Julia S. Stokes, Deputy Commissioner for Historic Preservation, New York Office of Parks, Recreation and Historic Preservation ("NY SHPO"), to Mark Eger, Mark Eger & Bros., Inc. (Sept. 28, 1992) ("1992 SHPO Approval"), *appended as Ex. B* to Petition; *see* Petition at 4-5 n.4. The 1992 SHPO Approval concluded that the existing 190-foot tower structure that Eger proposes to replace with a new 190-foot tower at the same site "will have No Impact upon cultural resources in or eligible for inclusion in the State and National Registers of Historic Places."

⁹ *See* Petition at 3-5, 7-9. Section III.B of the NPA generally excludes from Section 106 review a replacement tower that does not substantially increase the size of the existing tower, provided certain other conditions are met. *See infra* note 50.

¹⁰ *See* Letter from John W. Caffry, Counsel for Olana Partnership and Scenic Hudson, Inc., to Dan Abeyta, Assistant Chief, Spectrum and Competition Policy Division, at 1, 3 (Apr. 5, 2011) ("Informal Complaint").

¹¹ *See Letter Ruling* at 3.

¹² *See* Petition at 3-11.

¹³ *See, e.g.,* Columbia County Attorney Letter; Sen. Marchione Letter.

Division almost *two more years* to rule on the petition, only to dismiss it on procedural grounds and find that the *Letter Ruling* was a non-final, interlocutory action not subject to reconsideration.¹⁴ Notably, the Division refused the County's first responders an opportunity to be heard, even though the Division's decision indefinitely delayed needed upgrades to their public safety systems.¹⁵

The Division's finding that the *Letter Ruling* is interlocutory and not subject to review is clear error, and the *Reconsideration Order* must be vacated. Pursuant to the Supreme Court's test in *Bennett v. Spear* – the very precedent relied upon by the Division¹⁶ – the decision to require Eger to complete a full Section 106 review was a final action imposing a specific obligation on Eger and resulting in real legal consequences to Eger and the public safety co-applicants. It is therefore fully reviewable. In any case, the Commission should exercise its discretion to consider the merits given the vital public safety interests at stake.¹⁷ Prompt review by the Commission is therefore warranted to conform to precedent, correct the Division's erroneous finding, and avoid further procedural prejudicial error to Eger and its public safety co-applicants.¹⁸ Upon consideration of the merits, the Commission should balance environmental considerations with its core mandate to "promot[e] safety of life and property through the use of

¹⁴ *Reconsideration Order* at ¶¶ 9-11.

¹⁵ See Columbia County Attorney Letter.

¹⁶ See *Reconsideration Order* at ¶ 9 & n.39 (citing *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) ("*Bennet*")).

¹⁷ See, e.g., *Carmel Broadcasting Limited Partnership*, 6 FCC Rcd 3287, 3287 ¶ 3 (1991) ("*Carmel Broadcasting*"); *Am. Tel. & Telegraph Co.*, 41 F.C.C.2d 389, 446 ¶ 109 n.23 (ALJ 1971) ("*AT&T*").

¹⁸ 47 C.F.R. § 1.115(b).

... radio communication,”¹⁹ and find that the proposed tower is excluded from Section 106 review under the plain terms of the 2004 NPA.

After more than four years, the time is now to act and allow this project to move forward, consistent with the 2004 NPA. As New York State Senator Kathleen Marchione has warned: *“Continued delay ... would, without question, unduly compromise public safety and continue to jeopardize the lives of our first responders.”*²⁰

II. QUESTIONS PRESENTED FOR REVIEW

The following questions are presented for Commission review:

- (i) whether the Commission should consider the merits of the Petition, finding that the Division erroneously dismissed the Petition as an interlocutory appeal, contrary to precedent, or that vital public safety considerations compel the Commission to exercise its discretionary review; and
- (ii) whether the Commission should find on the merits that the proposed tower is excluded from Section 106 review under Section III.B of the 2004 NPA or, at a

¹⁹ 47 U.S.C. § 151; *see Amendment of Environmental Rules*, 6 FCC Rcd 1716, 1716 ¶ 4 n.13 (1991) (FCC must “reach fully informed decisions that address and balance environmental issues with other issues within [its] mandates”). The FCC’s commitment to public safety is long held at the highest levels of the Commission. *See, e.g.,* Remarks of FCC Chairman Tom Wheeler, American Enterprise Institute, Washington, D.C., at 2 (June 12, 2014) (“The FCC’s responsibility to promote public safety ... is fundamental. Our mandate is codified in the Communications Act”), https://apps.fcc.gov/edocs_public/attachmatch/DOC-327591A1.pdf; *Deployment of Text-to-911 Applications*, 29 FCC Rcd 9846, 9944 (2014) (Statement of Commissioner Ajit Pai) (“The FCC has no higher purpose than promoting the safety of life and property through the use of communications.”); *NET 911 Improvement Act*, 23 FCC Rcd 13144, 13175 (2008) (Statement of Commissioner Jonathan S. Adelstein) (“Since the earliest days of this Commission, promoting our nation’s public safety through communications has been our highest calling.”); *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, 19 FCC Rcd 15676, 15747 (2004) (Statement of Commissioner Kathleen Q. Abernathy) (“[T]he Commission has no higher priority than promoting public safety”).

²⁰ Sen. Marchione Letter (emphasis added).

minimum, that public safety co-applicants must be afforded a full opportunity to be heard to avoid further prejudicial procedural error.

As shown below, these questions should be answered in the affirmative.²¹ Accordingly, these questions warrant Commission consideration because the action taken by the Division conflicts with precedent, contains erroneous findings as to important questions of fact, and has resulted in prejudicial procedural error. 47 C.F.R. § 1.115(b).

III. ARGUMENT

A. The Division Wrongly Dismissed Eger's Petition for Reconsideration, and in Any Case the Commission Should Consider the Merits Given Vital Public Safety Considerations.

The *Reconsideration Order* misapplied applicable Supreme Court precedent to erroneously find that the *Letter Ruling* is interlocutory and not subject to reconsideration. Under *Bennett*, two requirements must be met for an agency action to be final and not interlocutory. "First, the action must mark the consummation of the agency's decisionmaking process – it must not be of a merely tentative or interlocutory nature. And second, the action must be one by

²¹ Consistent with Section 1.115(c), the Division has had ample opportunity to consider whether, under applicable precedent, a Division directive to perform an environmental review is interlocutory. See *Global Tower, LLC*, 29 FCC Rcd 8339 (WTB/SCPD 2014) ("*Global Tower*") (affirming Division's decision requiring tower proponent to prepare an Environmental Assessment and dismissing a petition for reconsideration as interlocutory), cited in *Reconsideration Order* at ¶ 9 nn.38-39. In any case, the Division's position is already "crystalized" in light of *Global Tower*, see *Tribune Co. v. FCC*, 133 F.3d 61, 67 (D.C. Cir. 1998), and public safety's interest in having this matter "resolved promptly" after more than four years "is so great" that further exhaustion before the Division is inappropriate, see *Mathews v. Eldridge*, 424 U.S. 319, 330 (1976); *WSTE-TV, Inc. v. FCC*, 566 F.2d 333, 336-37 (D.C. Cir. 1977) ("*WSTE-TV*"). Nevertheless, in the event the Commission concludes that any arguments are "new," Eger respectfully requests that the Commission treat this filing as a petition for further reconsideration and, pursuant to its general authority to review such petitions, consider the issues presented herein. See 47 U.S.C. § 405; 47 C.F.R. § 1.106; *Extension of Initial Non-Delinquency Period for C and F Block Installment Payments*, 14 FCC Rcd 6080, 6081 n.1 (1999); *Side by Side, Inc.*, 27 FCC Rcd 11132, 11132 n.6 (EB 2012).

which rights or obligations have been determined, or from which legal consequences will flow.”²² Importantly, these requirements should be applied in both a “‘flexible’ and ‘pragmatic’” manner.²³ Both requirements are amply met here.

First, the *Letter Ruling* was the Division’s definitive determination that Section 106 review is required; the conclusion on that point was not tentative. While the *Reconsideration Order* concludes that the requirement to perform a Section 106 review is not the “‘consummation’ of the Section 106 review process” and does not “determine[] whether ... the proposed tower would have an adverse effect,”²⁴ that is not what *Bennet* asks. Rather, the germane question is whether the decision to require Eger to perform a Section 106 review is itself a “final” and not a “tentative” decision,²⁵ and the answer is clearly “yes.”

For example, in *Pennaco Energy, Inc. v. United States DOI*,²⁶ the Tenth Circuit held that a decision by the Department of Interior Board of Land Appeals (“IBLA”) finding that National Environmental Policy Act (“NEPA”) requirements were not satisfied prior to auctioning oil and gas leases, and that further environmental review was required, is a “final” action under the first prong of *Bennett*. The court explained:

Although the IBLA did not make a final determination as to what NEPA required, the IBLA’s decision was a definitive statement of its position that the environmental analyses already prepared by the

²² *Bennett*, 520 U.S. at 177-78 (internal citations and quotations omitted).

²³ *Qureshi v. Holder*, 663 F.3d 778, 781 (5th Cir. 2011) (“In evaluating whether a challenged agency action meets these two [*Bennett*] conditions, this court is guided by the Supreme Court’s interpretation of the APA’s finality requirement as ‘flexible’ and ‘pragmatic.’”) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 149-50 (1967)).

²⁴ *Reconsideration Order* at ¶ 10.

²⁵ *Bennet*, 520 U.S. at 177-78.

²⁶ *Pennaco Energy, Inc. v. United States DOI*, 377 F.3d 1147 (10th Cir. 2004) (“*Pennaco*”).

BLM were not adequate. The IBLA's conclusion on that point was neither tentative nor interlocutory in nature.²⁷

This case presents the same scenario. Although the Division did not make a final determination as to whether the proposed replacement would have an adverse effect, the Division's decision "was a definitive statement of its position that the environmental analyses already prepared" by Eger, in reliance on the 1992 NY SHPO "No Impact" finding and the replacement tower exclusion in the 2004 NPA, "were not adequate."²⁸ The Division's "conclusion on that point was neither tentative nor interlocutory in nature,"²⁹ and therefore is a final action under *Bennett*.

Second, the *Letter Ruling* resulted in an action "by which ... obligations have been determined" and "from which legal consequences will flow" under the second prong of *Bennett*. The *Reconsideration Order*'s conclusion that the requirement to perform a Section 106 review is not an adverse effect determination is irrelevant,³⁰ because it says nothing about the obligations and legal consequences that *do* flow from the *Letter Ruling*. Namely, it "direct[ed] Eger to complete the Section 106 process pursuant to the procedures specified in the [2004 NPA]."³¹ Absent the *Letter Ruling*, Eger had no obligation to complete Section 106 review, because Eger's proposed replacement tower meets all of the criteria to be excluded from Section 106 review pursuant to Section III.B of the 2004 NPA.³²

²⁷ *Id.* at 1555.

²⁸ *Id.*; see also Petition at 3-5 & Ex. A ("FCC/NEPA Screening Report") at 2-4.

²⁹ *Pennaco*, 377 F.3d at 1555.

³⁰ See *Reconsideration Order* at ¶ 10.

³¹ *Letter Ruling* at 1.

³² See Petition at 3-5, 9; see also 2004 NPA, § III ("Undertakings that fall within the provisions listed in [the Section III.B exclusion for replacement towers] are excluded from Section 106 review").

Moreover, “legal consequences” flowed from the *Letter Ruling*: pending the time-consuming and uncertain outcome of a Section 106 review process, Eger’s ability to construct the tower, and the public safety co-applicants’ ability to implement their needed system upgrades, are delayed.³³ In fact, the Commission itself has spelled out those legal consequences: “[F]ailure to complete the Section 106 review process prior to construction may violate ... the NHPA and the Commission’s rules.”³⁴ The *Reconsideration Order* therefore wrongly concluded that the petition for reconsideration was an interlocutory appeal.³⁵

In any case, even assuming *arguendo* the *Letter Ruling* is an interlocutory decision, the Commission has the discretion to review such a ruling in cases where critical public interest considerations are presented.³⁶ This is just such a case, and the public interest equities here compel full and immediate review on the merits. The record shows support from all segments of

³³ See *Pennaco*, 377 F.3d at 1155 (“Definite legal consequences flowed from the IBLA’s decision, namely that Pennaco’s development of the leased tracts is delayed until the BLM has prepared additional unspecified NEPA documentation.”).

³⁴ *Nationwide Programmatic Agreement*, Report and Order, 20 FCC Rcd 1073, 1133 ¶ 164 (2004) (“2004 NPA R&O”).

³⁵ While the *Reconsideration Order* also cites the Commission’s 2014 decision in *Jet Fuel Broadcasting* for the proposition that an action that does not dismiss an application or terminate an applicant’s right to participate is interlocutory, see *Reconsideration Order* at ¶ 9 (citing *Jet Fuel Broadcasting Application for a New AM Broadcast Station*, 29 FCC Rcd 2471, 2471-72 ¶ 2 (2014) (“*Jet Fuel Broadcasting*”)), that case is inapposite. *Jet Fuel Broadcasting* involved two competing applicants for an FCC radio license. See *Jet Fuel Broadcasting*, 29 FCC Rcd at 2471 ¶ 1. Here, Eger is a tower owner, not a competing applicant for a mutually exclusive license.

³⁶ See, e.g., *Carmel Broadcasting*, 6 FCC Rcd at 3287 ¶ 3 (finding that review of an interlocutory ruling is appropriate where “far-reaching and vital concerns to the public interest” are presented); *AT&T*, 41 F.C.C.2d at 446 ¶ 109 n.23 (noting that while challenges to an interlocutory ruling normally will not be entertained, “the Commission may decide, purely as a matter of discretion, to depart from this rule”).

the local public safety community – 911, police, fire, medical, as well as state and local legislators – all stressing the critical and imminent need for the replacement tower.³⁷

In their submissions, public safety advocates explained that the topography in Columbia County (rolling hills and deep valleys) makes radio communications difficult, and the existing location is an “ideal” site that provides “excellent coverage” and “critical communication capability to many of our fire, EMS and police agencies.”³⁸ As one representative explained, it is “without question one of our best sites.”³⁹ Nevertheless, these public safety representatives stated that the existing structure, used by County emergency services for decades, requires immediate replacement.⁴⁰ Structural analysis revealed that the existing structure cannot accept any additional loading.⁴¹ “The inability to expand our capability at this tower site jeopardizes the entire [Columbia County emergency communications] upgrade project – which jeopardizes public safety.”⁴² The County’s public safety agencies are therefore working with Eger to replace the existing tower with simply a stronger tower of the same height at the same site that is capable

³⁷ See, e.g., Letter from Robert C. Lopez, Columbia County 911, to Daniel Abeyta, Assistant Chief, Spectrum and Competition Policy Division (Nov. 30, 2011) (“Columbia County 911 Letter”); Letter from P.J. Keeler, EMS Coordinator, County of Columbia – Emergency Medical Services, to Daniel Abeyta, Assistant Chief, Spectrum and Competition Policy Division (Dec. 2, 2011) (“Columbia County EMS Letter”); Letter from Paul Jahns, Chief, Livingston Fire District, to Daniel Abeyta, Assistant Chief, Spectrum and Competition Policy Division (Dec. 27, 2011); Letter from Benjamin A. Wheeler, Chief, Lebanon Valley Protective Association, to Daniel Abeyta, Assistant Chief, Spectrum and Competition Policy Division (Dec. 26, 2011) (“Lebanon Valley Protective Ass’n Letter”); Rep. Gibson Letter; Sen. Marchione Letter; Columbia County Attorney Letter.

³⁸ See Columbia County 911 Letter; Columbia County EMS Letter.

³⁹ Columbia County 911 Letter.

⁴⁰ See Rep. Gibson Letter; Columbia County 911 Letter; Columbia County EMS Letter; Lebanon Valley Protective Ass’n Letter.

⁴¹ Columbia County 911 Letter; Columbia County EMS Letter.

⁴² Columbia County 911 Letter.

of supporting additional load.⁴³ “Without this replacement tower Columbia County is unable to move forward with our countywide public safety radio infrastructure upgrade project that began back in 2005.”⁴⁴

Tragically, “the number of ‘near misses’ attributable to the condition of the existing radio system grows every year.”⁴⁵ For example, according to Columbia County’s state senator, a number of volunteer firefighters only narrowly escaped an exploding building because of shortcomings in the radio system.⁴⁶ For all these reasons, the public safety co-applicants have called the need for the replacement tower “imminent” and “critical” and urged the Commission to act now to make the county safe, stressing time is of the essence: “This replacement tower is an absolute essential part of the Columbia County public safety radio network and it is imperative the project move forward without delay.”⁴⁷

Accordingly, the Commission should reach the merits and, as discussed below, find that the proposed tower is excluded from Section 106 review under Section III.B of the 2004 NPA. At the very least, the Commission should find that the Division erred in failing to account for public safety concerns and should afford the public safety co-applicants, as parties to the proceeding, an opportunity to be heard.

⁴³ See Rep. Gibson Letter.

⁴⁴ Columbia County EMS Letter.

⁴⁵ Sen. Marchione Letter.

⁴⁶ *Id.*

⁴⁷ Columbia County EMS Letter; Columbia County Attorney Letter; Rep. Gibson Letter; *cf. Lamb’s Knoll, Maryland*, 19 FCC Rcd 12283, 12292-93 ¶ 27 (WTB/SCPD 2004) (recognizing public safety considerations are important).

B. The Commission Should Find that the 2004 NPA Excludes the Proposed Tower from Section 106 Review, and at a Minimum Must Give Public Safety an Opportunity to Be Heard.

On the merits, the Commission should find that the proposed tower fits squarely within the replacement tower exclusion in the 2004 NPA. As a consequence, under the express terms of the 2004 NPA, the proposed replacement tower is “excluded from Section 106 review by the SHPO/THPO, the Commission, and the Council,” and, accordingly, “shall not be submitted to the SHPO/THPO for review.”⁴⁸

In its Petition, Eger explained that it retained Tectonic Engineering & Land Surveying, P.C. (“Tectonic”) to review the proposed replacement tower for compliance with applicable environmental requirements, including the 2004 NPA.⁴⁹ Tectonic determined that the proposed replacement tower was excluded from Section 106 review because it meets the criteria for exclusion in Section III.B of the 2004 NPA.⁵⁰ Specifically, the replacement tower is the same height as the existing tower it will replace; it is at the same site and does not expand its boundaries or require any excavation outside any existing access or utility easements related to the site; and the tower it will replace was constructed prior to March 16, 2001.⁵¹ In addition to meeting all of the exclusion criteria, Eger also explained that the existing 190-foot structure to be

⁴⁸ 2004 NPA, § III.

⁴⁹ See Petition at 3-5, 7-9; FCC/NEPA Screening Report at 2-4.

⁵⁰ 2004 NPA, § III.B (excluding from Section 106 review the construction of a replacement tower that does not substantially increase the size of the existing tower; does not expand the boundaries of the leased or owned property surrounding the tower by more than 30 feet in any direction; does not involve excavation outside these expanded boundaries or outside any existing access or utility easement related to the site; and does not replace a tower built after March 16, 2001 that did not undergo Section 106 review).

⁵¹ FCC/NEPA Screening Report at 2-4.

replaced underwent a Section 106 review process, which was completed with a determination of “No Impact” rendered by the NY SHPO on September 28, 1992.⁵²

Importantly, the Division *does not dispute* that the proposed tower meets the replacement tower exclusion criteria.⁵³ Instead, crediting concerns that the replacement tower “may present a significantly greater visual intrusion” than the existing structure, it ordered Eger to perform a full Section 106 review citing Section XI of 2004 NPA.⁵⁴ Section XI, however, does not direct an outcome; rather, it states that if a member of the public notifies the Commission of concerns regarding application of the 2004 NPA to excluded undertakings, the Commission “will consider public comments” and “where appropriate, take appropriate actions.”⁵⁵

The Commission should revisit the Division’s finding that Section 106 review here is “appropriate.” As noted, the Division does not dispute the applicability of the replacement tower exclusion. The Commission adopted that exclusion because “it is highly unlikely that a replacement tower within the exclusion could have any impact other than on archeological properties,”⁵⁶ and categorically excluding such facilities from Section 106 review would “facilitate[e] the timely deployment of service.”⁵⁷ The Division makes no finding that archaeological resources are in any way impacted here, focusing solely on the potential change

⁵² Petition at 4-5; 1992 SHPO Approval.

⁵³ See *Letter Ruling* at 3.

⁵⁴ *Id.*

⁵⁵ 2004 NPA, § XI.

⁵⁶ 2004 NPA R&O, 20 FCC Rcd at 1090 ¶ 45.

⁵⁷ *Id.* at 1087 ¶ 35. The Commission also rejected a proposed provision to the 2004 NPA that would allow SHPOs to “opt-out” of exclusions from Section 106 Review. See *id.* at 1100 ¶ 72. As Eger explained in its Petition, the Division’s application of Section XI to require Section 106 review effectively amends the 2004 NPA to include an “opt-out” provision, contrary to the provisions of Section XII of the 2004 NPA. See Petition at 9-11 (noting that any amendment to the 2004 NPA “shall be subject to appropriate public notice and comment”).

in visibility from Olana of the replacement tower as compared to the existing twin guyed tower structure that has been in Olana's viewshed for decades.⁵⁸

While Olana is an important resource, the facts here do not support a finding that special environmental review outside the bounds of the 2004 NPA is needed, particularly when weighed against the critical public safety communication needs at stake.⁵⁹ First, the proposed replacement tower meets the replacement tower exclusion criteria, and therefore by definition is "highly unlikely" to impact anything other than archaeological resources.⁶⁰ Second, the proposed tower is located two miles away from Olana, which is well beyond the 0.5 mile area of potential effects normally considered for visual impacts under the 2004 NPA for a non-excluded tower.⁶¹ Third, the Town of Livingston conducted an exhaustive assessment of visual effects, taking into account visual impact studies, and concluded that "[t]he new tower will have a similar minimal visual impact" as the structure it will replace.⁶² Fourth, the New York State

⁵⁸ See *Letter Ruling* at 3.

⁵⁹ See *supra* note 19 and accompanying text.

⁶⁰ 2004 NPA R&O at ¶ 45.

⁶¹ 2004 NPA, § VI.C.4.a; see Sen. Marchione Letter (noting that the replacement tower is "located outside the traditional viewshed" from Olana).

⁶² *Scenic Hudson* at 7-8 (quoting Town of Livingston June 12, 2013 Planning Board Resolution). Specifically, the Resolution found:

"The current application seeks the replacement of the two existing towers with one tower and so represents lowering the number of towers.... According to both visual impact studies received, the existing towers are visible today from Olana. The Planning Board finds this visual impact from Olana to be minimal. The new tower will have a similar minimal visual impact. The proposed tower location is of the same height as the existing towers and in the same location as the existing towers. It has been suggested by those speaking on behalf of the Olana Historic Site that because the proposed tower is about 13 feet [w]ide at the tree line (which is about 40 feet high), while the existing towers are each about 2 feet

Supreme Court upheld that finding, concluding that the Town took a “hard look” at the impact of the tower on the Olana viewshed.⁶³ Fifth, *the NY SHPO found the existing structure has “No Impact” on historic resources.*⁶⁴

Given the foregoing, the “appropriate” action under Section XI of the 2004 NPA is to conclude that the proposed tower meets the replacement tower exclusion criteria and Section 106 review is not required.⁶⁵ As Senator Marchione explained: “I understand that there is some concern about the proximity of the existing tower to the Olana State Historic Site. Olana is a treasure, and the view of the Hudson enjoyed by its visitors is breathtaking. *If this replacement tower, located outside of the traditional viewshed, were to have any adverse impact on it, I wouldn't be lending my support to this project.*”⁶⁶

Moreover, the Division *twice* failed to “consider public comments” submitted by the public agencies about the immediate and critical need for the tower, and for this reason alone the

wide, therefore, the visual impact of the proposed tower would be greater than the visual impact of the existing tower. However, the difference of less than 11 feet in width is not discernible at the distance of about 2 miles away from the site to Olana The Planning Board [also] takes notice that the proposed tower would be one of many twentieth and twenty-first century additions to the Olana viewshed made since Frederic Church's lifetime, and because there are already two towers at the location, does not represent an increase in the number of such additions. There are, in the same viewshed, three [other] radio towers. These towers are taller than the existing/proposed towers here under review. They are much closer to Olana, about ½ mile away. They carry lights which blink at night. The three towers are visible to a much greater degree than the proposed tower.”

⁶³ *Id.* at 7.

⁶⁴ See 1992 SHPO Approval.

⁶⁵ See Petition at 10-11.

⁶⁶ Sen. Marchione Letter (emphasis added).

Commission must revisit the Division's invocation of Section XI. In its Petition, Eger explained that the *Letter Ruling* 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, as confirmed by the numerous letters to the Commission discussed above.⁶⁷ As the Columbia County Attorney's Office so eloquently explained:

We note that ... several of Columbia County's public safety agencies and departments had written to the Commission expressing their imminent need for the replacement tower. The Commission did not respond and, in its [*Letter Ruling*], the Commission did not consider Columbia County's public safety need for the replacement tower. We understand that the Commission was also made aware that Columbia County's public safety agencies and departments became co-applicants to Eger Communications' application for the replacement tower ... but the Commission still failed to afford Columbia County an opportunity to be heard or otherwise take into consideration Columbia County's interests in this matter.

Columbia County's public safety interest in the development of the replacement tower is distinct from that of the tower owner Unless and until the Commission grants the Petition and takes Columbia County's public safety interests into consideration *before* deciding the informal complaint, the public interest will not be served.

We respectfully request that the Commission ... afford Columbia County an opportunity to be heard as soon as possible.⁶⁸

The *Reconsideration Order* perpetuates the *Letter Ruling*'s error by relying on a perceived procedural hurdle – the erroneous conclusion that the *Letter Ruling* is interlocutory and cannot be appealed – to silence the important voices of the public safety community. This is clear prejudicial procedural error. As the D.C. Circuit has recognized, it is incumbent upon the

⁶⁷ See Petition at 5-7, 11 & Ex. C.

⁶⁸ Columbia County Attorney Letter.

Commission to “consider[] whether the public interest would be served by reviewing the [Petition] on its merits” before upholding its dismissal on purely procedural grounds.⁶⁹

IV. CONCLUSION

Reading the Division’s *Letter Ruling* and *Reconsideration Order*, one would have no idea that important public safety agencies alerted the Division to the threat to public safety posed by the Division’s inaction, or even that the Division took these concerns into consideration. The Commission should right this wrong by vacating the *Reconsideration Order* and reaching the merits to confirm that the proposed tower is a replacement tower that is excluded from Section 106 review under Section III.B of the 2004 NPA. At a minimum, the Commission’s public interest standard mandates that the Commission vacate the *Reconsideration Order* and remand to the Division with instructions to rescind its 2013 *Letter Ruling* and restore the *status quo ante*, and thereafter afford public safety a full opportunity to be heard before making a final ruling.

⁶⁹ *WSTE-TV*, 566 F.2d at 337.

Respectfully submitted,

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Dated: August 26, 2015

CERTIFICATE OF SERVICE

I, Blake A. Zanardi of Wilkinson Barker Knauer, LLP, hereby certify that on this 26th day of August, 2015, a copy of the foregoing Application for Review was served via first-class United States mail, postage prepaid, on the following:

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New York State Senate
188 State Street Legislative Office Bldg.
Room 918
Albany, NY 12247

Andrew B. Howard
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Office of the Columbia County Attorney
401 State Street, Suite 2B
Hudson, NY 12534

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Columbia County 911 Emergency
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P.J. Keeler, EMS Coordinator
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Michael Cozzolino
Secretary, Board of Directors
Greenport Rescue Squad
3 Newman Road, P.O. Box 275
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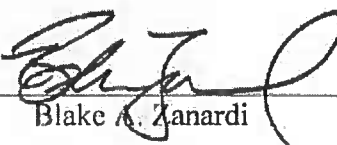
Benjamin A. Wheeler, Chief
Lebanon Valley Protective Association
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Mark Browne
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NDP Emergency Medical Services
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Commissioners
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COMMITTEE ON AGRICULTURE
SUBCOMMITTEE ON COMMODITY EXCHANGES,
ENERGY, AND CREDIT

SUBCOMMITTEE ON NUTRITION

COMMITTEE ON THE BUDGET

COMMITTEE ON TRANSPORTATION
AND INFRASTRUCTURE
VICE CHAIR, SUBCOMMITTEE ON
RAILROADS, PIPELINES, AND HAZARDOUS MATERIALS

SUBCOMMITTEE ON ECONOMIC DEVELOPMENT,
PUBLIC BUILDINGS, AND EMERGENCY MANAGEMENT

SUBCOMMITTEE ON HIGHWAYS AND TRANSIT

Congress of the United States
House of Representatives

July 17, 2018

The Honorable Ajit Pai
Chairman
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Case Number: DA15862

Dear Chairman Pai:

I wanted to provide an update from the Columbia County Board of Supervisors regarding the replacement of the Eger Communications Blue Hill replacement tower project. While the FCC continues to evaluate the Application for Review, the local governments, school districts, and first responders which rely on the tower for their communication needs have been active in their support for the project.

Most recently, the Columbia County Board of Supervisors unanimously passed Resolution No. 190-2018 to support the application of Eger Communications for a replacement tower project. The resolution, which passed on May 10, 2018, highlights the level of local support for this project. The Board of Supervisors notes that the communications systems dependent on the tower provide for the backbone of the emergency service infrastructure within western portion of Columbia County. The tower is necessary for the communication and dispatch capabilities of local fire companies, police departments, and rescue squads.

A certified copy of this resolution has been sent to the local, state, and federal officials which are reviewing the application of Eger Communications. I have also attached a copy to be sure the FCC is fully aware of the opinion of the local officials involved in this process.

Thank you for your attention to this important matter. Please do not hesitate to reach out if I can be of further assistance.

Sincerely,

John J. Faso
Member of Congress

Enclosure

DELHI DISTRICT OFFICE
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KINGSTON DISTRICT OFFICE
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PHONE: (845) 514-2322

cc:

Mark Eger - Eger Communications

Karl Eger - Eger Communications

Ralph Eger - Eger Communications

James Eger - Eger Communications

John M. Fowler - Executive Director, Advisory Council on Historic Preservation

P.J. Keeler - EMS Coordinator, Columbia County Emergency Medical Services

Benjamin A. Wheeler - Chief, Lebanon Valley Protective Association

Richard Briggs - Chief, Hillsdale Fire Company No.1

Robert C. Lopez - Director Columbia County 911 Emergency Communications Department

Antonio Merante - Director, Greenport Rescue Squad

William Hunt - Columbia County Fire Coordinator

Paul Jahns - Chief, Livingston Fire District

Richard M. Lacouette - President NYCOMCO Wireless Communications

John W. Caffry - Caffry & Flower

Mark Browne - Vice President, Operations, NDP Emergency Medical Services

Craig E. Gilmore - Wilkinson Barker Knauer, LLP

Jacqueline Phillips Murray - The Murray Law Firm, PLLC

Brian Fontes - Chief Executive Officer, National Emergency Number Association

Stephen Traylor - Executive Director, National Association of Telecommunications Officers and Advisors



Resolution
Board of Supervisors
County of Columbia
New York

Resolution No. 190-2018

Sponsored by Supervisor *[Signature]*

**RESOLUTION TO SUPPORT THE APPLICATION OF EGER COMMUNICATIONS FOR A
TELECOMMUNICATIONS TOWER**

UPON, recommendation of the Public Safety Committee at a meeting held on the 18th day of April 2018, and of the Finance Committee, at a meeting held on the 26th day of April, 2018;

WHEREAS, the County of Columbia is currently leasing space on telecommunication towers owned by Eger Communications, in the Town of Livingston New York, along with a portion of an accessory building to serve the County's emergency communication needs; and

WHEREAS, Eger Communications had submitted an application to the Town of Livingston for the installation of a new tower which is to be located on the Eger Farm on Blue Hill in proximity to existing towers; and

WHEREAS, the Chairman of the Columbia County Board of Supervisors submitted a letter dated May 27, 2008 in support of the Eger Communications application; and

WHEREAS, the Columbia County Board of Supervisors has been informed that there is a proceeding pending before the Federal Communications Commission that was submitted on August 26, 2015, and almost three years has elapsed since that application making it almost ten years since the initial Eger Communications application for the Tower.

NOW, THEREFORE BE IT

RESOLVED, that the Columbia County Board of Supervisors, as previously stated and submitted to local, state and federal agencies undertaking reviews of the Eger Communications request, needs to improve and upgrade an aged communications system that is imperative for our first responders; fire, police, and rescue squads, in order to communicate, dispatch, assist and prevent damages, injuries and death to the residents and visitors of Columbia County, and be it further

RESOLVED, that the Columbia County Board of Supervisors requests that the review and processing of the Eger Communications matter be expedited, and be it further

RESOLVED, that certified copies of this resolution be forwarded to the Director of Columbia County 911 Service, the Chairman of the Columbia County Board of Supervisors, the Town of Livingston and the Columbia County Attorney, as well as local, state and federal officials undertaking a review of the Eger Communications.

Approved: _____

[Signature]
Robert J. Fitzsimmons, County Attorney

Resolution
Committee

[Signature]
SJS
Par

Docket No.19-1031

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

-----X
EGER COMMUNICATIONS,

Petitioner,

vs.

**AMENDED
PETITION FOR
*WRIT of MANDAMUS***

FEDERAL COMMUNICATION COMMISSION
and UNITED STATES OF AMERICA,

Respondents.
-----X

By and through its counsel, Michael H. Sussman, Esq., petitioner Eger
Communications hereby avers as follows:

I. PARTIES

1. Petitioner, Eger Communications, is a partnership organized pursuant to the laws of the State of New York and operating in that state.

2. Respondent Federal Communication Commission [hereinafter "FCC"] is a federal agency charged with reviewing and approving communication tower installations. Respondent United States of America funds and staffs the FCC.

II. JURISDICTION

3. This Court has jurisdiction to issue a *writ of mandamus* pursuant to the All Writs Act, 28 U.S.C. section 1651(a), as a means of protecting its prospective jurisdiction. No lower or inferior court has jurisdiction to issue a writ of mandamus to compel agency action.

III. STATEMENT OF MATERIAL FACTS

4. On August 5, 2013, responding to a letter/informal complaint filed by the Olana Partnership and Scenic Hudson, Inc. dated April 5, 2011, the Competition and Infrastructure Policy Division of the Wireless Communications Bureau of the FCC [hereinafter “the division”] issued a decision requiring Eger to seek review pursuant to section 106 of the National Historic Preservation Act [“NHPA”] for a proposed replacement communication tower it intended to install on its property. See Exhibit 1 hereto.

5. Said communication tower is, and remains, necessary to upgrade emergency service in the western sections of Columbia County, New York and local law enforcement and firematic agencies avidly support its construction.

6. Petitioner Eger argued to the division that section III(B) of the Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Commission [“NPA”] expressly excluded this proposed replacement communication tower from section 106 review.

7. Specifically, petitioner Eger argued that since its proposed replacement communication tower did not substantially increase the size of the existing tower or expand the boundaries of the 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, the exception applied to its project.

8. Petitioner premised its argument upon a study completed by Tectonic Engineering and Land Surveying which concluded that its communication tower met the criteria for exclusion set forth in section III(B).

9. The original division decision rested on Section XI of the NPA which allows the FCC to take ‘appropriate actions’ in response to public comments.

10. On or about August 30, 2013, Eger filed a Petition for Reconsideration of the August 5, 2013 decision. See Exhibit 2 hereto.

11. On or about September 12, 2013, Scenic Hudson, Inc. and the Olana Partnership opposed Eger’s Petition for Reconsideration. See Exhibit 3 hereto.

12. On September 20, 2013, petitioner Eger filed a further brief in support of its Petition for Reconsideration. See Exhibit 4 hereo.

13. On October 24, 2014, citing a recent State Supreme Court decision which had dismissed a challenge by The Olana Partnership and Scenic Hudson to the Town of Livingston Planning Board’s approval of the communication tower

replacement, Eger applied for leave to amend its pending petition for reconsideration. See Exhibit 5 hereto.

14. On May 6, 2015, counsel for petitioner Eger wrote the FCC threatening to seek judicial review of the Commission's August 5, 2013 decision pursuant to 47 CFR section 1.106(m) if the division did not confirm within 30 days whether it intended to decide the outstanding petition. See Exhibit 6 hereto.

15. On July 27, 2015, more than three and one-half years ago, citing section 1.106(a)(1) of the FCC's rules, to wit, "the Commission and its staff acting under delegated authority will only entertain petitions requesting reconsideration of a final action," the deputy chief of the division dismissed the petition as interlocutory. See Exhibit 7 hereto.

16. On August 26, 2015, pursuant to section 1.115 of the Commission's rules and citing *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997), petitioner Eger sought review by the FCC Commissioners of this division determination, arguing that [a] the underlying division determination was subject to reconsideration, [b] requiring Eger to perform a full section 106 historic preservation review was plain error and [c] the proposed tower was necessary to alleviate significant threats to public health and safety and its construction consistent with FCC policy. See Exhibit 8 hereto.

17. On September 9, 2015, Scenic Hudson, Inc. and The Olana Partnership filed their joint opposition to the petitioner's application for review and the matter was fully submitted. See Exhibit 9 hereto.

18. On September 12, 2018, three years after the matter was fully submitted, counsel for petitioner urged the FCC to act on the outstanding application for review. See Exhibit 10 hereto.

19. To date, respondents have not resolved the pending matter and this delay is injurious to public health and safety.

20. To date, respondents have not requested any further submission from any party to this proceeding.

IV. CAUSE OF ACTION

21. Petitioner incorporates paras. 1-20 as if fully re-stated herein.

22. Respondent FCC's delay in resolving the pending matter contravenes both the "rule of reason" and Congressional intent [when reposing such matters with the FCC] to ensure expeditious review of issues related to the provision of responsible communication services to all communities, particularly rural communities and particularly, as here, where human health and welfare are at stake.

23. Here, the FCC has long had before it the concerns of local law enforcement leaders and firemanic providers attesting to the need for the upgraded

service petitioner Eger seeks to provide through replacement of its current inadequate communication tower.

24. The lengthy delay in agency action and the FCC's failure to consistently enforce federal law, including the apposite regulations which exempt Eger from another time-consuming and expensive section 106 review, prejudice such health and safety interests.

25. The agency delay is particularly prejudicial because petitioner Eger's current twin communication towers were subjected to a section 106 review and their proposed replacement tower is less environmentally or aesthetically intrusive than these current towers and meets all the objective criteria for grant of the exception respondent has invoked and the Division has refused to apply.

26. The FCC has delayed Eger more than five and one-half years by requiring it to satisfy a regulation from which it is plainly excepted and respondents' delay in resolving the petition now pending for nearly three and one-half years is frustrating petitioner Eger's right to obtain judicial review and the public's interest in benefitting from the substantial upgrade in promised service petitioner's plan entails.

V. PRAYER FOR RELIEF

WHEREFORE, petitioner prays that this Honorable Court issue a *writ of mandamus* compelling respondents to render a prompt decision on petitioner

Eger's pending application for review and enter any additional and further relief as the interests of justice and equity require.

Dated: February 12, 2019

Respectfully submitted,


MICHAEL H. SUSSMAN

SUSSMAN & ASSOCIATES

1 Railroad Avenue, Suite 3

PO Box 1005

Goshen, NY 10924

Counsel for Petitioner Eger Communications

CERTIFICATE OF COMPLIANCE

Michael H. Sussman, Esq., counsel for petitioner, hereby certifies that the annexed Amended Petition for Writ of Mandamus has been prepared on a personal computer using Times Roman 14 font and contains a total of 1,183 words. The annexed document is PDF saved through OCR.



MICHAEL H. SUSSMAN

DOCKET NO. 19-1031

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT-----X
EGER COMMUNICATIONS,

Petitioner,

vs.

NOTICE OF
AMENDED PETITION
FOR *WRIT OF*
*MANDAMUS*FEDERAL COMMUNICATION COMMISSION
and UNITED STATES OF AMERICA,Respondents.
-----XTo: Chairman, Federal Communication Commission
Attorney General, United States Department of Justice

PLEASE TAKE NOTICE that upon the annexed Amended Petition for Writ of Mandamus and Exhibits 1-10 thereto and all prior proceedings, petitioner, Eger Communications, shall move this Honorable Court at a time and date set by the Court for the issuance of a Writ of Mandamus directing and requiring the Federal Communication Commission to resolve its pending application forthwith.

Responsive papers shall be filed in accordance with the Order of this Court.

Dated: February 13, 2019

Respectfully submitted,


MICHAEL H. SUSSMAN

SUSSMAN & ASSOCIATES

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(845)-294-3991 [ph]

(845)-294-1623 [fax]

Sussman1@frontiernet.net

Counsel for Petitioner, Eger Communications

EXHIBIT 1



FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

August 5, 2013

VIA ELECTRONIC MAIL AND U.S. MAIL

Jacqueline Phillips Murray, Esq.
10 Maxwell Drive, Suite 100
Clifton Park, New York 12065

Re: Proposed communications tower
Eger Communications, Inc., Columbia County, New York

Dear Ms. Murray:

GENERAL PARTNERSHIP

The Spectrum and Competition Policy Division (Division) of the Wireless Telecommunications Bureau, Federal Communications Commission (FCC or Commission), has before it a pending complaint regarding the above-referenced tower, which Eger Communications, Inc. (Eger) proposes to construct in Columbia County, New York. Specifically, the Olana Partnership and Scenic Hudson, Inc. (Olana/Hudson) have filed a Letter/Informal Complaint (Informal Complaint)¹ regarding the review process for the proposed tower under Section 106 of the National Historic Preservation Act (NHPA).² Eger opposed the Informal Complaint,³ and Olana/Hudson submitted a reply.⁴ For the reasons discussed below, we grant the Informal Complaint in part and direct Eger to complete the Section 106 process pursuant to the procedures specified in the Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission (Nationwide Agreement).⁵

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Eger currently owns two 199-foot guyed towers located near the Olana House State Historic Site (Olana) in Columbia County (County).⁶ The two guyed towers were built in 1993. Several County and local public safety entities have existing FCC-licensed facilities on the two

¹ See Letter from John 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).

² 16 U.S.C. § 470f.

³ See Letter from Robert Gagen, Esq., counsel for Eger Communications, Inc., to Dan Abeyta, Assistant Chief, Spectrum and Competition Policy Division, dated August 29, 2011 (Eger Response); see also Letter from Robert Gagen, Esq., counsel for Eger Communications, Inc., to Dan Abeyta, Assistant Chief, Spectrum and Competition Policy Division, dated October 24, 2011.

⁴ See Letter from John Caffry, Esq., counsel for Olana Partnership and Scenic Hudson, Inc., to Dan Abeyta, Assistant Chief, Spectrum and Competition Policy Division, dated October 7, 2011 (Olana/Hudson Reply).

⁵ 47 C.F.R. Pt. 1, App. C.

⁶ See Informal Complaint at 2.

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Two towers.⁷ Eger proposes to construct a 199-foot self-support lattice tower on the site of one of the existing towers, move the existing licensees' antennas to the new tower, and remove the two guyed towers. The new construction would also provide additional collocation space for other service providers.

In their Informal Complaint and Reply, Olana/Hudson assert that the Eger tower should undergo full Section 106 review under the procedures specified in the Nationwide Agreement. Olana/Hudson assert that the proposed tower will be clearly visible near Olana, which is a National Historic Landmark (NHL) listed on the National Register of Historic Places.⁸ Olana/Hudson further contend that Olana has a unique and exceptional historic character as the home of the landscape painter Frederic Church, and that the views of the surrounding scenery in particular are integral to Frederic Church's paintings and thus to the historic character of Olana. Olana/Hudson also contend that the proposed self-support lattice tower will adversely affect the historic landscapes and views that contribute to Olana's historic character more than the two existing narrow guyed towers.⁹

The New York Parks and Recreation Department (NYSHPO), which is the designated New York State Historic Preservation Office under the NHPA,¹⁰ has raised similar arguments.¹¹ Specifically, the NYSHPO contends that a Section 106 review is necessary because the proposed Eger tower could adversely affect the historic views and scenery that were integral to Frederic Church's paintings. The NYSHPO also requests that the FCC conduct Section 106 review using the rules of the Advisory Council on Historic Preservation rather than the procedures in the Nationwide Agreement because of Olana's NHL status.¹²

Eger, in its Response, argues that the proposed tower need not complete Section 106 review because it is excluded from review under the Nationwide Agreement. Specifically, Section III.B of the Nationwide Agreement generally excludes from review a replacement for an existing tower that does not substantially increase the size of the existing tower, provided certain other conditions are met.¹³ Eger argues that the proposed tower qualifies for this exclusion because it will replace two existing guyed towers at the site of one of those towers.¹⁴ Eger also states that the NYSHPO provided no adverse effect determinations for the two guyed towers in 1993.¹⁵

⁷ *Id.*

⁸ *See* Informal Complaint at 3-5.

⁹ *Id.* at 4.

¹⁰ *See* 16 U.S.C. § 470a(b)(1).

¹¹ *See* E-mail from John Bonafide, New York Department of Parks and Recreation, to Stephen DelSordo, FCC Federal Preservation Officer, dated April 23, 2013.

¹² *Id.*; *see* 36 C.F.R. Part 800 (rules of the Advisory Council on Historic Preservation).

¹³ Nationwide Agreement, § III.B.

¹⁴ *See* Eger Response at 1-3.

¹⁵ *Id.* at 3.

After reviewing all of the pleadings, we find, based on the unique facts of this matter, that Eger must complete Section 106 review for the proposed tower under the procedures specified in the Nationwide Agreement. In reaching this decision, we need not resolve whether the proposed tower falls within the replacement tower exclusion. Rather, we rely on Section XI of the Nationwide Agreement.¹⁶ Section XI provides that any interested party may notify the Commission of its concerns regarding the Nationwide Agreement's application to the review of individual undertakings, and that the Commission shall consider such comments and take appropriate actions. Thus, Section XI affords the Division discretion to require appropriate procedures in unique unusual situations where strict adherence to the terms of the Nationwide Agreement would produce a result that is manifestly inconsistent with the intent of the Nationwide Agreement and the NHPA.

In this instance, several unique circumstances, considered in combination, render Section 106 review necessary to fulfill the purposes of the NHPA. First, the proposed tower would be plainly and prominently visible from Olana, which is an NHL. Moreover, as the home of a landscape artist and the site of many of his famous works, the view from Olana is not only a contributing characteristic to its historic integrity, but is uniquely important to understanding the life and experiences of its famous resident. In addition, the proposed lattice tower may present a significantly greater visual intrusion than the existing guyed towers on the Olana historic property and landscapes. Taking these considerations together, we find it necessary under these unique circumstances for the NYSHPO and the Division to assess under Section 106 whether the proposed tower will have an adverse effect on historic properties. Therefore, we find that Eger must complete Section 106 review pursuant to our authority under Section XI of the Nationwide Agreement.

We reject the NYSHPO's request to conduct Section 106 review using the ACHP's rules only and not the Nationwide Agreement. We find that the process specified in the Nationwide Agreement will give all interested parties, including the NYSHPO, Eger, the existing licensees on the two towers, and any other potential consulting parties, a full opportunity to participate in the Section 106 process. For the same reasons, we also find it unnecessary to discuss any further arguments in the Informal Complaint.

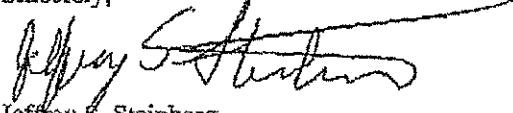
Accordingly, the Division hereby GRANTS IN PART the Informal Complaint, filed by the Olana Partnership and Scenic Hudson, Inc., to the extent that it requests that the tower proposed by Eger Communications, Inc. complete Section 106 review. The Division otherwise DISMISSES IN PART the Olana/Hudson complaint as moot. The Division DENIES the request of the NYSHPO to use procedures other than those specified in the Nationwide Agreement. The Division FINDS that Eger Communications, Inc. must complete the Section 106 process pursuant to Sections IV through VII of the Nationwide Agreement.

¹⁶ Nationwide Agreement, § XI.

Page 4

If you have any questions, please call Don Johnson of my staff at 202-418-7444.

Sincerely,



Jeffrey S. Steinberg
Deputy Chief
Spectrum and Competition Policy Division
Wireless Telecommunications Bureau

John W. Caffry, Esq.
Caffry & Flower
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Glens Falls, NY 12801
Counsel for Olana Partnership and Scenic Hudson, Inc.

John A. Bonafide
Director, Division for Historic Preservation
New York State Department of Parks and Recreation
P.O. Box 189
Waterford, NY 12188-0189

EXHIBIT 2

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of

EGER COMMUNICATIONS, INC.
PROPOSED REPLACEMENT TOWER,
COLUMBIA COUNTY, NEW YORK.

PETITION FOR RECONSIDERATION

Filed by:

The Murray Law Firm, PLLC
Jacqueline Phillips Murray, Esq., Of Counsel
10 Maxwell Drive, Suite 100
Clifton Park, NY 12065
(518) 688-0755

Attorneys for Eger Communications, Inc.

Date: August 30, 2013

I. Introduction

Pursuant to 47 CFR §1.106, Eger Communications, Inc. ("Eger") respectfully requests that the Commission reconsider its August 5, 2013 decision to require Eger to complete a review process pursuant to Section 106 of the National Historic Preservation Act ("NHPA") in respect to Eger's proposed replacement of an existing 190-foot tower structure with a replacement tower of the same 190-foot height at the same site.

Since 1931, the Eger site has been owned and operated by the Eger family as a fruit farm and, since the 1960's, has been the site of several communications towers that support public safety communications systems throughout the region. In the early 1960's, three (3) towers were developed on the Eger site. In 1992, those three (3) towers were replaced by the 190-foot twin lattice guyed tower that exists at the Eger site today, and that Eger now proposes to replace with a stronger tower of the same height at the same site to support antennas needed to upgrade public safety communications systems in the region.

The Commission rendered its August 5, 2013 decision in response to a letter/informal complaint by The Olana Partnership and Scenic Hudson, Inc. ("Complainants") dated April 5, 2011 requesting that the Commission require an NHPA Section 106

review of Eger's proposed replacement tower. The Complainants alleged that the replacement tower would have an impact on the Olana State Historic Site located 2 miles from the Eger site.

By letter dated August 29, 2011, Eger opposed the informal complaint, explaining that the proposed replacement tower is expressly excluded from Section 106 review pursuant to Section III (B) of the Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Commission ("NPA"). Specifically, NPA Section III (B) provides that replacement towers falling within the below criteria are "excluded from Section 106 review by the SHPO/THPO, the Commission and the Council and, accordingly, shall not be submitted to the SHPO/THPO for 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 (see Attachment 1 of this Agreement, Stipulation 1.c.1-3) and that 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 or outside any existing access or utility easement related to this 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.¹

¹ See NPA Section III [B] at pg. B-8.

NPA Section III further provides that "the determination that an exclusion applies to an Undertaking should be made by an authorized individual within the Applicant's organization...."²

Consistent with NPA Section III, Eger retained Tectonic Engineering & Land Surveying, P.C. ("Tectonic"), to review the proposed replacement tower in compliance with the National Environmental Policy Act. Tectonic determined that the proposed replacement tower was excluded from Section 106 review because it met the criteria for exclusion set forth in NPA Section III (B).³ Specifically, the Eger replacement tower is the same height as the existing tower it will replace; it is at the same site and does not expand its boundaries or require any excavation outside any existing access or utility easements related to the site; and it was constructed prior to March 16, 2001. In addition to meeting all of the exclusion criteria, the existing 190-foot tower to be replaced also underwent a Section 106 review process, which was completed with a determination of No Effect rendered by the New York State Office of Parks Recreation and Historic Preservation ("NY SHPO") on September

² *Id.*

³ See FCC/NEPA Screening Report by Tectonic Engineering & Land Surveying Consultants, PC, dated August 8, 2011, a copy of which is enclosed as Exhibit "A".

28, 1992.⁴ Insofar as the replacement tower meets all of the criteria for exclusion from Section 106 review under NPA Section III (B), Eger appropriately determined that the replacement tower is excluded from Section 106 review.

In deciding to nevertheless require the Eger replacement tower to undergo a Section 106 review, the Commission stated that it "need not resolve whether the proposed tower falls within the replacement tower exclusion" and, instead, relied solely on NPA Section XI, which states that the Commission may take "appropriate actions" in response to public comments.⁵

The Commission's decision also 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 as confirmed by numerous letters to the Commission. Specifically, co-applicant Columbia County Emergency Services and its related departments and public safety agencies, including the Columbia County Emergency Communications

⁴ The NY SHPO's September 28, 1992 determination concluded that the existing 190-foot tower that Eger proposes to replace with a new 190-foot tower at the same site "will have No Impact upon cultural resources in or eligible for inclusion in the State and National Registers of Historic Places." Notably, the NY SHPO's determination was based on an in-field assessment for potential visual impacts on the 190-foot tower by the NY SHPO's Field Services Bureau. A copy is enclosed as Exhibit "B".

⁵ See FCC Letter dated August 5, 2013 at page 3.

Department, the Columbia County Office of Fire Coordinator, the Columbia County Emergency Medical Services Coordinator, the Hillside Fire Company No. 1, the Greenport Rescue Squad, Inc., NDP Emergency Medical Services, the Lebanon Valley Protective Association, Inc., and co-applicant the Town of Livingston Fire District had all written to the Commission to explain their need for the replacement tower to support upgrades to their public safety communications systems.⁶ During the Commission's review of the informal complaint, Eger requested that the Commission afford Eger's co-applicants an opportunity to be heard because the co-applicants' planned public safety antenna upgrades would be directly affected by the Commission's decision. The Commission rejected the request and did not take into

⁶ See Letter from Columbia County 911 Emergency Communications Department to Daniel Abeyta dated November 30, 2011; Letter from County of Columbia - Emergency Medical Services to Daniel Abeyta dated December 2, 2011; Letter from Columbia County Office of Fire Coordinator to Daniel Abeyta dated December 6, 2011; Letter from NDP Emergency Medical Services to Daniel Abeyta dated December 14, 2011; Letter from Lebanon Valley Protective Association, Inc. to Daniel Abeyta dated December 26, 2011; Letter from Livingston Fire District Board of Fire Commissioners to Daniel Abeyta dated December 27, 2011; Letter from Greenport Rescue Squad, Inc. to Daniel Abeyta dated December 29, 2011; Letter from Hillside Fire Company No. 1 to Daniel Abeyta dated January 1, 2012. Copies of these letters are enclosed as Exhibit "C".

consideration the written comments by the co-applicant public safety agencies in its decision.

Based on the foregoing, Eger respectfully requests that the Commission reconsider its decision to not address whether the Eger replacement tower is excluded from Section 106 review pursuant to NPA Section III (B) and, in turn, that the Commission reconsider whether it is "appropriate action" under NPA Section XI to completely avoid the NPA's express and binding provisions. Eger further asks the Commission to reconsider its decision to require Section 106 review of the Eger replacement tower and respectfully requests that the Commission issue a decision on reconsideration that the Eger replacement tower is excluded from Section 106 review because it meets the criteria for exclusion pursuant to NPA Section III (B).

II. The Commission Should Determine That The NPA Exclusion From Section 106 Review Applies To The Eger Replacement Tower

Section 214 of the NHPA authorizes the Advisory Council on Historic Preservation ("Council") to exempt from Section 106 review classes of federal undertakings that would be unlikely to impact historic properties.⁷ Consistent with such authority, the Council, together with the Commission, concluded that "categorically excluding from routine Section 106 review

⁷ See 16 U.S.C. § 470v.

categories of construction that are unlikely adversely to impact historic properties is appropriate and in the public interest."⁸ Accordingly, the Commission adopted the replacement tower exclusion in NPA Section III (B), reasoning as follows:

Similar to collocations, strengthened structures may reduce the need for more towers by housing up to two, four or more additional antennas. Given the limitation of the exclusion to replacements that do not effectuate a substantial increase in size, it is highly unlikely that a replacement tower within the exclusion could have any impact other than on archeological properties. Moreover, the limitation on construction and excavation to within 30 feet of the existing leased or owned property means that only a minimal amount of previously undisturbed ground, if any, would be turned, and that would be very close to the existing construction. Balancing the small risk of new archeological disturbance against the benefits of encouraging replacement rather than the construction of new towers, and taking into account the requirement to cease work and provide notice in case of unanticipated discoveries, we conclude that an exclusion for replacement towers, limited to within 30 feet of the existing leased or owned boundary, is reasonable and appropriate.⁹

Eger respectfully requests that the Commission reconsider its August 5, 2013 decision and, instead, determine that the replacement tower is excluded from Section 106 review pursuant to the plain language of NPA Section III (B).

⁸ See In the Matter of Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, FCC Report and Order adopted Sept. 9, 2004 at pg.15.

⁹ *Id.* at pg. 18 (footnotes omitted).

First, the Eger replacement tower meets all of the criteria set forth in NPA Section III (B): it is the same height as the existing tower it will replace; it is at the same site and does not expand its boundaries or require any excavation outside any existing access or utility easements related to the site; and it was constructed prior to March 16, 2001. Moreover, in excess of the exclusion criteria, the NY SHPO already completed a Section 106 review for the existing tower to be replaced and determined by letter dated September 28, 1992 that it has No Effect on historic or cultural resources.

Second, to require a Section 106 review notwithstanding that the replacement tower meets all of the NPA's criteria for exclusion from Section 106 review is inconsistent with the Commission's Report and Order in Matter of Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process (FCC Report and Order adopted Sept. 9, 2004). In that Report and Order, the Commission considered - and rejected - a proposed provision to allow SHPOs to "opt-out" of the NPA's exclusions from Section 106 review, reasoning as follows:¹⁰

We reject the proposed opt-out provision. As drafted, the exclusions from the Section 106 process are not

¹⁰ *Id.* at pgs. 27-28 (footnotes omitted).

dependent on local conditions, but identify circumstances under which construction is unlikely to significantly adversely affect historic properties in any state. Indeed, in order to avoid potential effects on historic properties, the Nationwide Agreement as adopted substantially limits the exclusions from which commenters most vigorously sought to opt-out. Thus, the opt-out provision is unnecessary. At the same time, such a provision would create a patchwork of varying agreements, state-by-state, and thus cause additional administrative burdens for applicants. Moreover, procedural changes, adopted by use of the opt-out provision, would likely occur over a period of time, creating additional burdens and confusion for all parties concerned.¹¹

The Commission's decision effectively amends the NPA to include an "opt-out" provision, even though the Commission has already rejected an "opt-out" provision. Insofar as NPA §XII requires that any amendment to the NPA must occur in accordance with standard processes, including public notice, comment and execution by the parties to the NPA, it is respectfully submitted that the Commission's August 5, 2013 decision amounts to an amendment of the NPA in contravention of NPA §XII.

Third, it is respectfully submitted that the Commission's decision to require Section 106 review even though the Eger replacement tower meets all of the NPA's criteria for exclusion therefrom is not "appropriate" action pursuant to NPA §XI. As explained above, the Commission has already determined that the

¹¹ *Id.*

NPA exclusion for replacement towers is "reasonable and appropriate" where a replacement tower, like the Eger replacement tower, meets the stringent criteria set forth therein. As such, the Commission's decision that it is "appropriate action" under NPA Section XI to create an exception from the NPA exclusion applicable to the Eger replacement tower simply cannot be reconciled with its prior determination that it is appropriate to exclude such replacement towers - without exception - from the NPA.

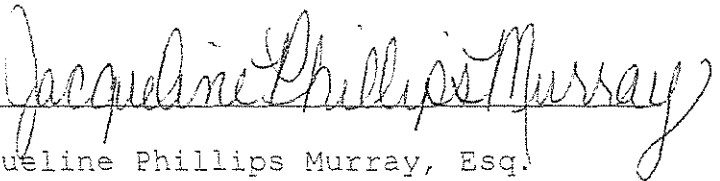
Finally, it is respectfully requested that the Commission take into consideration the critical and imminent needs of the co-applicant public safety agencies that require the Eger replacement tower to support critical upgrades to their public safety communications systems. In this regard, we submit that the Commission should afford the co-applicant public safety agencies an opportunity to be heard on this Petition. Unless and until that occurs, the record before the Commission will lack data relevant to assessing the impact to the public interest and particularly public safety.

III. Conclusion

For the reasons set forth above, Eger respectfully requests that the Commission determine that the Eger replacement tower is excluded from Section 106 review pursuant to NPA §III (B).

Respectfully submitted,

By:



Jacqueline Phillips Murray, Esq.
The Murray Law Firm, PLLC
10 Maxwell Drive, Suite 100
Clifton Park, NY 12065
(518) 688-0755

Attorneys for Eger Communications, Inc.

Date: August 30, 2013

Exhibit A: FCC/NEPA Screening Report by Tectonic
Exhibit B: 1992 NYSHPO Determination of No Impact
Exhibit C: Public Safety Agency Letters of Need and Support for Replacement Tower



New York State Office of Parks, Recreation and Historic Preservation
The Governor Nelson A. Rockefeller Empire State Plaza
Agency Building 1, Albany, New York 12238-0001

September 28, 1992

Mr. Mark Eger
Mark Eger & Bros., Inc.
RD 2, Box 11A
Hudson, New York 12534

Dear Mr. Eger:

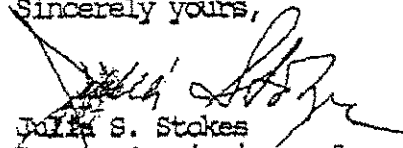
Re: SEQRA
190' Communication Tower on Blue Hill
Greenport, Columbia County
92PR1502

The Office of Parks, Recreation and Historic Preservation (OPRHP) has received the documentation you provided on your project. As the state agency responsible for the coordination of the State's historic preservation programs, including the encouragement and assistance of local preservation programs, we offer the following comments.

Recently, staff from our Field Services Bureau visited the area of the proposed communication tower to assess the potential visual impact of the project. Based upon this review, it is the OPRHP's opinion that this project will have No Impact upon cultural resources in or eligible for inclusion in the State and National Registers of Historic Places.

If you have any questions, please call our Project Review Unit at (518) 474-0479.

Sincerely yours,


Julia S. Stokes
Deputy Commissioner for
Historic Preservation

JSS/RDK:tr

FCC LAND USE SCREENING CHECKLIST
FOR PROPOSED REPLACEMENT TOWER

EGER COMMUNICATIONS
170 EGER ROAD, HUDSON,
COLUMBIA COUNTY, NEW YORK

PREPARED FOR:

EGER COMMUNICATIONS
33 EGER ROAD
HUDSON, NY 12534

PREPARED BY:

TECTONIC ENGINEERING & SURVEYING CONSULTANTS P.C.
70 PLEASANT HILL ROAD
MOUNTAINVILLE, NEW YORK 10953

August 8, 2011

TECTONIC

Practical Solutions, Exceptional Service

FCC LAND USE SCREENING CHECKLIST
FOR PROPOSED REPLACEMENT TOWER
170 EGER ROAD, HUDSON,
COLUMBIA COUNTY, NEW YORK

SUMMARY OF RESEARCH

1

FIGURE I SITE LOCATION MAP

FIGURE II SITE PLAN

APPENDIX I FCC REGULATIONS (47 CFR Part 1, Subpart 1, Section 1.1307)

APPENDIX II NEPA CHECKLIST

APPENDIX III TOPOGRAPHIC MAP

APPENDIX IV WILDLIFE DOCUMENTATION

APPENDIX V FEMA FLOODPLAIN MAP

APPENDIX VI WETLAND MAPS

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Eger Communications

August 8, 2011

1. Wilderness Areas (47 CFR 1 § 1.1307 (a)(1) and (2))

Tectonic has conducted a review of the current United States Geologic Survey 7.5 Minute Topographic Quadrangle for the Subject Site (Appendix III), as well as the U.S. National Wilderness Preservation System Map, the Federal Lands and Indian Reservations Map, and the National Landscape Conservation System: Wilderness and Wilderness Study Areas Map. According to these maps, the Subject Site is not located within an officially designated Wilderness Area. As such, no further investigation regarding Wilderness Areas is required.

2. Wildlife Preserves (47 CFR 1 § 1.1307 (a)(1) and (2))

Tectonic has conducted a review of the current United States Geologic Survey 7.5 Minute Topographic Quadrangle for the Subject Site (Appendix III), as well as the National Wildlife Refuge System Map. According to these maps, the Subject Site is not located within an officially designated Wildlife Preserve. As such, no further investigation regarding Wildlife Preserves is required.

3. Listed Threatened or Endangered Species or Designated Critical Habitat (47 CFR 1 § 1.1307 (a)(3))

The New York State Department of Environmental Conservation (NYSDEC) has determined that certain telecommunication/tower projects will not adversely affect threatened or endangered species, or designated critical habitats. According to the NYSDEC, the proposed project will have no adverse effect upon rare species or significant natural communities, provided that the development meets one of the following criteria:

1. New antennae or panels on existing towers, or new communications equipment installed within existing fenced equipment areas, provided that all new work is confined within existing equipment areas, no previously undisturbed land is disturbed, and no new access roads or expansion of existing access roads is involved.
2. New or existing towers, antennae and associated equipment installed at a location currently wholly occupied by lawn, pavement and/or gravel.
3. New or existing towers, antennae and associated equipment installed on or in existing buildings, rooftops, billboards or bridges, with the exception of buildings and bridges with peregrine falcon nests.

Based on a review of the Subject Site, the proposed replacement installation will be limited to an existing manicured lawn and previously disturbed, gravel parking area located approximately 5 feet from the existing guyed tower. A further review of the NYSDEC Environmental Resource Map of the project area indicates that there are no significant natural communities within the Subject Site. As the Subject Site meets the NYSDEC criteria and is not located within a significant natural community, Tectonic has

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August 8, 2011

determined that the proposed project will have no adverse effect on listed or proposed threatened or endangered species, or designated critical habitats.

Tectonic has also reviewed the Subject Site in accordance with the United States Fish and Wildlife Services' (USF&WS) *Service Interim Guidelines for Recommendations on Communications Tower Siting, Construction, Operation and Decommissioning*. Per the Service's Guidelines, the proposed installation has been designed as a 190 high self-supporting lattice tower without lighting, and will not be located in or near an area of wetlands or wildlife refuge.

Based on the assessment of the Subject Site in accordance with NYSDEC policies, the NYSDEC Environmental Resource Map, and USF&WS guidelines, Tectonic has concluded that no further investigation regarding Listed Threatened or Endangered Species, or Designated Critical Habitats is required.

All relevant documents are included in Appendix IV.

4. Historic Places (47 CFR 1 § 1.1307 (a)(4)) - "May affect districts, sites, building, structures, or objects, significant in American history, architecture, engineering or culture that are eligible for listing in the National Register of Historic Places..."

Tectonic has reviewed the Subject Site in accordance with the *Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission* (NPA). According to the NPA, certain undertakings are excluded from Section 106 review. These undertakings include: "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 direction or involve excavation outside of 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."

Elements 1-3 of the Collocation Agreement define a substantial increase as:

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

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Eger Communications

August 8, 2011

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 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."

According to a review of the Subject Site, the proposed replacement tower meets the Section 106 exclusion policies outlined in the NPA. The following information was determined through Tectonic's review of the Subject Site in regards to these stipulations:

- The existing tower structure was built in 1992 and is being replaced because it is structurally unsound.
- The proposed replacement tower and related construction activities will be limited to the current boundaries of the owned property.
- The proposed replacement tower will not substantially increase the size of the existing guyed tower.

Based on Tectonic's review of the Subject Site, the proposed project complies with the stipulations set forth by the NPA. Therefore, in accordance with the NPA, the proposed replacement tower may be installed without being reviewed under the consultation process set forth under Subpart B of 36 CFR Part 800.

All relevant documentation is provided in Appendix V.

5. Indian Religious Sites (47 CFR 1 § 1.1307 (a)(5))

According to a review of the Subject Site in accordance with the NPA, as outlined above, the proposed replacement tower is excluded from Section 106 review. As such, Tectonic did not participate in tribal consultation through the FCC Tower Construction Notification System.

In the unlikely event that unanticipated historic properties, cultural artifacts, archaeological deposits or human remains are inadvertently encountered during the proposed construction and installation activities, Eger Communications must halt activities immediately and contact the appropriate tribal governments, local officials and state agencies, in accordance with federal and state regulations.

6. Located in a Flood Plain (Executive Order 11988) (47 CFR 1 § 1.1307 (a)(6))

Tectonic has reviewed the FEMA Flood Insurance Rate Map of the project area (Appendix V). Based on the information obtained, the Subject Site is not located within a 100-year or 500-year flood plain.

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Eger Communications

August 8, 2011

As the Subject Site is not located within a 100-year or 500-year flood plain, Tectonic has determined that no further investigation regarding Flood Plains is required.

7. Wetlands (47 CFR § 1.1307 (a)(7)) "Construction will involve significant change in surface features (e.g. wetland fill, deforestation or water diversion)"

Tectonic has conducted a review of the USF&WS National Wetlands Inventory map and the NYSDEC Natural Resource Mapper for the Subject Site (Appendix VI). Upon review of these federal and state wetlands maps, it was determined that the Subject Site is not located within or adjacent to a mapped wetland or regulated water body.

As the Subject Site is not located within a mapped wetland, Tectonic has determined that no further investigation regarding Wetlands or other surface features is required.

8. High Intensity White Lights (47 CFR 1 § 1.1307 (a)(8))

According to the location of the Subject Site and the height of the proposed tower, the Subject Site will not require High Intensity White Lights in a residential neighborhood.

9. Radio Frequency Radiation (47 CFR 1 § 1.1307 (b))

The proposed Eger Communications replacement installation will be limited to the construction of a self-supporting lattice tower. The tower itself will not emit radio frequency radiation. FCC licensees who may transmit from antennae mounted to the tower will be required to comply with applicable radio frequency exposure standards.

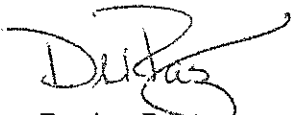
CONCLUSIONS/RECOMMENDATIONS

Based on the review of readily available information regarding the above-referenced FCC issues, no further investigation is warranted prior to the development of the proposed replacement tower at 33 Eger Road in Hudson, Columbia County, New York as outlined in 47 CFR Part 1, Subpart 1, Section 1.1307 (a) and (b).

If you have any questions about information in this report or if we can be of further assistance, please contact the undersigned at (845) 534-5959.

Sincerely,

TECTONIC ENGINEERING & SURVEYING CONSULTANTS P.C.



Denise Pantzer
Staff Archaeologist



Peter T. Sutherland, P.E., L.E.P., C.P.G.
Vice President, Manager of Environmental Services

FIGURE I

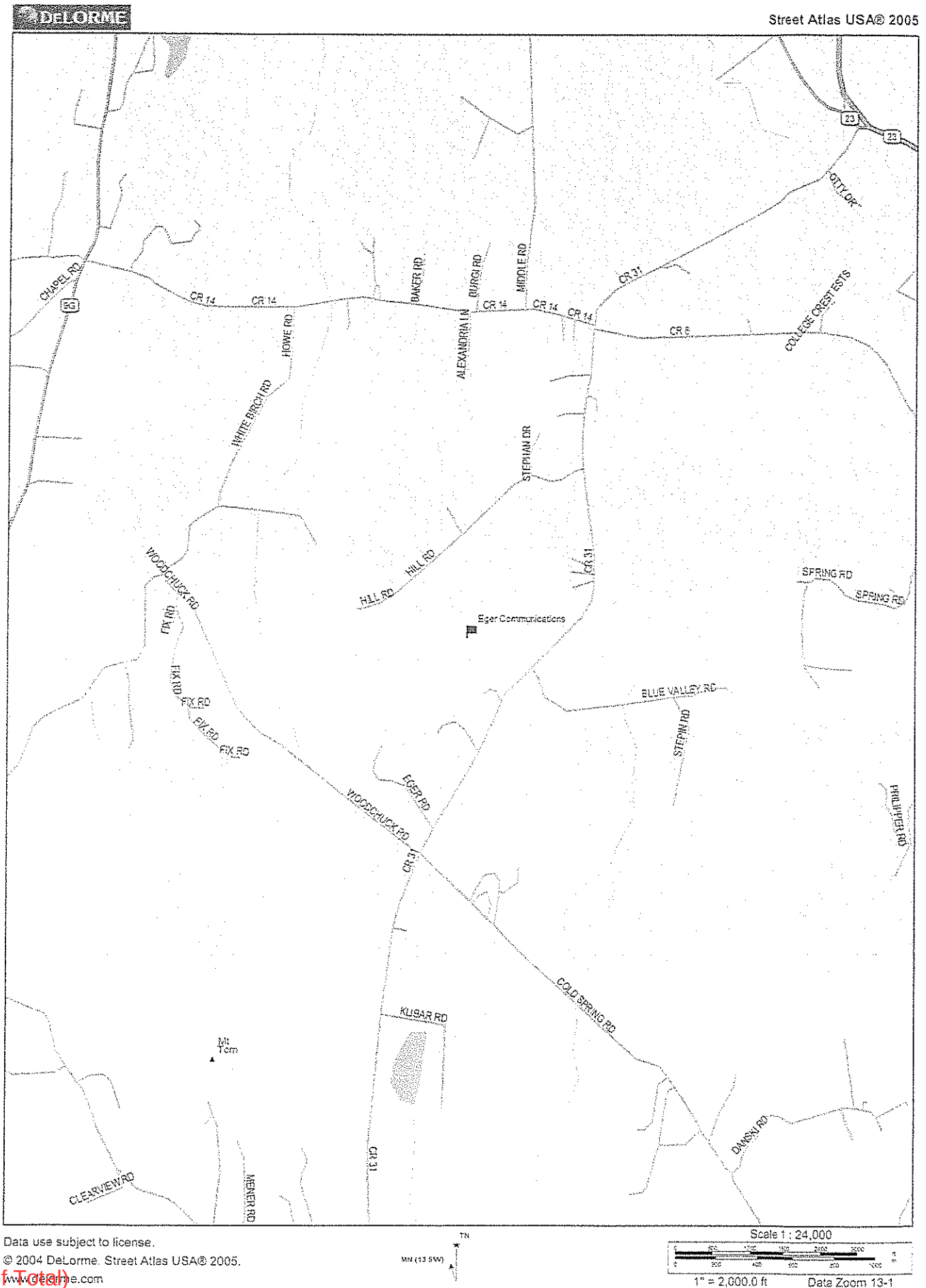
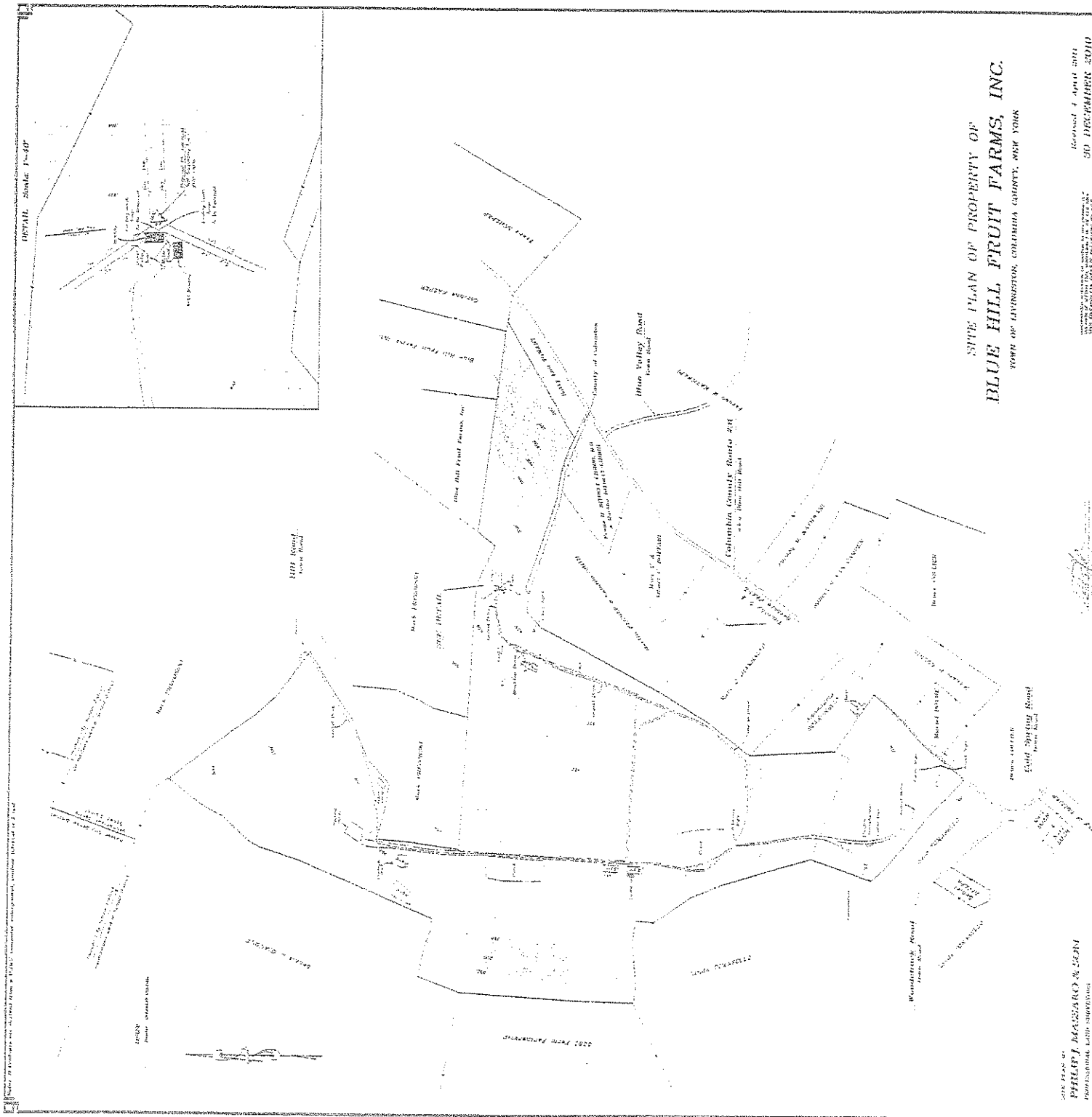


FIGURE II



APPENDIX I

Federal Communications Commission

§ 1.1307

the applicable health and safety guidelines cited in § 1.1307(b).

[51 FR 15000, Apr. 22, 1986, as amended at 51 FR 18889, May 23, 1986; 53 FR 28393, July 28, 1988; 56 FR 13414, Apr. 2, 1991; 64 FR 19061, Apr. 19, 1999]

§ 1.1307 Actions that may have a significant environmental effect, for which Environmental Assessments (EAs) must be prepared.

(a) Commission actions with respect to the following types of facilities may significantly affect the environment and thus require the preparation of EAs by the applicant (see §§ 1.1308 and 1.1311) and may require further Commission environmental processing (see §§ 1.1314, 1.1315 and 1.1317):

(1) Facilities that are to be located in an officially designated wilderness area.

(2) Facilities that are to be located in an officially designated wildlife preserve.

(3) Facilities that: (i) May affect listed threatened or endangered species or designated critical habitats; or (ii) are likely to jeopardize the continued existence of any proposed endangered or threatened species or likely to result in the destruction or adverse modification of proposed critical habitats, as determined by the Secretary of the Interior pursuant to the Endangered Species Act of 1973.

NOTE: The list of endangered and threatened species is contained in 50 CFR 17.11, 17.22, 222.23(a) and 227.4. The list of designated critical habitats is contained in 50 CFR 17.95, 17.96 and part 226. To ascertain the status of proposed species and habitats, inquiries may be directed to the Regional Director of the Fish and Wildlife Service, Department of the Interior.

(4) Facilities that may affect districts, sites, buildings, structures or objects, significant in American history, architecture, archeology, engineering or culture, that are listed, or are eligible for listing, in the National Register of Historic Places. (See 16 U.S.C. 470w(5); 36 CFR 60 and 800.)

NOTE: The National Register is updated and re-published in the FEDERAL REGISTER each year in February. To ascertain whether a proposal affects a historical property of national significance, inquiries also may be made to the appropriate State Historic Pres-

ervation Officer, see 16 U.S.C. 470a(b); 36 CFR parts 63 and 800.

(5) Facilities that may affect Indian religious sites.

(6) Facilities to be located in a flood Plain (See Executive Order 11988.)

(7) Facilities whose construction will involve significant change in surface features (e.g., wetland fill, deforestation or water diversion). (In the case of wetlands on Federal property, see Executive Order 11990.)

(8) Antenna towers and/or supporting structures that are to be equipped with high intensity white lights which are to be located in residential neighborhoods, as defined by the applicable zoning law.

(b) In addition to the actions listed in paragraph (a) of this section, Commission actions granting construction permits, licenses to transmit or renewals thereof, equipment authorizations or modifications in existing facilities, require the preparation of an Environmental Assessment (EA) if the particular facility, operation or transmitter would cause human exposure to levels of radiofrequency radiation in excess of the limits in §§ 1.1310 and 2.1093 of this chapter. Applications to the Commission for construction permits, licenses to transmit or renewals thereof, equipment authorizations or modifications in existing facilities must contain a statement confirming compliance with the limits unless the facility, operation, or transmitter is categorically excluded, as discussed below. Technical information showing the basis for this statement must be submitted to the Commission upon request. Such compliance statements may be omitted from license applications for transceivers subject to the certification requirement in § 25.129 of this chapter.

(1) The appropriate exposure limits in §§ 1.1310 and 2.1093 of this chapter are generally applicable to all facilities, operations and transmitters regulated by the Commission. However, a determination of compliance with the exposure limits in § 1.1310 or § 2.1093 of this chapter (routine environmental evaluation), and preparation of an EA if the limits are exceeded, is necessary only for facilities, operations and transmitters that fall into the categories listed

§ 1.1307

47 CFR Ch. I (10-1-04 Edition)

in table 1, or those specified in paragraph (b)(2) of this section. All other facilities, operations and transmitters are categorically excluded from making such studies or preparing an EA, except as indicated in paragraphs (c) and (d) of this section. For purposes of table 1, building-mounted antennas means antennas mounted in or on a building structure that is occupied as a workplace or residence. The term power in column 2 of table 1 refers to total operating power of the transmitting operation in question in terms of effective radiated power (ERP), equivalent isotropically radiated power (EIRP), or peak envelope power (PEP), as defined in § 2.1 of this chapter. For the case of the Cellular Radiotelephone Service, subpart H of part 22 of this chapter; the

Personal Communications Service, part 24 of this chapter and the Specialized Mobile Radio Service, part 90 of this chapter, the phrase total power of all channels in column 2 of table 1 means the sum of the ERP or EIRP of all co-located simultaneously operating transmitters owned and operated by a single licensee. When applying the criteria of table 1, radiation in all directions should be considered. For the case of transmitting facilities using sectorized transmitting antennas, applicants and licensees should apply the criteria to all transmitting channels in a given sector, noting that for a highly directional antenna there is relatively little contribution to ERP or EIRP summation for other directions.

TABLE 1—TRANSMITTERS, FACILITIES AND OPERATIONS SUBJECT TO ROUTINE ENVIRONMENTAL EVALUATION

Service (title 47 CFR rule part)	Evaluation required if
Experimental Radio Services (part 3)	Power > 100 W ERP (164 W EIRP)
Multipoint Distribution Service (subpart K of part 21).	<i>Non-building-mounted antennas:</i> height above ground level to lowest point of antenna < 10 m and power > 1640 W EIRP <i>Building-mounted antennas:</i> power > 1640 W EIRP MDS licensees are required to attach a label to subscriber transceiver or transceiver antennas that: (1) provides adequate notice regarding potential radiofrequency safety hazards, e.g., information regarding the safe minimum separation distance required between users and transceiver antennas; and (2) references the applicable FCC-adopted limits for radiofrequency exposure specified in § 1.1310.
Paging and Radiotelephone Service (subpart E of part 22).	<i>Non-building-mounted antennas:</i> height above ground level to lowest point of antenna < 10 m and power > 1000 W ERP (1640 W EIRP) <i>Building-mounted antennas:</i> power > 1000 W ERP (1640 W EIRP)
Cellular Radiotelephone Service (subpart H of part 22).	<i>Non-building-mounted antennas:</i> height above ground level to lowest point of antenna < 10 m and total power of all channels > 1000 W ERP (1640 W EIRP) <i>Building-mounted antennas:</i> total power of all channels > 1000 W ERP (1640 W EIRP)
Personal Communications Services (part 24) ...	(1) Narrowband PCS (subpart D): <i>non-building-mounted antennas:</i> height above ground level to lowest point of antenna < 10 m and total power of all channels > 1000 W ERP (1640 W EIRP) <i>Building-mounted antennas:</i> total power of all channels > 1000 W ERP (1640 W EIRP) (2) Broadband PCS (subpart E): <i>non-building-mounted antennas:</i> height above ground level to lowest point of antenna < 10 m and total power of all channels > 2000 W ERP (3280 W EIRP) <i>Building-mounted antennas:</i> total power of all channels > 2000 W ERP (3280 W EIRP)
Satellite Communications (part 25)	All included. In addition, for NGSO subscriber equipment, licensees are required to attach a label to subscriber transceiver antennas that: (1) provides adequate notice regarding potential radiofrequency safety hazards, e.g., information regarding the safe minimum separation distance required between users and transceiver antennas; and (2) references the applicable FCC-adopted limits for radiofrequency exposure specified in § 1.1310 of this chapter.
General Wireless Communications Service (part 26)	Total power of all channels > 1640 W EIRP
Wireless Communications Service (Part 27)	(1) for the 1350–1392 MHz, 1392–1395 MHz, 1432–1435 MHz 1670–1675 MHz and 2365–2390 MHz bands <i>Non-building-mounted antennas:</i> Height above ground level to lowest point of antenna < 10 m and total power of all channels > 2000 W ERP (3280 W EIRP).

APPENDIX II

NEPA LAND USE SCREENING CHECKLIST

TECTONIC

Client: Eger Communications

Location: 170 Eger Road, Hudson,

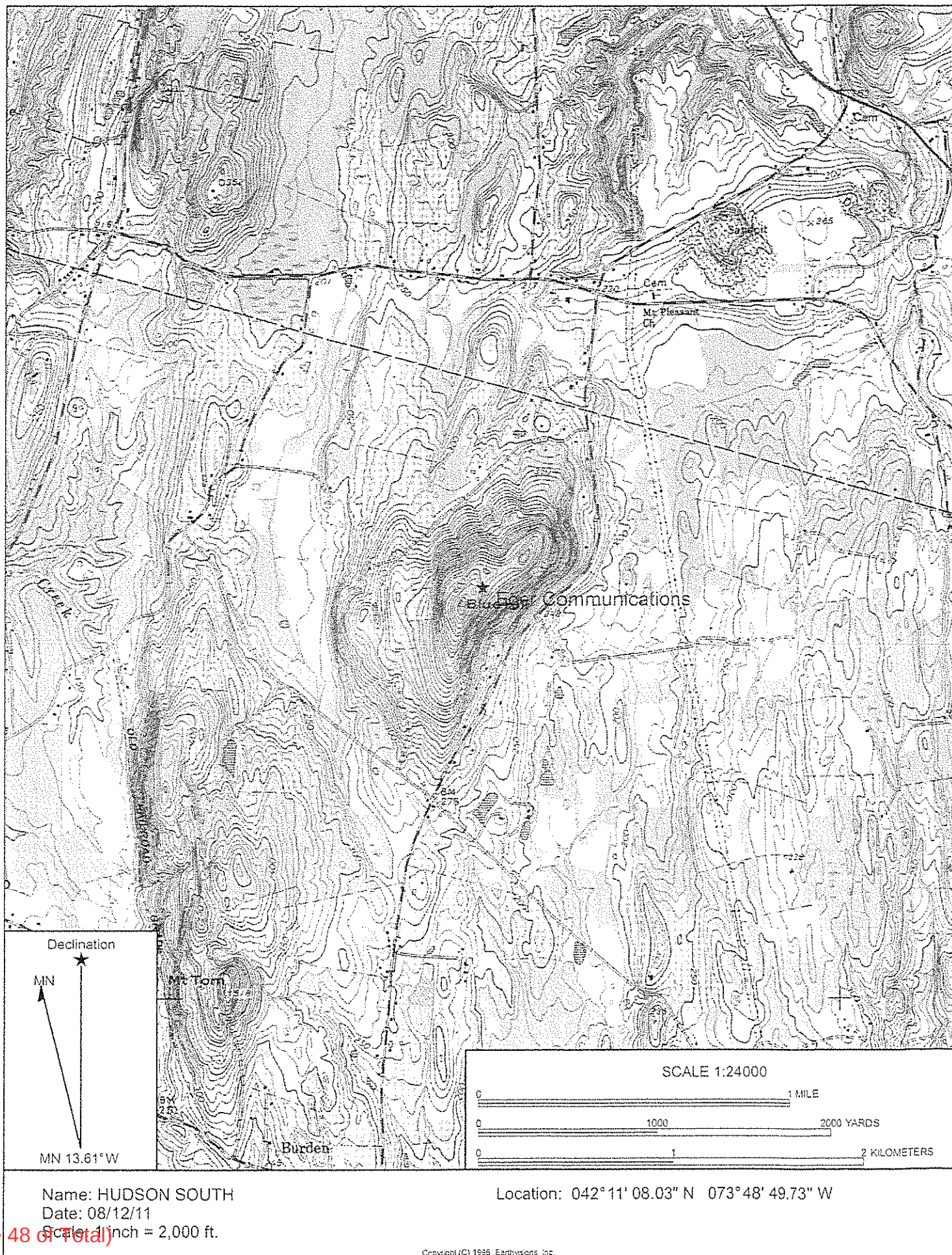
Site Name: n/a

Tectonic W.O. #5920.01

Columbia County, New York

FCC NEPA Category	Database/Agency/Map	No Adverse Impact	Potential Adverse Impact	Exempt from Review*	Collocation NPA or Exclusion Applies
1. Wilderness Area Is the proposed facility located in an officially designated wilderness area?	GIS Research Center U. S. Fish & Wildlife Service (USF&WS) Dept. of Environmental Conserv. (DEC)	X			
2. Wildlife Preserve Is the proposed facility located in an officially designated wildlife preserve?	United States Fish & Wildlife Service (USF&WS) Dept. of Environmental Conserv. (DEC)	X			
3A. Listed Threatened or Endangered Species Will the proposed facility likely affect threatened or endangered species?	U. S. Fish & Wildlife Service (USF&WS) Dept. of Environmental Conserv. (DEC)	X			
3B. Listed Threatened or Endangered Species Will the proposed facility likely jeopardize the cont. existence of any designated or proposed threatened or endangered species?	U. S. Fish & Wildlife Service (USF&WS) Dept. of Environmental Conserv. (DEC)	X			
3C. Critical Habitat Will the proposed facility likely result in the destruction or adverse modification of designated or proposed critical habitats, as determined by the Endangered Species Act of 1973?	U. S. Fish & Wildlife Service (USF&WS) Dept. of Environmental Conserv. (DEC)	X			
4. National Register of Historic Places Will the facility affect districts, sites, buildings, structures or objects, significant in American history, architecture, archaeology, engineering or culture, that are listed (or eligible for listing) in the National Register of Historic Places?	State Historic Preservation Office (SHPO)				X
5. Indian Religious Sites Will the facility affect Indian Religious Sites?	Tribal Historic Preservation Office (THPO)				X
6. Flood Plain Is the facility located in a flood plain?	Federal Emergency Management Agency (FEMA)	X			
7. Surface Features Will the construction of the proposed facility involve significant change in surface features (e.g. wetland fill, deforestation or water diversion)?	National Wetlands Inventory	X			
8. High Intensity White Lights Is the proposed facility located in a residential neighborhood, as defined by local zoning law, and required to be equipped with high intensity white lights?	Federal Aviation Administration (FAA) and Local Zoning (tower ht. and lighting requirement supplied by carrier)	X			
*For collocations, NEPA Land Use Screening Categories 4 & 5 are required. The remaining categories are categorically excluded.					
The undersigned has reviewed and approved the completion of this NEPA checklist for the above referenced site.					
Signed: _____					
Title: Staff Archaeologist _____					
Date: August 8, 2011 _____					
B. Facility Power *Responsibility of Client		Reference health-safety and/or power density report(s) prepared by carrier.			

APPENDIX III



Name: HUDSON SOUTH

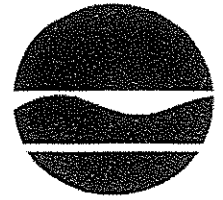
Date: 08/12/11

Scale: 1 inch = 2,000 ft.

Location: $042^\circ 11' 08.03'' N$ $073^\circ 48' 49.73'' W$

APPENDIX IV

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION
Division of Fish, Wildlife & Marine Resources
New York Natural Heritage Program
625 Broadway, 5th Floor, Albany, New York 12233-4757
Phone: (518) 402-8935 • Fax: (518) 402-9027
Website: www.dec.ny.gov



Joe Martens
Commissioner

November, 2011

**Guidelines for Consultation with NY Natural Heritage
regarding
Proposed Collocations of Telecommunication Facilities
on Existing Towers and Buildings**

Regarding reviews of the databases of the New York Natural Heritage Program for rare, endangered, or threatened species in the vicinity of proposed telecommunication equipment to be collocated on existing telecommunications towers and on existing buildings: New York Natural Heritage has no records of rare or listed species which would be of concern, and therefore does not require a consultation with NY Natural Heritage, for any communication facilities projects that meet one of three criteria below:

- 1) New antennae or panels on existing towers, or new communications equipment installed within existing fenced equipment areas, provided that all new work is confined within existing equipment areas, no previously undisturbed land is disturbed, and no new access roads or expansion of existing access roads is involved.
- 2) New or existing towers, antennae, and associated equipment installed at a location currently wholly occupied by lawn, pavement and/or gravel.
- 3) New or existing towers, antennae, and associated equipment installed on or in existing buildings, rooftops, billboards, or bridges, with the exception of the buildings and bridges with peregrine falcon nests listed later in this letter.

For projects which meet the above criteria, we do not have any records of rare species or significant natural communities which will be of concern in relation to the proposed projects. Therefore, in these cases, separate consultation with the New York Natural Heritage Program is not necessary for a project sponsor to complete the environmental assessment required by the FCC; this letter may serve as a finding of no known impacts on state-listed species or on other rare species. This determination may be reconsidered at any time should additional information on communication facility projects or on rare species become available. Please note that neither this office, nor the NYS DEC Endangered Species Unit, need to be consulted in the future regarding communication facilities and equipment collocated on existing towers in New York State, nor for those located on buildings and bridges except for those listed below.

The NYS DEC Endangered Species Unit offers this guidance regarding cellular communication facilities atop buildings in urban areas: There is not a concern with regards to peregrine falcons when new antennas or communications towers and associated equipment are

proposed, or existing ones modified, unless they are actually on the same building or bridge that a nest is located on. Projects located in adjacent areas will not have a significant impact on this species. If the projects are proposed for construction on the same building or bridge as a nest or breeding pair, then please contact the Endangered Species Unit for further consultation at 625 Broadway, Albany, NY, 12233-4754.

For your reference, peregrine falcon nests currently occur on the following buildings and bridges in the following major urban areas:

New York City buildings:

- Cornell Medical College, 68th Street and York Avenue
- Wall Street: 48 Wall Street at Nassau Ave., and at 55 Water Street
- Riverside Church, Riverside Drive and 120th
- Met Life Building, 200 Park Avenue
- Candler Building, W 42nd and Fashion Avenue (near Times Square)
- Pier 57

New York City bridges:

- Verrazano Narrows, Throgs Neck, Hell Gate Railroad, Triborough, Outerbridge Crossing, Marine Parkway, Goethals, George Washington, Bayonne, Brooklyn, Broadway, Williamsburg, Park Avenue Railroad
- Town of Hempstead, Nassau County: Nassau County Medical Center, East Meadow
- Town of Islip, Suffolk County: Captree Island Bridge
- Buffalo: Statler Building (Franklin and West Genessee Streets), City Hall (Niagara Square), Central Terminal, and State University at Buffalo's South Campus
- Rochester: Marine Midland Plaza Building (Court and Chestnut Streets) and Eastman Kodak Building (State Street near Plymouth and Platt)
- Syracuse: State Tower Building (South Warren Street)
- Binghamton: Exchange Street
- Albany: Dunn Memorial Bridge
- Troy: Collar City (Route 7) Bridge
- Hudson River Bridges: Tappan Zee, Newburgh-Beacon, Kingston-Rhinecliff, Mid-Hudson, Rip van Winkle, Castleton-on-Hudson, and Bear Mountain
- Ogdensburg: Ogdensburg Bridge
- Grand Island/Niagara Falls: North and South Grand Island Bridges (I-190 over Niagara River)

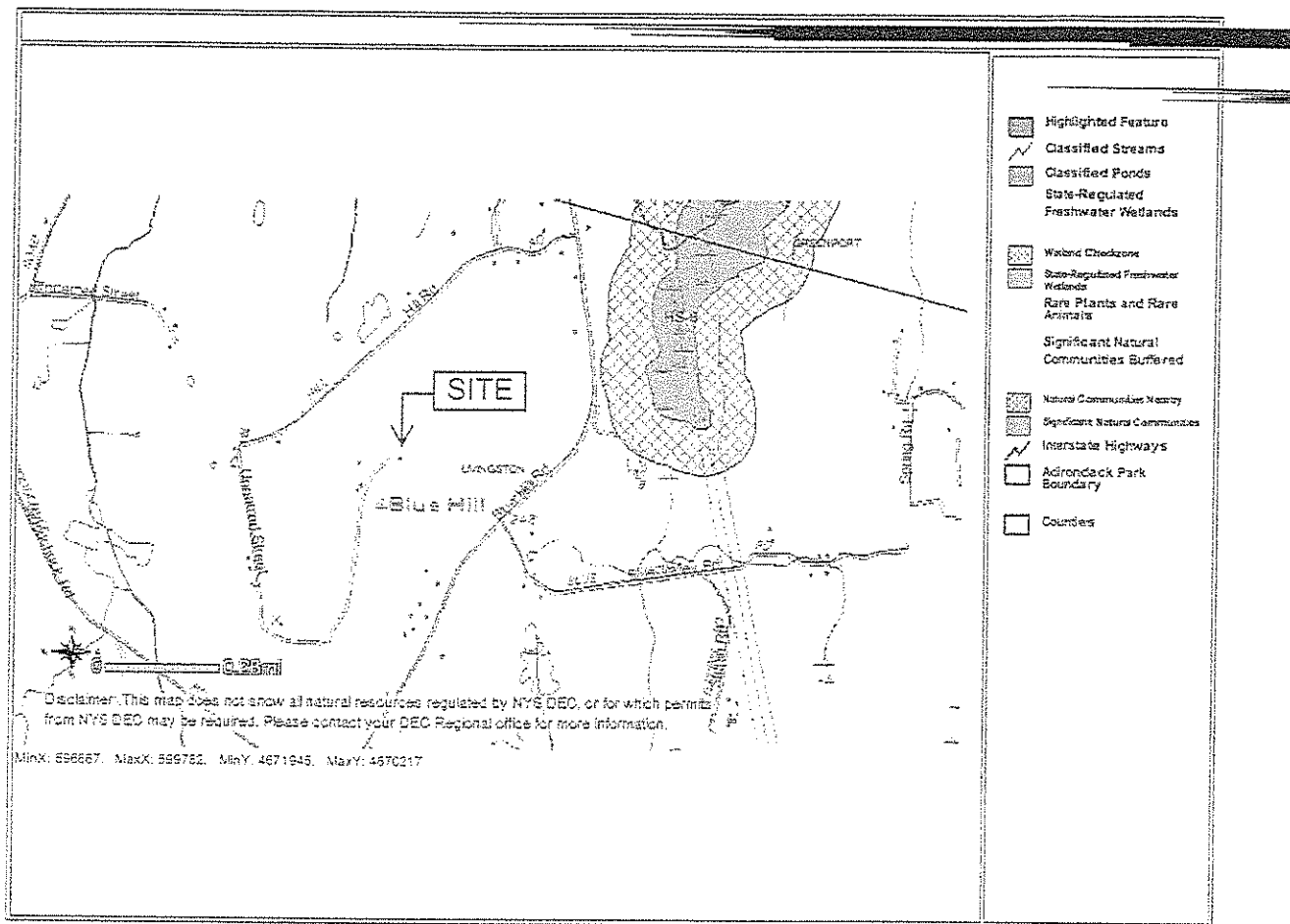
For proposed telecommunications facilities which do not meet the above criteria, including those projects involving the construction of new towers, please submit a request to the New York Natural Heritage Program for a review of any rare or listed species in the vicinity of the proposed project. Directions for submitting a request can be found at <http://www.dec.ny.gov/animals/31181.html>, or can be provided by NY Natural Heritage.

If you have any questions regarding these determinations, please contact our office.

Map Output

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Please set your printer orientation to "Landscape".



Disclaimer: This map was prepared by the New York State Department of Environmental Conservation using the most current data available. It is deemed accurate but is not guaranteed. NYS DEC is not responsible for any inaccuracies in the data and does not necessarily endorse any interpretations or products derived from the data.

United States Department of Interior
Fish and Wildlife Service
Washington, DC 20240

September 14, 2000

To: Regional Directors
From: Director /s/ Jamie Rappaport Clark
Subject: Service Guidance on the Siting, Construction, Operation and Decommissioning of Communications Towers

Construction of communications towers (including radio, television, cellular, and microwave) in the United States has been growing at an exponential rate, increasing at an estimated 6 percent to 8 percent annually. According to the Federal Communication Commission's *2000 Antenna Structure Registry*, the number of lighted towers greater than 199 feet above ground level (AGL) currently number over 45,000 and the total number of towers over 74,000. Non-compliance with the registry program is estimated at 24 percent to 38 percent, bringing the total to 92,000 to 102,000. By 2003, all television stations must be digital, adding potentially 1,000 new towers exceeding 1,000 feet AGL.

The construction of new towers creates a potentially significant impact on migratory birds, especially some 350 species of night-migrating birds. Communications towers are estimated to kill 4-5 million birds per year, which violates the spirit and the intent of the Migratory Bird Treaty Act and the Code of Federal Regulations at Part 50 designed to implement the MBTA. Some of the species affected are also protected under the Endangered Species Act and Bald and Golden Eagle Act.

Service personnel may become involved in the review of proposed tower sitings and/or in the evaluation of tower impacts on migratory birds through National Environmental Policy Act review; specifically, Sections 1501.6, opportunity to be a cooperating agency, and 1503.4, duty to comment on federally-licensed activities for agencies with jurisdiction by law, in this case the MBTA, or because of special expertise. Also, the National Wildlife Refuge System Improvement Act requires that any activity on Refuge lands be determined as compatible with the Refuge system mission and the Refuge purpose(s). In addition, the Service is required by the ESA to assist other Federal agencies in ensuring that any action they authorize, implement, or fund will not jeopardize the continued existence of any Federally endangered or threatened species.

A Communication Tower Working Group composed of government agencies, industry, academic researchers and NGO's has been formed to develop and implement a research protocol to determine the best ways to construct and operate towers to prevent bird strikes. Until the research study is completed, or until research efforts uncover significant new mitigation measures, all Service personnel involved in the review of proposed tower sitings and/or the evaluation of the impacts of towers on migratory birds should use the attached interim guidelines when making recommendations to all companies, license applicants, or licensees proposing new tower sitings. These guidelines were developed by Service personnel from research conducted in several eastern, midwestern, and southern states, and have been refined through Regional review. They are based on the best information available at this time, and are the most prudent and effective measures for avoiding bird strikes at towers. We believe that they will provide significant protection for migratory birds pending completion of the Working Group's recommendations. As new information becomes available, the guidelines will be updated accordingly.

Implementation of these guidelines by the communications industry is voluntary, and our recommendations must be balanced with Federal Aviation Administration requirements and local

community concerns where necessary. Field offices have discretion in the use of these guidelines on a case by case basis, and may also have additional recommendations to add which are specific to their geographic area.

Also attached is a Tower Site Evaluation Form which may prove useful in evaluating proposed towers and in streamlining the evaluation process. Copies may be provided to consultants or tower companies who regularly submit requests for consultation, as well as to those who submit individual requests that do not contain sufficient information to allow adequate evaluation. This form is for discretionary use, and may be modified as necessary.

The Migratory Bird Treaty Act (16 U.S.C. 703-712) prohibits the taking, killing, possession, transportation, and importation of migratory birds, their eggs, parts, and nests, except when specifically authorized by the Department of the Interior. While the Act has no provision for allowing unauthorized take, it must be recognized that some birds may be killed at structures such as communications towers even if all reasonable measures to avoid it are implemented. The Service's Division of Law Enforcement carries out its mission to protect migratory birds not only through investigations and enforcement, but also through fostering relationships with individuals and industries that proactively seek to eliminate their impacts on migratory birds. While it is not possible under the Act to absolve individuals or companies from liability if they follow these recommended guidelines, the Division of Law Enforcement and Department of Justice have used enforcement and prosecutorial discretion in the past regarding individuals or companies who have made good faith efforts to avoid the take of migratory birds.

Please ensure that all field personnel involved in review of FCC licensed communications tower proposals receive copies of this memorandum. Questions regarding this issue should be directed to Dr. Benjamin Tuggle, Chief, Division of Habitat Conservation, at (703)358-2161, or Jon Andrew, Chief, Division of Migratory Bird Management, at (703)358-1714. These guidelines will be incorporated in a Director's Order and placed in the Fish and Wildlife Service Manual at a future date.

Service Interim Guidelines For Recommendations On

Communications Tower Siting, Construction, Operation, and Decommissioning

1. Any company/applicant/licensee proposing to construct a new communications tower should be strongly encouraged to collocate the communications equipment on an existing communication tower or other structure (*e.g.*, billboard, water tower, or building mount). Depending on tower load factors, from 6 to 10 providers may collocate on an existing tower.
2. If collocation is not feasible and a new tower or towers are to be constructed, communications service providers should be strongly encouraged to construct towers no more than 199 feet above ground level (AGL), using construction techniques which do not require guy wires (*e.g.*, use a lattice structure, monopole, etc.). Such towers should be unlighted if Federal Aviation Administration regulations permit.
3. If constructing multiple towers, providers should consider the cumulative impacts of all of those towers to migratory birds and threatened and endangered species as well as the impacts of each individual tower.
4. If at all possible, new towers should be sited within existing "antenna farms" (clusters of towers). Towers should not be sited in or near wetlands, other known bird concentration areas (*e.g.*, state or

Federal refuges, staging areas, rookeries), in known migratory or daily movement flyways, or in habitat of threatened or endangered species. Towers should not be sited in areas with a high incidence of fog, mist, and low ceilings.

5. If taller (>199 feet AGL) towers requiring lights for aviation safety must be constructed, the minimum amount of pilot warning and obstruction avoidance lighting required by the FAA should be used. Unless otherwise required by the FAA, only white (preferable) or red strobe lights should be used at night, and these should be the minimum number, minimum intensity, and minimum number of flashes per minute (longest duration between flashes) allowable by the FAA. The use of solid red or pulsating red warning lights at night should be avoided. Current research indicates that solid or pulsating (beacon) red lights attract night-migrating birds at a much higher rate than white strobe lights. Red strobe lights have not yet been studied.
6. Tower designs using guy wires for support which are proposed to be located in known raptor or waterbird concentration areas or daily movement routes, or in major diurnal migratory bird movement routes or stopover sites, should have daytime visual markers on the wires to prevent collisions by these diurnally moving species. (For guidance on markers, see *Avian Power Line Interaction Committee (APLIC). 1994. Mitigating Bird Collisions with Power Lines: The State of the Art in 1994. Edison Electric Institute, Washington, D.C., 78 pp*, and *Avian Power Line Interaction Committee (APLIC). 1996. Suggested Practices for Raptor Protection on Power Lines. Edison Electric Institute/Raptor Research Foundation, Washington, D.C., 128 pp*. Copies can be obtained via the Internet at <http://www.eei.org/resources/pubcat/enviro/>, or by calling 1-800/334-5453).
7. Towers and appendant facilities should be sited, designed and constructed so as to avoid or minimize habitat loss within and adjacent to the tower "footprint". However, a larger tower footprint is preferable to the use of guy wires in construction. Road access and fencing should be minimized to reduce or prevent habitat fragmentation and disturbance, and to reduce above ground obstacles to birds in flight.
8. If significant numbers of breeding, feeding, or roosting birds are known to habitually use the proposed tower construction area, relocation to an alternate site should be recommended. If this is not an option, seasonal restrictions on construction may be advisable in order to avoid disturbance during periods of high bird activity.
9. In order to reduce the number of towers needed in the future, providers should be encouraged to design new towers structurally and electrically to accommodate the applicant/licensee's antennas and comparable antennas for at least two additional users (minimum of three users for each tower structure), unless this design would require the addition of lights or guy wires to an otherwise unlighted and/or unguyed tower.
10. Security lighting for on-ground facilities and equipment should be down-shielded to keep light within the boundaries of the site.
11. If a tower is constructed or proposed for construction, Service personnel or researchers from the Communication Tower Working Group should be allowed access to the site to evaluate bird use, conduct dead-bird searches, to place net catchments below the towers but above the ground, and to place radar, Global Positioning System, infrared, thermal imagery, and acoustical monitoring equipment as necessary to assess and verify bird movements and to gain information on the impacts of various tower sizes, configurations, and lighting systems.

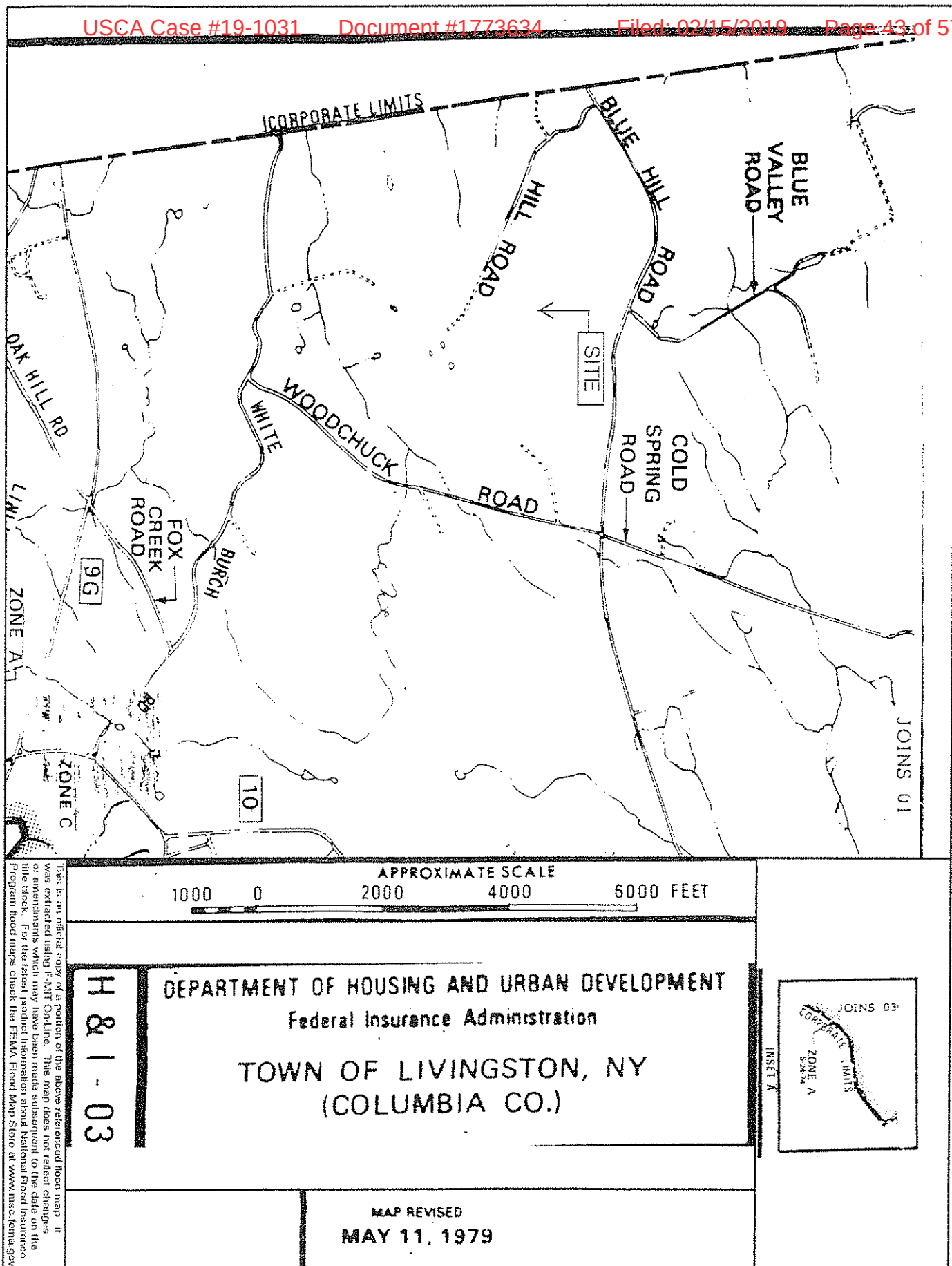
12. Towers no longer in use or determined to be obsolete should be removed within 12 months of cessation of use.

In order to obtain information on the extent to which these guidelines are being implemented, and to identify any recurring problems with their implementation which may necessitate modifications, letters provided in response to requests for evaluation of proposed towers should contain the following request:

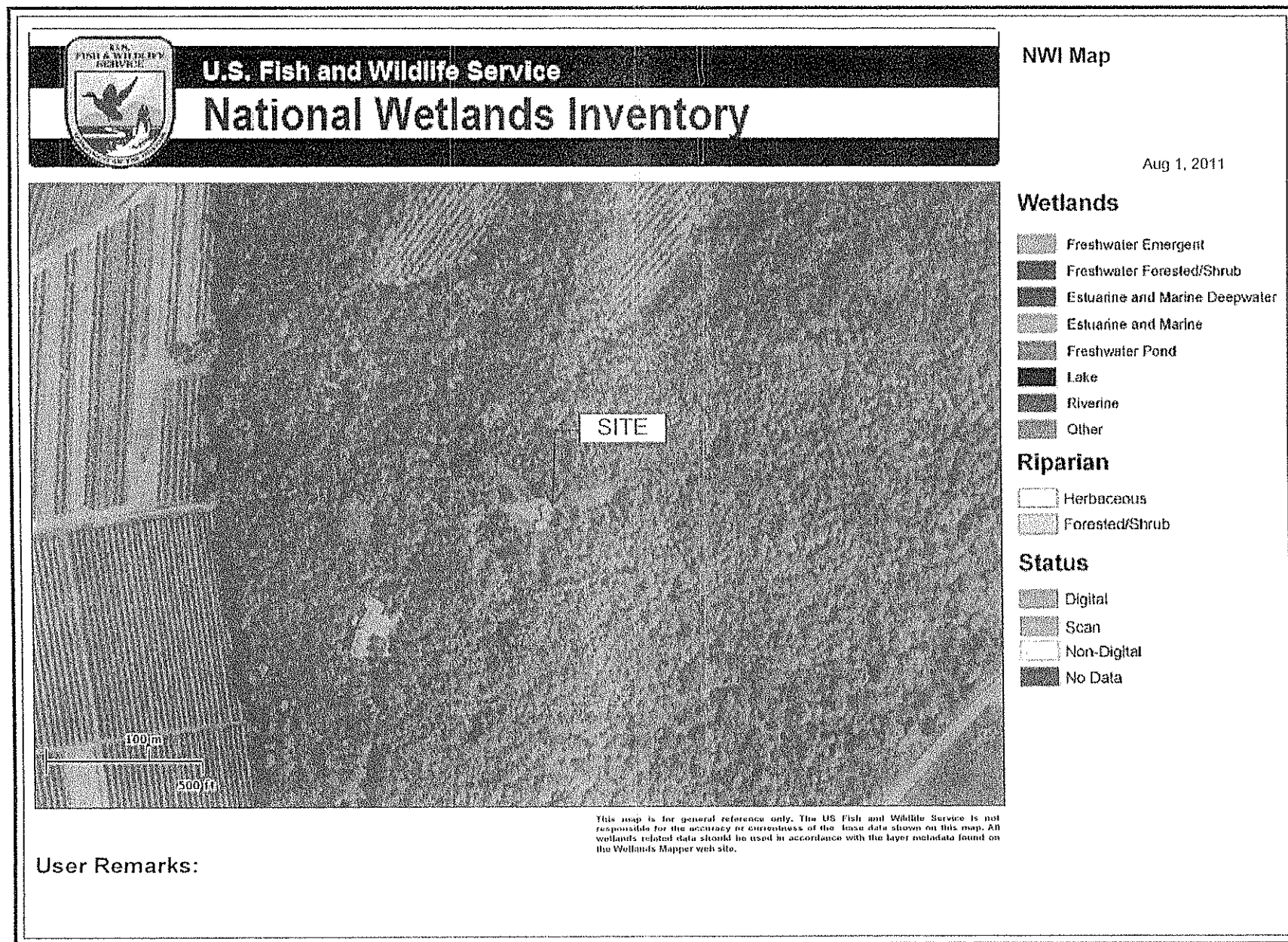
“In order to obtain information on the usefulness of these guidelines in preventing bird strikes, and to identify any recurring problems with their implementation which may necessitate modifications, please advise us of the final location and specifications of the proposed tower, and which of the measures recommended for the protection of migratory birds were implemented. If any of the recommended measures can not be implemented, please explain why they were not feasible.”

[Return to Home Page](#)

APPENDIX V



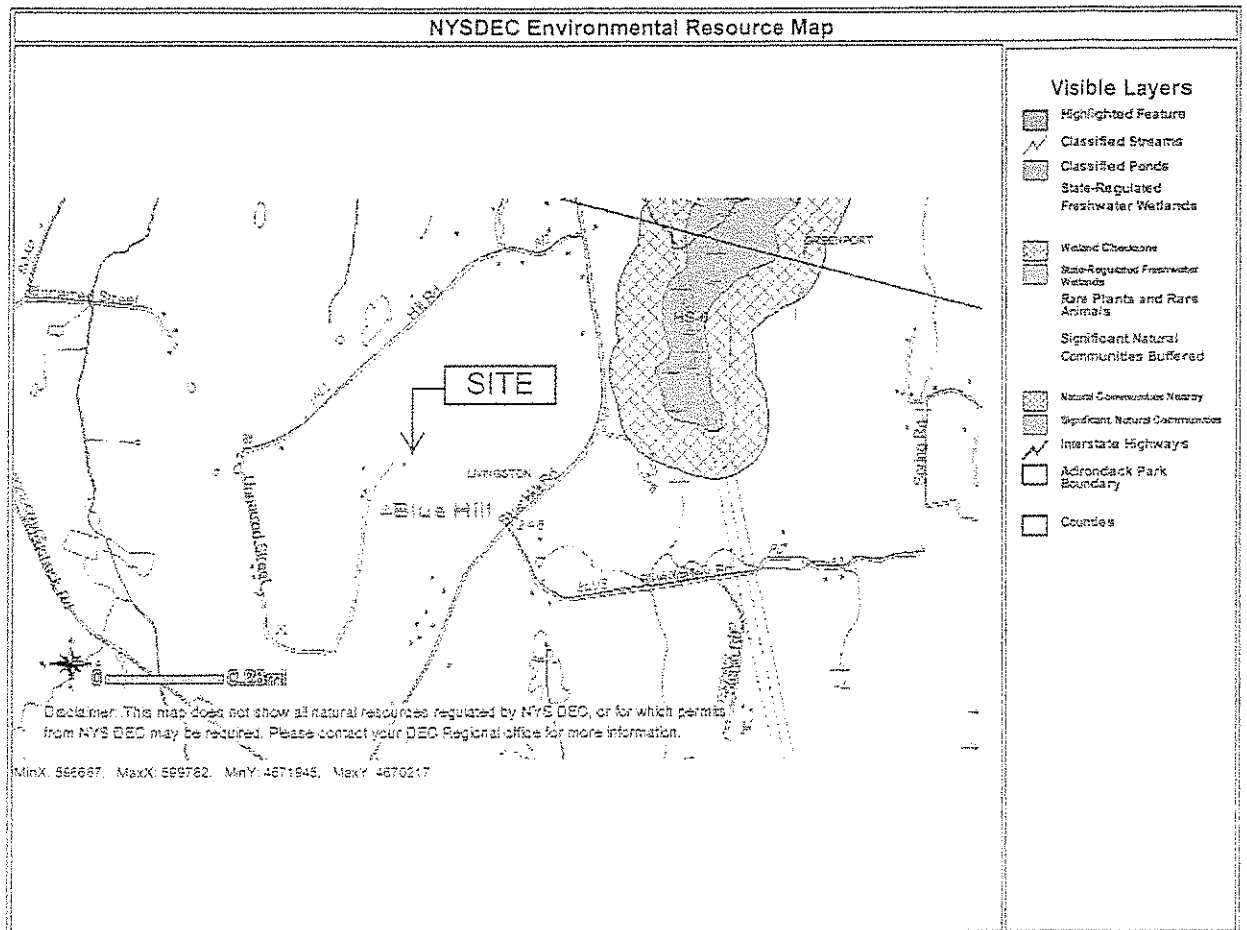
APPENDIX VI



Map Output

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Please set your printer orientation to "Landscape".



Disclaimer: This map was prepared by the New York State Department of Environmental Conservation using the most current data available. It is deemed accurate but is not guaranteed. NYS DEC is not responsible for any inaccuracies in the data and does not necessarily endorse any interpretations or products derived from the data.

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*Columbia County 911***EMERGENCY COMMUNICATIONS DEPARTMENT**

85 Industrial Tract
Hudson, New York 12534

Robert C. Lopez
Director

Office: 518-828-1263
Fax: 518-828-9088

November 30, 2011

Mr. Daniel Abeyta, Assistant Chief
Spectrum & Competition Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
1445 12th Street SW
Washington, DC 20554

Re: Letter of support for the Eger Communications REPLACEMENT tower – located on Blue Hill in the Town of Livingston, County of Columbia, State of New York.

Dear Mr. Abeyta,

I am writing to express, from a public safety standpoint, my strong support for the Eger Communications replacement tower project.

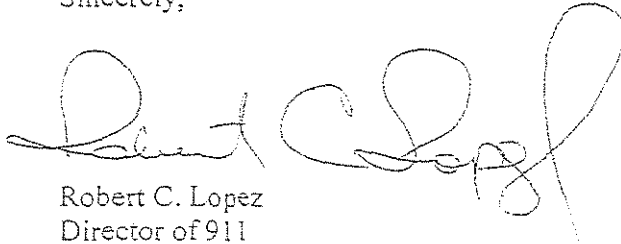
The topography in Columbia County makes radio communications difficult. The 634 square miles encompassing Columbia County are bordered to the west by the Hudson River and to the east by the Berkshire Mountains, with the Taconic Mountain range extending through the center of the county. We are a county of rolling hills and deep valleys, making effective communications a challenge. As the primary public safety answering point in Columbia County, we dispatch for 31 fire departments, 5 ambulance services, 9 police departments, and many other support agencies. Critical to all of these agencies, and the public safety response system in general, is the ability to effectively communicate. Responders depend on this vital link to receive dispatch information via pager and to communicate with the dispatch center while operating on emergency incidents.

For the past six plus years, with the help of professional radio consultants, we have evaluated our radio communications network and identified areas that require attention. Most critical are areas of poor pager, portable radio, and mobile radio coverage across the public safety spectrums we utilize. We also need to address interoperability issues. To mitigate these issues we formulated a 3-phase upgrade plan centered on a simulcast solution. As part of the upgrade project we had an independent structural analysis performed at each of our tower sites. The structural analysis at Eger's Blue Hill tower revealed that the twin guyed towers could not accept any additional loading beyond replacing our point to point infrastructure. The inability to expand our capability at this tower site jeopardizes the entire upgrade project – which jeopardizes public safety. It's important to note that the Blue Hill tower site offers excellent coverage throughout the County. It is without question one of our best sites. Without this site we would have to add, minimally, two to three additional sites to achieve the same coverage.

We recently completed phase one of our project which included replacement of our 45 year old legacy microwave system (including replacement of equipment at Eger's Blue Hill tower). We are now at a standstill, waiting for Eger Communications to install a replacement tower that can support our equipment needs. In order to complete our build-out, which is long overdue, and to be consistent with the National Emergency Communications Plan, we need the replacement tower installed. The current tower is just not capable of handling the additional loading.

I appreciate this opportunity to express our support for this project and strongly urge your favorable consideration for the Eger Communications replacement tower. This tower has been a critical link in Columbia County's public safety radio system for many years and continues to be today. Please feel free to contact me with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert C. Lopez", with a large, stylized loop at the end.

Robert C. Lopez
Director of 911



County of Columbia - Emergency Medical Services

85 Industrial Tract ~ Hudson, New York 12534

(518) 822-8610 Fax: (518) 828-2790

email: info@ccemscoordinator.com

website: www.ccemscoordinator.com

EMS Coordinator

P. J. Keeler

Deputy EMS Coordinators

Kevin Johnson

Sue VanEgghen

JoAnn Sheehy

John Silvernail

Brian Gagne

December 2, 2011

Mr. Daniel Abeyta, Assistant Chief
Spectrum & Competition Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
1445 12th Street SW
Washington, DC 20554

Dear Mr. Abeyta,

I write in support of the Eger Communications Blue Hill replacement tower located in the town of Livingston (Columbia County, NY). This replacement tower is an absolute essential part of the Columbia County public safety radio network and it is imperative the project move forward without delay.

The Blue Hill site currently consists of two 190' towers that have been used by Columbia County emergency service agencies for decades. This tower is an ideal site that provides critical communication capability to many of our fire, EMS and police agencies. Unfortunately, we have reached a point where additional build-out on this tower is not possible due to loading issues. Columbia County 911 conducted its own independent structural analysis which confirmed this. The proposed replacement tower would replace one of the two existing towers at the site with a heavy duty 190' tower that is capable of supporting additional load.

Without this replacement tower Columbia County is unable to move forward with our countywide public safety radio infrastructure upgrade project that began back in 2005. This upgrade project includes replacement of our aging microwave system and the addition of simulcasting ability to help resolve critical gaps in coverage around the county. This is a much needed and long awaited upgrade to our public safety radio network. Unfortunately, it is all on hold until the Eger Communications replacement tower is erected.

I urge you to ensure this replacement project is moved along without delay. Columbia County's emergency services agencies, and the residents they serve, are depending on this.

Sincerely,

P. J. Keeler
EMS Coordinator

COLUMBIA COUNTY
OFFICE OF FIRE COORDINATOR

85 INDUSTRIAL TRACT- HUDSON, NY 12534 OFFICE (518) 822-8610 CELL (518) 821-9758
FAX (518) 828-2790

WILLIAM HUNT
DEPUTY COORDINATOR
PO BOX 144
ANCRAH, NY 12502

JAMES VAN DEUSEN
FIRE COORDINATOR
102 ROUTE 23
CLAVELACK, NY 12513

TAB EIGENBRODT
DEPUTY COORDINATOR
95 CODY LANE
EAST CHATHAM, NY 12060

JOHN HOWE
DEPUTY COORDINATOR
17 SHORE ROAD
CHATHAM, NY 12037

GEORGE KEELER
DEPUTY COORDINATOR
PO BOX 333
CLAVELACK, NY 12513

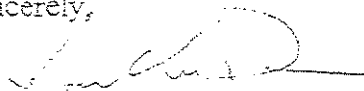
Dec. 6, 2011

Daniel Abeyta, Assistant Chief
Spectrum & Competition Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
1445 12th Street SW
Washington, DC 20554

Re: Eger Communications REPLACEMENT tower

The Eger Communication tower located on Blue Hill in the town of Livingston, Columbia County, State of New York is the main tower for our Fire and EMS communications in our county. It has been for years. We can't lose this location. They only want to replace a tower. This office fully supports this endeavor.

Sincerely,



James VanDeusen,
Columbia Co. Fire Coordinator



P.O. Box 672 • Rhinebeck, NY 12572

(845) 876-0338 • (800) 580-2909 • Fax (845) 876-7071 • www.ndpems.com

December 14, 2011

Mr. Daniel Abeyta, Assistant Chief
Spectrum & Competition Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
1445 12th Street SW
Washington, DC 20554

Dear Mr. Abeyta,

I write in support of the Eger Communications Blue Hill replacement tower located in the town of Livingston (Columbia County, NY). This replacement tower is an absolutely essential part of the Columbia County's public safety radio network and it is imperative the project move forward without delay.

The Blue Hill site currently consists of two 190' towers that have been used by Columbia County emergency service agencies for decades. This tower is an ideal site that provides critical communication capability to many of our fire, EMS and police agencies including ours. Unfortunately, the point has been reached where additional build-out on this tower is not possible due to loading issues. Columbia County 911 conducted its own independent structural analysis which confirmed this. The proposed replacement tower would replace one of the two existing towers at the site with a heavy duty 190' tower that is capable of supporting additional load.

Without this replacement tower Columbia County is unable to move forward with their countywide public safety radio infrastructure upgrade project that began back in 2005. This upgrade project includes replacement of an aging microwave system and the addition of simulcasting ability to help resolve critical gaps in coverage around the county. This is a much needed and long awaited upgrade to the public safety radio network. Unfortunately, it is all on hold until the Eger Communications replacement tower is erected.

Proper communications capabilities are imperative for the timely provision of emergency medical services, and other essential emergency service to the residents of our service area. I urge you to ensure that the replacement project is moved along without delay to ensure the safety and security of the residents of Columbia County.

Sincerely,

Mark Browne
Vice President - Operations

Lebanon Valley Protective Association, Inc.

BOX 162, NEW LEBANON, NEW YORK 12125

December 26, 2011

Daniel Abeyta, Assistant Chief
Spectrum & Competition Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
1445 12th Street SW
Washington, DC 20554

Asst. Chief Abeyta,

As the Chief of the Lebanon Valley Protective Association, Inc., I am sending you this letter in support of the Eger Communications REPLACEMENT tower located on Blue Hill in the Town of Livingston, Columbia County, State of New York.

Columbia County has completed Phase I of planned upgrades to the emergency communications system in this county and is in the process of completing Phase II. These upgrades are now at a standstill as they are awaiting approval of the replacement tower. Our current low band system is a functional but antiquated system that will not support additional upgrades to stay in compliance with future FCC regulations. The system is also running on parts that are obsolete and non-repairable should we have a malfunction of some of our main transmission components. This radio tower needs to be replaced so that the necessary upgrades to our communication system can be completed. As a member of the communications community, I do not need to tell you the pending ramifications of a failed radio system in this county should these upgrades not be completed prior to failure of our current system.

I and the rest of my department and emergency response community appreciate your time in reading this letter. We also hope that you will see that this replacement tower project continues so that we may have uninterrupted emergency communications in Columbia County.

Sincerely,



Benjamin A. Wheeler Chief

Livingston Fire District**Board of Fire Commissioners**

P.O. Box 34 Livingston, NY 12541

518-851-2710

Fax: 518-851-6540

WWW.LIVINGSTONFD.COM E-mail: lfid@mhccable.com

Livingston Fire District
Chief Paul Jahns
P.O. Box 34
Livingston, New York 12541

Daniel Abeyta, Assistant Chief
Spectrum & Competition Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
1445 12th Street SW
Washington, DC 20554

December 27, 2011

Dear Mr. Abeyta:

I am writing you regarding the "Edgar Communications REPLACEMENT tower located on Blue Hill in the town of Livingston/County of Columbia in the state of New York.

The Livingston Fire District and myself are writing you in support of the replacement tower. This tower has been there over 40 years where our emergency attenas for fire, ems and police agencies have been located on this tower.

Now it is time to replace this tower and two special interest groups Scenic Hudson and Olana Society are objecting to this replacement with no merit. This will not affect the environment or community but will affect communications for emergency responders because this is a prime communication site in columbia county. Moving the entire site would decrease our communications abilities.

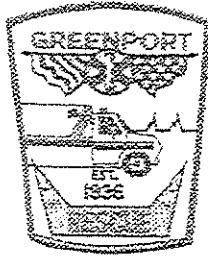
This tower is located in our town of Livingston.

The town and the county would appreciate your speedy assistance on approving this communication replacement site.

Sincerely,

Chief Paul Jahns

Chief Paul Jahns
Livingston Fire District

**Greenport Rescue Squad, Inc.**

3 Newman Road • P. O. Box 275 • Hudson, New York 12534
Office (518) 822-8511 • Fax (518) 822-0047 • Operations (518) 828-5175

December 29, 2011

Mr. Daniel Abeyta, Assistant Chief
Spectrum & Competition Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
1445 12th Street SW
Washington, DC 20554

Dear Assistant Chief Abeyta:

I write on behalf of the Greenport Rescue Squad, Inc. in support of the Blue Hill replacement tower located in the State of New York, County of Columbia, Town of Livingston. This replacement tower is an indispensable part of the Columbia County, NY public safety radio network and it is imperative that the project move forward without delay.

The Blue Hill Tower site is currently comprised of two (2) one hundred ninety feet (190') towers that have been used by emergency service agencies within the County for decades. This tower site provides mission-critical communications. Due to loading limitations, additional build-out on this tower is not possible. Columbia County's independent structural analysis confirmed this. The proposed replacement tower would replace one of the two existing towers and is a heavy duty tower of the same height that is capable of supporting additional load.

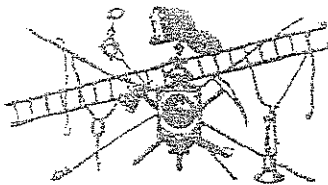
Without this replacement tower Columbia County is unable to complete the County-wide public safety radio infrastructure upgrade project that was initiated in 2005. This upgrade project will help resolve critical gaps in radio communications around the County. This entire project is at a standstill and cannot be resumed and completed until the Eger Communications replacement tower is erected.

I urge you to ensure that this replacement tower project is moved forward without delay. Columbia County's emergency services and the residents they serve are depending on this.

Very truly yours,

Michael Cozzolino
Secretary
Board of Directors

HILLSDALE FIRE COMPANY NO. 1



9387 STATE ROUTE 22
HILLSDALE, NEW YORK 12529

1/1/12

Fred R. Miller, Chief HFC
16 Deerfield Circle
Copake, NY 12516

Daniel Abeyta, Assistant Chief
Spectrum & Competition Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
1445 12th Street SW
Washington, DC 20554

Dear Chief Abeyta,

As a member and Chief of the Hillsdale Fire Company, I am writing this letter on behalf of our membership. Hillsdale is located at the Eastern edge of Columbia County in the state of New York. Because of Hillsdale's geographic layout our county, emergency radio communications can be intermittent in various locations. We strongly support the Eger Communications REPLACEMENT Tower, which is located in the town of Livingston, NY in Columbia County on Blue Hill. This REPLACEMENT tower would help to maintain and improve much needed communications during emergency responses. Clear, precise communications saves lives of the residents, as well as, the emergency responders of this, and neighboring counties. We respond wherever needed, in times of such emergencies and disasters, 24/7/365 and we believe in and support this tower REPLACEMENT to help protect lives and property.

Thank you for your consideration in this important matter.

Firematically,

A handwritten signature in black ink, appearing to read "Fred R. Miller". The signature is fluid and cursive, with the first name "Fred" being more prominent.

Fred R. Miller
Chief Hillsdale Fire Company
(518) 965-3159

EXHIBIT 3

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of

OPPOSITION TO PETITION
FOR RECONSIDERATION

EGER COMMUNICATIONS
PROPOSED TOWER PROJECT
COLUMBIA COUNTY, NEW YORK.

Filed by:

Caffry & Flower
John W. Caffry, of Counsel
Claudia K. Braymer, of Counsel
100 Bay Street
Glens Falls, New York 12801
(518) 792-1582

Attorneys for Scenic Hudson, Inc. and The Olana Partnership

Date: September 12, 2013

**I. Background Regarding the New Tower
And Its Potential Adverse Effects
On a National Historic Landmark**

This firm represents Scenic Hudson, Inc. ("Scenic Hudson") and The Olana Partnership ("TOP") with respect to this matter. Scenic Hudson and TOP were granted "consulting party" status (16 U.S.C. § 800.2) in this matter pursuant to a determination by the Federal Preservation Officer for the Federal Communications Commission ("FCC") dated August 27, 2013.¹ Eger Communications² ("Eger") is the current owner and operator of two 190 foot tall guyed towers located on Blue Hill in the Town of Livingston, Columbia County, New York. Those towers support several antennas and other devices that are licensed by the FCC.

Eger proposes to construct a new tower on Blue Hill. The proposed new tower would be located within the viewshed of the Olana State Historic Site ("Olana"), which was designated as a National Historic Landmark in 1965, and was added to the National Park Service's Watch List of Threatened and Endangered National

¹ The National Park Service ("NPS") also requested to participate in the Section 106 consultation process, but Eger declined to grant that agency consulting party status. See Letter from Maryanne Gerbauckas (NPS) to Mr. Mark Eger (Eger) dated October 19, 2010, a copy of which is attached hereto as Attachment A.

² Although the Petition for Reconsideration refers to "Eger Communications, Inc.", there is no New York Corporation by that name. It is our understanding that Eger Communications is a general partnership.

Historic Landmarks in 2004. Our clients share the position of the New York State Historic Preservation Office ("SHPO") - the Office of Parks, Recreation and Historic Preservation ("OPRHP") - that the new tower will have an adverse visual effect on Olana and its viewshed.

Due to the potential adverse effects on Olana, and Eger's apparent lack of regard for those effects (Eger refused numerous requests by Scenic Hudson and TOP to have these effects addressed and mitigated), Scenic Hudson and TOP filed a complaint with the FCC requesting that Eger be required to complete the Section 106 process for the proposed tower.³ Eger opposed the complaint, arguing that the new tower was a "replacement" tower and as such was excluded from Section 106 review by the Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission ("NPA").⁴ After careful consideration over a two-year period of time, FCC determined that the new tower was subject to Section 106 review and "direct[ed] Eger to

³ See Letters from John Caffry, Esq. to Dan Abeyta (FCC) dated April 5, 2011 and October 7, 2011, with attachments.

⁴ See Letters from Robert J. Gagen, Esq. and Jacqueline Phillips Murray, Esq. to Daniel Abeyta (FCC) dated August 29, 2011 and October 24, 2011.

complete the Section 106 process pursuant to the procedures specified in the [NPA]".⁵

In the meantime, Eger sought and received local zoning approval from the Town of Livingston to construct the new tower on Blue Hill. Scenic Hudson and TOP have filed a proceeding in New York State Supreme Court to challenge the Town's approval of the new tower.

**II. The Petition for Reconsideration
Should Be Dismissed Because There
Are No New Facts or Arguments**

Petitions for reconsideration of final FCC actions may be summarily dismissed or denied if they do not present new facts or arguments. See 47 C.F.R. § 1.106(c), (p).

Here, Eger's attorneys argued in 2011 that the tower was excluded from Section 106 review because it a "replacement" tower. Now, in 2013, Eger's attorneys make the exact same argument - "that the replacement tower is excluded from Section 106 review pursuant to the plain language of NPA Section III (B)".⁶ "After reviewing all of the pleadings", the FCC explicitly decided to reject the parties' arguments relating to

⁵ Letter from Jeffrey S. Steinberg (FCC) to Jacqueline Phillips Murray, Esq. dated August 5, 2013.

⁶ Eger's Petition for Reconsideration dated August 30, 2013 (hereinafter "Eger's Petition"), p. 8.

whether or not the tower qualified as a replacement tower.⁷

Therefore, since this is not a new argument, but is one that has been "fully considered and rejected," Eger's Petition must be dismissed. 47 C.F.R. § 1.106(p)(3); see 47 C.F.R. § 1.106(c).

Eger tried to raise new facts by referencing the need for the new tower "to support upgrades to public safety communications systems that serve the area". Eger's Petition, p. 5. However, this information relates to circumstances that were present prior to 2011, and were known to Eger in 2011, when the original complaint was filed and opposed by Eger. There have been no changed circumstances; Eger could have brought these facts to the FCC in its prior opposition to the complaint. See 47 C.F.R. § 1.106(b)(2)(i), (ii). Indeed, Eger admits that it attempted to raise this information previously⁸ and that the FCC "rejected" it. Eger's Petition, p. 6. Therefore, Eger's Petition relies upon old facts and arguments that were, or could have been, brought before the FCC. See 47 C.F.R. § 1.106(b)(2). As such, Eger's Petition can not be granted, and must be dismissed. See 47 C.F.R. § 1.106(c); 47 C.F.R. § 1.106(p)(1), (2).

⁷ Letter from Jeffrey S. Steinberg (FCC) to Jacqueline Phillips Murray, Esq. dated August 5, 2013, p. 3.

⁸ At least eight different letters were sent to Mr. Daniel Abeyta (FCC) in 2011 regarding the use of the tower by public safety organizations for communication services.

III. The New Tower is Not a Replacement Tower

The proposed tower is not a "replacement" tower that is exempt from Section 106 review under the NPA.⁹ Neither the NPA or the applicable FCC and Advisory Council on Historic Preservation ("ACHP") regulations regarding Section 106 define a "replacement" tower. However, as Eger points out, the NPA "substantially limits the exclusions" from Section 106 review available under the NPA, Section III. Eger's Petition, p. 10, quoting Matter of Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process (FCC Report and Order adopted September 9, 2004). Therefore, if FCC were to decide the question of whether the exclusion applies to the proposed tower, the FCC should determine that the limited exclusion does not apply to the new tower, especially because the tower would cause adverse effects on Olana (see Point IV, infra).¹⁰

The new tower would be a relocated, alternative tower and would not be a mere in-kind "replacement" of one of the two existing towers on the site. First, it will be a stand-alone

⁹ See Letter from John Caffry, Esq. to Dan Abeyta (FCC) dated October 7, 2011, p. 5.

¹⁰ See 36 C.F.R. § 800.14(c) (exclusions under agency programmatic agreements are allowed only when the "potential effects of the undertakings . . . are foreseeable and likely to be minimal or not adverse").

lattice tower, that will be much more visible.¹¹ The existing towers are slender guyed towers. Also, because it would hold the equipment from the two existing towers, and additional new equipment, plus capacity for even more apparatus in the future, its visibility will be increased.¹² The proposed tower will support large antennas and other large equipment (20 feet or more in height), so that it is not exempt under the criteria § I.C of the Collocation NPA.¹³ Thus, the new, alternative tower structure is not a "replacement", as that term is used in the NPA.

**IV. FCC Can Determine That There
Are Unique Circumstances That
Require Section 106 Review**

The NPA is the means by which the FCC implements the National Historic Preservation Act (see 16 U.S.C. § 470f), and meets its obligations under the ACHP's regulations (see 36 C.F.R. § 800.1). While the NPA provides the process for FCC's review of an undertaking, rather than using ACHP's process, the remainder of ACHP's regulations remain in effect. See 36 C.F.R.

¹¹ See Letters from Matthew W. Allen (Saratoga Associates) to Lawrence Hermance and Thomas Alvarez (Town of Livingston) dated April 22, 2013 and June 28, 2013, copies of which are attached hereto as Attachment B.

¹² See id.

¹³ See id.

§ 800.14(a). The ACHP's regulations specifically provide that an agency can "determine[] that there are circumstances under which the normally excluded undertaking should be reviewed". 36 C.F.R. § 800.14(c)(6).

Moreover, the NPA allows the FCC to hear and consider "[c]oncerns regarding the application of these exclusions from Section 106 review". NPA, Section III. Upon considering those concerns, the FCC can "take appropriate action". NPA, Section XI. Appropriate action here means overruling Eger's faulty determination that the exclusion applies to its tower, and determining that the tower should undergo Section 106 review due to its potential adverse effects on Olana.

The SHPO (in this case, New York State OPRHP) has stated that the proposed tower "would be significantly more visible in the historic viewshed" from Olana than the existing guyed towers.¹⁴ The SHPO has explained that the "density of the proposed 190 foot free-standing tower is demonstrably more visible in the landscape than the existing guyed units which are viewed one behind the other from Olana."¹⁵ In a more recent letter, OPRHP stated that the Tower "will have a significant

¹⁴ Letter from Andy Beers (SHPO) to Kevin McDonald and Lawrence Hermance (Town of Livingston) dated December 2, 2010, a copy of which is attached hereto as Attachment C.

¹⁵ Id.

adverse impact on the historic viewsheds associated with" Olana.¹⁶

A visual impact analysis procured by Scenic Hudson and TOP stated that the tower would be "front and center in Olana's signature south viewshed and will be directly visible from virtually all of the places on the property commonly visited by the public".¹⁷ The analysis explained that the new tower's structure, size, and proposed appurtenances and equipment make the new tower "significantly more visible" than the existing two guyed towers.¹⁸ The SHPO also found that the "existing thin guyed towers currently blend well into the view from Olana in most atmospheric conditions", but that the new proposed tower would have a "much more pronounced silhouette in the landscape" because it would be a "solid mass in the landscape" and would be "further exaggerated" by the new telecommunications equipment mounted on the tower.¹⁹

¹⁶ Letter from Ruth L. Pierpont (SHPO) to Mr. Alvarez and Mr. Hermance (Town of Livingston) dated April 18, 2013, a copy of which is attached hereto as Attachment D.

¹⁷ Letter from Matthew W. Allen (Saratoga Associates) to Lawrence Hermance and Thomas Alvarez (Town of Livingston) dated April 22, 2013, Attachment B hereto.

¹⁸ Id.

¹⁹ Letter from Ruth L. Pierpont (SHPO) to Mr. Alvarez and Mr. Hermance (Town of Livingston) dated April 18, 2013, Attachment D hereto.

Eger's reliance on an old letter from the SHPO, relating to an entirely different tower (one of the two guyed towers), is inappropriate. The SHPO's determination from 1992 does not address the current concerns raised by the new tower's mass and associated equipment. Furthermore, the SHPO's 1992 determination does not constitute Section 106 review for that tower, or for this new tower.²⁰

Eger's continued reliance on this old information, and refusing to conduct the Section 106 review, has caused delays for several years.²¹ If Eger had done the Section 106 review a few years ago, when requested by Scenic Hudson and TOP, the critical needs of the various public safety agencies could have been met by now. The public safety agencies have no expertise on the potential effects of the new tower on historic properties, such as Olana. Therefore, their input is not necessary at this stage of the process.

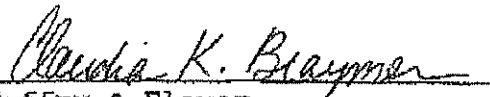
²⁰ We respectfully request that FCC provide documentation of a Section 106 review for the existing guyed towers, if any review was conducted.

²¹ As early as 2007, when the new tower was first proposed, the SHPO advised Eger that the tower was subject to Section 106 review, and that the effects on Olana must be addressed in that process. See Letter from John A. Bonafide (SHPO) to Mr. Mark Eger (Eger) dated May 30, 2007, a copy of which is attached hereto as Attachment E.

V. Conclusion

Eger's Petition for Reconsideration must be dismissed, and the Section 106 process must proceed due to the tower's potential adverse effects on Olana. We look forward to working with the FCC, the SHPO and Eger throughout the Section 106 review.

Dated: September 12, 2013


Caffry & Flower
John W. Caffry, of Counsel
Claudia K. Braymer, of Counsel
Attorneys for Scenic Hudson, Inc.
and The Olana Partnership
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Glens Falls, New York 12801
(518) 792-1582

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Caffry & Flower

ATTORNEYS AT LAW

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GLENS FALLS, NEW YORK 12801
(518) 792-1582 • FAX: 793-0541

JOHN W. CAFFRY

CLAUDIA K. BRAYMER

KRISTINE K. FLOWER

September 12, 2013

VIA OVERNIGHT MAILMarlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
9300 East Hampton Drive
Capitol Heights MD 20743Re: Opposition to Petition for Reconsideration
Regarding Eger Communications Tower Project
Blue Hill, Town of Livingston, Columbia County, New York

Dear Ms. Dortch:

Please find enclosed for filing an original and one copy of an Opposition to Petition for Reconsideration, with attachments, regarding the above-referenced matter. A third "File Copy" is also enclosed, along with a self-addressed stamped envelope. Please stamp the File Copy with the time/date of filing and return it to us in the enclosed envelope.

Also enclosed is an Affidavit of Service for filing. Please stamp the copy and return it to us in the enclosed envelope.

If there are any questions. Please feel free to contact me. Thank you kindly.

Sincerely,


Claudia K. Braymer
cbraymer@caffrylawoffice.comCKB/ljs
enc.cc: Jeffrey S. Steinberg, FCC
Donald Johnson, Esq., FCC (via e-mail)
Jacqueline P. Murray, Esq., Attorney for Eger Communications
John A. Bonafide, OPRHP
Sara Griffen, TOP (via e-mail)
Jeffrey Anzevino, Scenic Hudson (via e-mail)

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EXHIBIT 4

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of

EGER COMMUNICATIONS
PROPOSED REPLACEMENT TOWER,
COLUMBIA COUNTY, NEW YORK.

REPLY IN FURTHER SUPPORT OF
PETITION FOR RECONSIDERATION

Filed by:

The Murray Law Firm, PLLC
Jacqueline Phillips Murray, Esq., Of Counsel
10 Maxwell Drive, Suite 100
Clifton Park, NY 12065
(518) 688-0755

Attorneys for Eger Communications

Date: September 20, 2013

I. Introduction

Eger Communications¹ ("Eger") respectfully submits this Reply in further support of its Petition for Reconsideration of the Commission's August 5, 2013 letter decision on an informal complaint, requiring Eger to complete a review process pursuant to Section 106 of the National Historic Preservation Act ("NHPA") even though its proposed replacement of an existing 190-foot tower with a tower of the same height at the same site meets all of the criteria for exclusion from such review pursuant to Section III (B) of the Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Commission ("NPA").

II. Eger's Petition Should Be Granted Because It Meets The Requirements Of 47 CFR §1/106(c).

The Commission's regulations clearly state that petitions for reconsideration may be granted where (1) the Commission or designated authority determines that consideration of the facts or arguments relied on is required in the public interest; or (2) the petition relies on facts or arguments which relate to events which have occurred or circumstances which have changed

¹ "Eger Communications, Inc." is the entity named by the Commission in its August 5, 2013 letter decision. However, Eger Communications is a New York general partnership.

since the last opportunity to present such matters to the Commission.

Contrary to the opponents' claims, such facts and arguments have been presented in this Petition to warrant reconsideration.

By email dated October 7, 2011, the Commission declared that the pleading cycle on the opponents' informal complaint was complete. Eger requested an opportunity to Surreply, which resulted in the pleading cycle being completed on October 24, 2011.² After the pleading cycle was completed, the Commission received numerous letters from public safety agencies that needed the replacement tower to support upgrades to their antiquated and unreliable public safety communications systems.³ Further, on January 11, 2013 - also after the pleading cycle was completed -- such public safety agencies joined Eger's Application for the replacement tower.

Given that the public safety agencies letters and status as Co-Applicants for this project occurred after the Commission declared the pleading cycle complete, the Commission did not afford the public safety agencies an opportunity to be heard on the informal complaint and, as a result thereof, did not take

² See Exhibit A - Electronic mail From the Commission (Donald Johnson) dated October 11, 2011.

³ See Exhibit "C" to Eger's Petition for Reconsideration dated August 30, 2013.

into consideration the interests of the public safety agencies in deciding the informal complaint. This is perhaps best confirmed by the Commission's August 5, 2013 decision on the informal complaint, which makes no mention whatsoever of the public safety agencies' need for the replacement tower, their written pleas to the Commission and their status as Co-Applicants with Eger. Indeed, the Commission's August 5, 2011 decision expressly states it was made "[a]fter reviewing all of the pleadings" only.

For this reason alone, it is respectfully submitted that the instant Petition should be granted so that the Commission affords the Co-Applicant public safety agencies an opportunity to be heard, and considers the facts and arguments that may be asserted by the Co-Applicant public safety agencies.

In addition, the Commission's regulations provide another independent basis for granting this Petition: that consideration of the facts or arguments relied on in the Petition is "required in the public interest" (47 CFR §1.106[c][2]). As documented by the letters submitted to the Commission by the Co-Applicant public safety agencies after the pleading cycle ended,⁴ it is clearly in the public interest to consider the Co-Applicant

⁴ Id.

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. Indeed, the Commission and the Advisory Council on Historic Preservation intended the NPA's replacement tower exclusion to promote collocation and "facilitate the timely deployment of service."⁵

It is respectfully submitted that the Commission should grant this Petition so that it may consider the public interest in timely deploying the Co-Applicant public safety agencies' communications system upgrades and the benefit of collocating the equipment for such upgrades on the replacement tower, and the potentially dire consequences of failing to do so.

**III. The Proposed Tower Is A "Replacement Tower"
As Defined In The NPA**

The opponents erroneously claim that the NPA does not define what constitutes a "replacement tower" that is excluded from Section 106 review. Quite to the contrary, the NPA Section III (B) provides a very clear definition of what constitutes a "replacement tower":

Construction of a replacement for an existing communications tower and any associated excavation

⁵ See In the Matter of Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, FCC Report and Order adopted Sept. 9, 2004 at pg. 15.

that does not substantially increase the size of the existing tower under elements 1-3 of the definition as defined in the Collocation Agreement (see Attachment 1 of this Agreement, Stipulation 1.c.1-3) and that 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 or outside any existing access or utility easement related to this 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.⁶

Consistent with the definition provided in NPA Section III(B), Eger proposes "construction of a replacement for an existing communications tower" being the existing 190-foot twin lattice tower. Eger's proposed tower "does not substantially increase the size of the existing tower under elements 1-3 of the definition as defined in the Collocation Agreement (see Attachment 1 of this Agreement, Stipulation 1.c.1-3)" because it is the same height of the existing tower. Eger's proposed tower also "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 or outside any existing access or utility easement related to this site" because it is proposed 5 feet from the existing tower at the very same site. Finally, the existing

⁶ See NPA Section III [B] at pg. B-8.

tower was not built "after March 16, 2001" and, in any event, the New York State Historic Preservation Office has determined that the existing tower "will have No Impact upon cultural resources in or eligible for inclusion in the State or National Register of Historic Places."⁷

Insofar as Eger's proposed replacement tower falls squarely within the plain definition prescribed by NPA Section III (B), it is excluded from Section 106 review thereunder.

Although the opponents attempt to characterize the replacement tower as an "alternative" tower, there is simply no characterization of the replacement tower that can overcome its ability to meet the NPA's definition of a replacement tower. Similarly, the opponents' statement of opinion about the replacement tower's visibility is of no probative value whatsoever. Aside from being mere opinion, nothing in the NPA affords an exception from the replacement tower exclusion due to alleged visibility. Further, to the extent that the opponent's object to the replacement tower because it will have greater structural capacity and will support additional collocation, it must be noted that the Commission and Council contemplated that replacement towers would have to be stronger and would support

⁷ See NY SHPO's September 28, 1992 determination, attached as Exhibit "B" to the Petition for Reconsideration.

additional collocation and nevertheless agreed to exclude them per NPA Section III (B), reasoning as follows:

We adopt the replacement tower exclusion. Similar to collocations, strengthened structures may reduce the need for more towers by housing up to two, four or more additional antennas.⁸

In sum, Eger's proposed tower is clearly a "replacement" tower as that term is unambiguously defined in the NPA. Accordingly, we respectfully submit that the Commission should grant the Petition and decide that the Eger replacement tower is excluded from Section 106 review per NPA Section III (B).

IV. The NPA Replaces the Council's Rules

The NPA unequivocally provides that it "constitutes a substitute for the Council's rules with respect to certain Commission Undertakings."⁹ Similarly, the Council's rules provide that "[c]ompliance with the procedures established by an approved programmatic agreement satisfies the agency's section 106 responsibilities for all individual undertakings of the program covered by the agreement until it expires or is terminated...."¹⁰ Here, the opponents do not dispute Eger's

⁸ See In the Matter of Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, FCC Report and Order adopted Sept. 9, 2004 at pg.18.

⁹ See NPA at pg. B-2.

¹⁰ See 36 CFR §800.14(b)(2)(iii).

compliance with the NPA procedures, because they cannot. Rather, the FCC/NEPA Screening Report¹¹ prepared by Eger's professional consultant documents that Eger fully complied with NPA procedures in determining that the replacement tower is excluded from Section 106 review per NPA Section III(B).

To somehow avoid the NPA and the regulations pursuant to which it was executed, the opponents cite a separate and distinct section of the Council's regulations that sets forth a process for "exempted categories."¹² Review of Section 800.14 of the Council's regulations in its entirety demonstrates that each subsection thereof establishes six (6) mutually exclusive "federal agency program alternatives" at subsections (a), (b), (c), (d), (e) and (f), each with their own procedures for implementation. The NPA expressly states that it was implemented pursuant to subsection (b) of Section 800.14.¹³ As such, the provisions of subsection (c) of Section 800.14 cited by the opponents are inapplicable because that subsection implements a different independent "federal agency program alternative." This regulatory framework is further confirmed by the Council's explanation of Section 800.14:

¹¹ See The FCC/NEPA Screening Report is at Exhibit "A" to Eger's Petition for Reconsideration.

¹² See 36 CFR 800.14(c).

¹³ See NPA at pg. B-2.

Section 800.14 of the ACHP's regulations lays out a variety of methods available to federal agencies to meet their Section 106 obligations. Each of these alternatives allows federal agencies to tailor the Section 106 process to meet their needs.¹⁴

Finally, the opponents' callously claim that the input of Columbia County's public safety agencies "is not necessary." In its Report and Order on the NPA, the Commission made it clear that the interests of public safety are absolutely relevant, finding as follows:

[W]e find, on balance, that the measures described herein will relieve unnecessary regulatory burdens and therefore will promote public safety and consumer interests, consistent with our deregulatory initiatives.¹⁵

The Commission further determined that "the standard of review the [NPA] must provide is not one of perfection but one of reasonableness, taking into account both the likelihood that adverse effects will not be considered in some instances and the overall benefits to be obtained from streamlining measures."¹⁶ Consistent with the NPA's intent, the overall benefits to be

¹⁴ See The Council's website at <http://www.achp.gov/progalt/>.

¹⁵ See In the Matter of Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, FCC Report and Order adopted Sept. 9, 2004 at pg.9, paragraph 20.

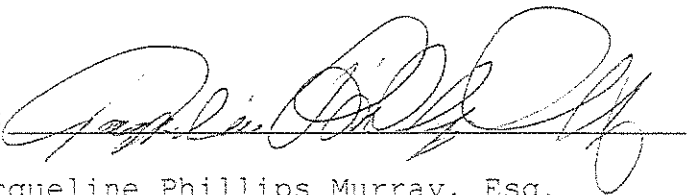
¹⁶ Id. at pg. 10, paragraph 21

obtained from the NPA's streamlining measures can only be fully considered upon affording Columbia County an opportunity to be heard and gathering input from Columbia County's public safety agencies about their imminent need for the replacement tower.

V. Conclusion

For the reasons set forth above, Eger respectfully requests that the Commission grant its Petition and, upon reconsideration, determine that the Eger replacement tower is excluded from Section 106 review pursuant to NPA §III (B).

Respectfully submitted,

By: 

Jacqueline Phillips Murray, Esq.
The Murray Law Firm, PLLC
10 Maxwell Drive, Suite 100
Clifton Park, NY 12065
(518) 688-0755

Attorneys for Eger Communications, Inc.

Date: September 20, 2013

Exhibit A: Electronic Mail dated 10/7/11
from FCC (D. Johnson)

EXHIBIT A

Jacqueline Murray

From: Donald Johnson <Donald.Johnson@fcc.gov>
Sent: Tuesday, October 11, 2011 2:38 PM
To: bob gagen; John W. Caffry; Dan Abeyta
Cc: Stephen Delsordo; sgriffen@olana.org; Sarah Price; Janzevino@scenichudson.org; Jacqueline Murray
Subject: RE: Eger Tower Project, Town of Livingston, New York

Thank you for your e-mail. Your response limited to new issues is due October 24, 2011.

FCC Spectrum Competition and Policy Division

From: bob gagen [mailto:bgagen@yahoo.com]
Sent: Tuesday, October 11, 2011 2:19 PM
To: Donald Johnson; John W. Caffry; Dan Abeyta
Cc: Stephen Delsordo; sgriffen@olana.org; Sarah Price; Janzevino@scenichudson.org; Jacqueline Phillips Murray
Subject: RE: Eger Tower Project, Town of Livingston, New York

Dear Mr. Johnson:

Please accept this email as confirmation of your conversation with Jacqueline Murray of this date. You agreed to grant our client, Eger Communications, until October 24, 2011 within which to submit a Sur Reply to the Reply letter of Caffry & Flowers dated 10/07/11. We will be responding only to new issues raised in their reply.

By a copy of this email I am notifying all parties.

Very truly yours,

Robert J. Gagen, Esq.
424 Warren St.
Hudson, NY 12534
518-828-5554
fax: 518-828-2685

This e-mail transmission and/or documents accompanying it may contain confidential information belonging to Robert J. Gagen, which is protected by the attorney-client or work-product privileges. The information is intended only for the use of the individual or entity named on this sheet. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution, or the taking of any action in reliance on the contents of this information is strictly prohibited. I have taken precautions to minimize the risk of transmitting software viruses, but I advise you to carry out your own virus checks on any attachment to this message. I cannot accept liability for any loss or damage cause by software viruses. If you have received this transmission in error, please immediately notify us by telephone to arrange for return of the documents.

--- On Fri, 10/7/11, Donald Johnson <Donald.Johnson@fcc.gov> wrote:

From: Donald Johnson <Donald.Johnson@fcc.gov>
Subject: RE: Eger Tower Project, Town of Livingston, New York
To: "John W. Caffry" <jcaffry@caffrylawoffice.com>, "Dan Abeyta" <Dan.Abeyta@fcc.gov>
Cc: "Stephen Delsordo" <stephen.delsordo@fcc.gov>, sgriffen@olana.org, "Sarah Price" <SPrice@olana.org>, Janzevino@scenichudson.org, bgagen@yahoo.com
Date: Friday, October 7, 2011, 4:47 PM

The FCC received your response to the opposition. The pleading cycle is complete.



Don Johnson
202-418-7444

From: John W. Caffry [<mailto:jcaffry@caffrylawoffice.com>]

Sent: Friday, October 07, 2011 4:36 PM

To: Dan Abeyta

Cc: Donald Johnson; Stephen Delsordo; sgriffen@olana.org; Sarah Price; Janzevino@scenichudson.org; bgagen@yahoo.com

Subject: Eger Tower Project, Town of Livingston, New York

Dear Mr. Abeyta:

Attached is the Reply of Scenic Hudson, Inc. and The Olana Partnership in the above-referenced matter, together with the two attachments thereto.

Hard copies are being mailed to you and to Mr. Gagen, and to other interested parties.

Sincerely,

John W. Caffry

This e-mail is sent by a law firm and may contain information that is privileged or confidential. If you are not the intended recipient, please delete the e-mail and any attachments and notify us immediately.

John W. Caffry
Attorney at Law
Caffry & Flower
100 Bay Street
Glens Falls, NY 12801
518-792-1582
Fax: 518-793-0541

jcaffry@caffrylawoffice.com

To ensure compliance with requirements imposed by the IRS, we inform you, that unless otherwise indicated, any tax advice contained in this communication (including any attachments) was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding tax-related penalties under the Internal Revenue Code, or (ii) promoting, marketing, or recommending to another party any tax -related matter addressed herein.

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www.themurraylawfirm.com

September 20, 2013

VIA UPS COURIER

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
9300 East Hampton Drive
Capitol Heights, MD 20743

COPY

Re: Reply in Further Support of Petition for Reconsideration
Eger Communications, Inc.
Proposed Replacement Tower, Columbia County, New York

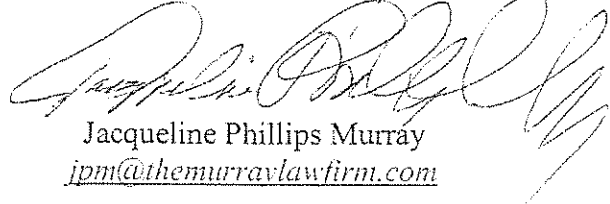
Dear Ms. Dortch:

Please find enclosed for filing an original and four (4) copies of the Reply in Further Support of Eger Communications' Petition for Reconsideration.

Should you have any questions or comments, please do not hesitate to contact me. Thank you for your attention to this matter.

Very truly yours,

THE MURRAY LAW FIRM, PLLC


Jacqueline Phillips Murray
jpm@themurraylawfirm.com

JPM/sw
Enclosure

cc (w/ encl.): Mark Eger
John Bonafide
John Caffry, Esq.
Donald Johnson
Jeffrey Steinberg
Daniel Abeyta
Stephen Delsordo

EXHIBIT 5

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of

EGER COMMUNICATIONS
PROPOSED REPLACEMENT TOWER,
COLUMBIA COUNTY, NEW YORK.

APPLICATION FOR LEAVE TO AMEND
PETITION FOR RECONSIDERATION

Filed by:

The Murray Law Firm, PLLC
Jacqueline Phillips Murray, Esq., Of Counsel
10 Maxwell Drive, Suite 100
Clifton Park, NY 12065
(518) 688-0755

Attorneys for Eger Communications

Date: October 24, 2014

I. Introduction

By Decision/Order dated August 26, 2014 (the "State Court Decision"), New York State Supreme Court, Columbia County, dismissed a proceeding by Scenic Hudson, Inc., The Scenic Hudson Land Trust, Inc. and The Olana Partnership (collectively, the "Opponents") against the Town of Livingston Planning Board, Eger Communications ("Eger"), and Blue Hills Fruit Farms, Inc., challenging certain municipal approvals awarded to Eger to replace two (2) 190-foot guyed lattice towers with a single self-supporting lattice tower of the same height and at the same site (the "Replacement Tower"). A copy of the State Court Decision is attached hereto as Exhibit "A".

Pursuant to 47 CFR §1.106(f), Eger respectfully requests that the Commission grant Eger leave to supplement its Petition for Reconsideration dated August 30, 2013 (the "Petition") to include the State Court Decision.

II. Procedural History

By letter dated April 5, 2011, the Opponents filed an informal complaint with the Federal Communications Commission (the "Commission") against Eger seeking a determination by the Commission that Eger's proposed Replacement Tower is subject to

Section 106 review of the National Historic Preservation Act ("NHPA").

By letter dated August 29, 2011, Eger opposed the informal complaint, explaining that the proposed Replacement Tower is expressly excluded from Section 106 review pursuant to Section III (B) of the Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Commission ("NPA"). Specifically, NPA Section III (B) provides that replacement towers falling within the below criteria are "excluded from Section 106 review by the SHPO/THPO, the Commission and the Council and, accordingly, shall not be submitted to the SHPO/THPO for 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 (see Attachment 1 of this Agreement, Stipulation 1.c.1-3) and that 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 or outside any existing access or utility easement related to this 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.¹

¹ See NPA Section III [B] at pg. B-8.

By letter dated August 5, 2013 (the "FCC decision"), the Commission directed Eger to complete a Section 106 review process for the Replacement Tower, without resolving whether the proposed Replacement Tower falls within the NPA's replacement tower exclusion. Rather, the Commission cited "unique circumstances" as rendering Section 106 review necessary in respect to the Replacement Tower.

On August 30, 2013, Eger filed a Petition for Reconsideration seeking reversal of the FCC decision.

Just prior to the issuance of the FCC decision, on July 12, 2013, the Town of Livingston awarded Eger with the municipal approvals necessary to install the Replacement Tower. The Opponents challenged such approvals by filing an Article 78 Petition (the "State Court Petition") in New York State Supreme Court, Columbia County, naming Eger as a Respondent as well. At issue in the State Court Petition, was whether the Town of Livingston failed to "take a hard look" at or make a rational decision about the Replacement Tower's visual impact upon the viewshed of the Olana State Historic Site ("Olana"), located approximately 2 miles from the existing 190-foot towers where the Replacement Tower of the same height is proposed.

In the State Court Decision, New York State Supreme Court made the following findings: (1) that the Town of Livingston Planning Board did indeed take a "hard look" at the potential impact of Eger's proposed Replacement Tower upon the Olana viewshed; and (2) that said Planning Board was justified in making a determination that the proposed Replacement Tower would not have an adverse impact on the Olana viewshed. Based upon such findings, the Court dismissed the Opponents' State Court Petition, thereby upholding the Planning Board's determination that Eger's proposed Replacement Tower would have no adverse impact upon the Olana viewshed.

III. The State Court Decision Is A New Fact That Merits Inclusion In The Record On Eger's Petition For Reconsideration

A supplemental and/or amended petition may be filed greater than 30 days after the FCC Decision upon an application for leave to file setting forth the grounds therefore. 47 CFR § 1.106(f). In the present case, leave to file a supplemental and/or amended petition to include the recent State Court Decision is warranted for a number of reasons. First, the State Court Decision answers the question of whether the Replacement Tower will have an adverse impact upon the Olana viewshed. This issue was raised in the FCC Decision where the Commission stated

that the potential risk that the proposed Replacement Tower would have a "significantly greater visual intrusion than the existing guyed towers" was a unique circumstance giving rise to the Commission's decision to require a Section 106 review of the Replacement Tower. On this point, however, the State Court Decision is instructive. In upholding the Town of Livingston's determination that the Replacement Tower would not have a discernible impact upon the Olana viewshed, the State Court held that the Town of Livingston Planning Board's findings were supported by "substantial evidence that included expert opinions, visual analyses and photographic simulations submitted by both parties." As such, the State Court Decision assesses and, more importantly, negates based on "substantial evidence" any potential risk of visual impact cited in the FCC Decision.

Second, the State Court Decision was issued just recently and, therefore, was not available at the time Eger's Petition for Reconsideration was filed. Notably, the Opponents opposed the initial Petition for Reconsideration, in part, on grounds that no new facts were alleged that were not present at the time of the FCC's Decision.² Clearly, the State Court Decision holding that there is substantial evidence that the proposed

² See Opponents' Opposition to Petition for Reconsideration dated September 12, 2013 at page 4, stating that "Eger's Petition relies upon old facts and arguments that were, or could have been brought before the FCC".

Replacement Tower will not have an adverse visual impact on Olana constitutes exactly such a new fact.

IV. Conclusion

For the reasons set forth above, Eger respectfully requests that the Commission grant Eger leave to supplement its Petition for Reconsideration with the recent State Court Decision.

Respectfully submitted,

By: 

Jacqueline Phillips Murray, Esq.
The Murray Law Firm, PLLC
10 Maxwell Drive, Suite 100
Clifton Park, NY 12065
(518) 688-0755

Attorneys for Eger Communications

Date: October 24, 2014

APPLICATION FOR LEAVE TO AMEND
PETITION FOR RECONSIDERATION

EXHIBIT "A"

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF COLUMBIA

COPY

SCENIC HUDSON, INC., THE SCENIC HUDSON
LAND TRUST, INC., and THE OLANA PARTNERSHIP,

Petitioners,

DECISION/ORDER

-against-

Index No. 6454-13

R.J.I. No. 10-13-0493

Richard Mott, J.S.C.

TOWN OF LIVINGSTON PLANNING BOARD, EGER
COMMUNICATIONS, and BLUE HILL FRUIT FARMS,
INC.,

Respondents.

Motion Return Date:

Final submission July 10, 2014

APPEARANCES:

Petitioners:Claudia K. Braymer, Esq.
Caffry & Flower
100 Bay Street
Glens Falls, NY 12801Respondents:Jacqueline Phillips Murray, Esq.
The Murray Law Firm, PLLC
10 Maxwell Drive, Suite 100
Clifton Park, NY 12065
For Eger Communications and Blue
Hill Fruit Farms, Inc.J. Theodore Hilscher, Esq.
Hilscher & Hilscher
The 1813 Courthouse
2 Franklin Street
Catskill, NY 12414
For Town of Livingston Planning BoardCOLUMBIA COUNTY
CLERK'S OFFICE

2019 AUG 29 P 12:44

FILED

Mott, J.

Petitioners Scenic Hudson, Inc., Scenic Hudson Land Trust, Inc. and the Olana Partnership (Petitioners) challenge the Town of Livingston Planning Board's ("the Town") decision granting site plan approval and a special use permit authorizing Respondent Eger Communications (Eger) to replace an existing 190-foot tall, guyed lattice tower with a single, wider¹, self-supporting lattice tower of the same height at 170 Eger Road, Town of Livingston, Columbia County.

By Decision/Order dated March 20, 2014, the Court denied Eger and the Town's motions to dismiss.

Statute of Limitations

Eger and the Town assert that the thirty day statute of limitations in Town Law §274-a(11) bars Petitioners' first cause of action. They argue that the negative State Environmental Quality Review (SEQR) declaration was issued on June 12, 2013, and, therefore, that the present action, filed on August 15, 2013, was not commenced within thirty days.

Petitioners argue that since the Planning Board issued the negative declaration, the site plan and special use approvals, the statute did not begin to run until July 19, 2013, because the site plan and special use approvals were not filed until then and that this

¹The proposed replacement tower is to be 11 feet wider at the base and 2.3 feet wider at the top.

action was therefore timely commenced.

In *North Country Citizens for Responsible Growth, Inc. v. Town of Potsdam Planning Board*, 39 A.D.3d 1098, 1103 (3d Dept. 2007), the Third Department wrote that since, as in this case, the same agency first made a negative SEQRA declaration² and then granted site plan approval, which were both steps in an integrated process, there was no concrete injury to petitioners until the site plan and special use permits were approved and the statute of limitations began to run upon the granting of the latter. Here, because this action was commenced within thirty days of the filing of the special use permit and the site plan approval, it was timely commenced.

The application to dismiss the first cause of action is hereby denied.

SEQR

Petitioners' Arguments

Petitioners assert that the Planning Board failed to take a "hard look" at or make a rational decision about the proposed tower's visual impacts upon Olana's viewshed. Specifically, Petitioners state that the Town relied upon a 1992 letter from New York State Office of Parks, Recreation and Historic Preservation(OPRHP) finding that a single guyed tower would "have No Impact upon cultural resources in or eligible for inclusion in the State and National Registers of Historic Places", but ignored OPRHP letters sent in 2010 and 2013 that the current proposed tower would be more visible than the existing towers

²Although the SEQRA determination preceded the other approvals, it remained subject to further administrative review and was not final until the other approvals were filed.

and "will have a significant adverse impact on the historic viewsheds associated with" Olana, and thereby "cut short" a proper environmental review when it found that the proposed tower would "not have an adverse impact."

Further, Petitioners argue that because the proposed tower is structurally different from the existing ones and has a different visual impact, it was irrational for the Town, relying upon the 1992 letter, to determine that the proposed tower had "no impact greater than that of the existing towers" and that its impact was "minimal." They assert that their visual impact assessments show that the proposed tower would be more visible than the existing ones.

Petitioners also argue that because the increased visibility of the proposed tower had "potential" to cause a "significant adverse [visual] impact", the Town should have adopted a positive declaration and required an Environmental Impact Statement (EIS). Moreover, Petitioners assert that the Town failed to specify in the Environmental Assessment Form (EAF) whether the impact to Olana was potentially significant, thereby violating the letter and spirit of SEQR.

Further, Petitioners argue that the Town violated SEQR by failing to consider future impacts on the viewshed as a result of the approval in this case, by failing to follow the requirements of the Town Zoning Law pertaining to alternative color schemes and tower designs, by misinterpreting the importance of Olana as a designated State Area of Statewide Significance (SASS), thereby too narrowly defining the zone of impact, and reliance upon generalized community support for the project.

Finally, Petitioners argue that appropriate mitigation of the towers impacts were

not considered.

Eger's Response

Eger asserts that the Town's June 12, 2013 Resolution demonstrates that it identified all of the environmental concerns raised by Petitioners, took the required "hard look" and made a satisfactory explanation of the reasons for its determination when it decided that the proposed replacement tower would not cause a significant adverse impact to Olana's viewshed. Eger states that the Resolution was supported by substantial evidence, including the visual analyses and photographic simulations of both sides and an expert professional opinion. Further, Eger asserts that the Town's choices between expert opinions are within its discretion and that they were rational. Further, Eger avers that Petitioners have misstated the record, in particular, with regard to submissions from OPRHP. Finally, Eger asserts that the Town's conclusions were based on substantial and objective evidence and must be upheld.

Eger argues that the Town reviewed a visual impact addendum, that it properly considered OPRHP's 1992 letter and did not ignore the April 18, 2013 letter. Eger denies that an EIS was required despite the Town's classifying the application as a Type I action and the 2013 OPRHP letter. Eger also denies that the Town was required to consider the future impact on the viewshed of an approval in this case or that it misinterpreted the importance of Olana as a SASS, noting that the Tower was not in the SASS. Eger further denies that the Town succumbed to comments by local residents.

The Town's Response

The Town asserts that it complied fully with SEQRA and that its decision was neither arbitrary nor capricious and had a rational basis. Specifically, the Town states that it created a sufficient record for its determination and that the Court must defer to its conclusions.

Discussion

"Judicial review of a lead agency's SEQRA determination is limited to whether the determination was made in accordance with lawful procedure and whether, substantively, the determination 'was affected by an error of law or was arbitrary and capricious or an abuse of discretion' (CPLR §7803(d), *Chinese Staff & Workers Assn. v. City of New York*, 68 N.Y.2d 359, 363; *Matter of Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 416 (1986)." *Akpan v. Koch*, 75 N.Y.2d 561, 570 (1990). The Court is required to "review the record to determine whether the agency identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination. *Id.*, citing *Matter of Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d at 417. Further, an agency's compliance with its substantive SEQRA obligations is governed by a rule of reason and the extent to which particular environmental factors are to be considered varies in accordance with the circumstances and nature of particular proposals. *Id.*

As the Court of Appeals explained in *Matter of Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d at 417, the lead agency need not identify and address every conceivable

environmental impact, mitigating measure or alternative to satisfy SEQRA's substantive requirements and agencies have considerable latitude in evaluating environmental effects and choosing among alternatives. The Court is not permitted to second-guess the agency's choice, which can be annulled only if it is arbitrary, capricious or unsupported by substantial evidence.

Here the record amply demonstrates that the Town identified Petitioners' particular environmental concerns about the impact of the replacement antenna on Olana's viewshed. The Planning Board's June 12, 2013 Resolution specifically noted the "potential area of environment concern was injury to the Olana viewshed." In fact, the June 12, 2013 Resolution makes it abundantly clear that the Planning Board took the required "hard look" at the impact of the replacement tower on Olana's viewshed. Hence, the Resolution specifically states in relevant part:

4. The current application seeks the replacement of the two existing towers with one tower and so represents lowering the number of towers.

5. According to both visual impact studies received, the existing towers are visible today from Olana. The Planning Board finds this visual impact from Olana to be minimal. The new tower will have a similar minimal visual impact. The proposed tower location is of the same height as the existing towers and in the same location as the existing towers. It has been suggested by those speaking on behalf of the Olana Historic Site that because the proposed tower is about 13 feet wide at the tree line (which is about 40 feet high), while the existing towers are each about 2 feet wide, therefore, the visual impact of the proposed tower would be greater than the visual impact of the existing tower. However, the difference of less than 11 feet in width is not discernible at the distance of about 2 miles away from the site to Olana...

7. The Planning Board takes notice that the proposed tower would be one of many twentieth and twenty-first century additions to the Olana viewshed made since Frederic Church's lifetime, and because there are already two towers at the location, does not represent an increase in the number of such

additions. There are, in the same viewshed, three radio towers. These towers are taller than the existing/proposed towers here under review. They are much closer to Olana, about ½ mile away. They carry lights which blink at night. The three towers are visible to a much greater degree than the proposed tower.

These and other portions of the Resolution adequately demonstrate that the Town took the requisite “hard look” at whether the replacement of the existing towers would cause injury to the Olana viewshed. Further, the Town’s determination was supported by substantial evidence that included visual analyses and photographic simulations submitted by both parties and professional opinion. The Town was entitled in its discretion to choose between the conflicting expert opinions it received³. See, e.g., *Matter of Brooklyn Bridge Park Legal Defense Fund, Inc. v. New York State Urban Dev. Corp.*, 50 A.D.3d 1029 (2d Dept. 2008) citing *Matter of Ball v. New York State Dept. Of Env’tl. Conservation*, 35 A.D.3d 732, 733 (2d Dept. 2006) and *Matter of Winston v. Freshwater Wetlands Appeals Bd.*, 254 A.D.2d 363, 364 (2d Dept. 1998). In fact, the Town was required to make the determination about the significance of the visual impact of the replacement tower, and this Court is constrained not to second-guess its choice. See, 6 N.Y.C.R.R. 617.7; *Matter of Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d at 417, *Akpan v. Koch*, 75 N.Y.2d at 571.

Petitioners’ arguments concerning the reference in the Resolution to the OPRHP’s 1992 but not its subsequent, 2013 letters are misplaced. As the Town points out, the New York State Department of Environmental Conservation (NYSDEC) SEQRA Handbook encourages review of previous significance determinations like the 1992 letter. Further,

³Nothing in the record suggests that the Town’s choice to credit one expert rather than another was irrational in any respect.

the record demonstrates that the Town did not ignore OPRHP's 2013 letter. The Town actually reviewed the letter at its April 22, 2013 meeting and was subsequently informed in a June 11, 2013 letter that OPRHP had made a factual error by believing that the proposed Tower was to be a "solid mass." Regardless, the April, 2013 letter was submitted prior to the visual analyses and photographic simulations the Town later received and it was weighed in making the determination.

The Court rejects Petitioners other arguments. Contrary to Petitioners' contentions, the Town received and viewed a Visual EAF Addendum both in 2010 and 2013. Further, the Town was not required to mandate that an EIS be completed because it took a hard look at the relevant environmental concerns, determined that the project would have no significant adverse impact and issued a negative declaration. *Village of Poquott v. Cahill*, 11 A.D.3d 536, 540 (2d Dept. 2004) and cases cited. In addition, the Town was not required to assess the future impact on Olana's viewshed of the approval in this case of the replacement tower (See, 6 N.Y.C.R.R. 617.7), nor was its review deficient because of an alleged failure to consider the importance of Olana's being an SASS. To the contrary, the Town reviewed and relied upon a 5-mile visual analysis that included the SASS. Moreover, the Town's decision was not improperly influenced by citizen comments. The Town received letters in support of both Petitioners and the project. It held appropriate public hearings. Nothing in the record supports the view that the comments improperly influenced the Town's decision that the replacement tower would have a minimal visual impact. Finally, the record shows that mitigation measures and alternatives were considered as the Town received the Visual Impact Assessment Report of Tectonic

Engineering, requested that the applicant provide an explanation of alternative colors and tower designs, considered the applicant's responses to those requests, and reviewed the visual analysis of June 11, 2013.

Clearly, the Town met all of its SEQRA obligations.

Zoning Law

Petitioners argue that the Town violated its Zoning Code because the applicant did not submit all of the necessary materials to obtain an approval. Specifically, Petitioners' assert that the applicant did not establish that the color of the tower "minimizes degree of visual impact" (Zoning Code 4.7(11)(a)(i)), that the Town failed to consider alternative tower designs (Zoning Code 4.7(10), (11)), and that the applicant failed to provide confirmation that the new antennas would be in compliance with federal guidelines for electromagnetic emissions (Zoning Code 4.7(8)(g)). Eger and the Town disagree.

The record compels the conclusion that the Town followed its own Zoning Law. With regard to the color of the tower, the applicant wrote that the same color gray was being used so that "there will be no discernible change in the structure color already present in the view shed, thereby resulting in no significant visual impact due to structure color." Further, the Supplemental Visual Analysis of June 11, 2013 reached the conclusion that an alternate color was likely to be more visible and would attract viewers.

With regard to lack of consideration of alternative designs, the same Supplemental Visual Analysis considered monopole, flagpole and simulated tree tower designs and concluded that these would result in greater visibility.

Finally, with regard to electromagnetic emissions, the replacement tower does not

emit electromagnetic emissions. Rather, those are emitted by the collocators' antennas. Petitioners have repeatedly noted that in this proceeding they were not challenging the approvals granted to Collocators to place their antennas on the replacement tower. Regardless, the application confirmed that the replacement tower would comply with federal guidelines for electronic emissions.


Petitioners' claims with regard to the Town Zoning law are denied.

The Petition is hereby dismissed.

This constitutes the Decision and Order of this Court. The Court is forwarding the original Decision and Order directly to Respondent Eger's counsel, who is required to comply with the provisions of CPLR §2220 with regard to filing and entry thereof. A photocopy of the Decision and Order is being forwarded to all other parties who appeared in the action. All original motion papers are being delivered by the Court to the Supreme Court Clerk for transmission to the County Clerk.

Dated: Claverack, New York
August 26, 2014

ENTER



RICHARD MOTT, J.S.C.

Documents Considered:

1. Notice of Petition, dated August 15, 2013, Petition, dated August 15, 2013 with Exhibit A, Petitioners' Memorandum of Law, dated October 22, 2013;
2. Respondent Eger's Answer, dated May 8, 2014, Memorandum of Law, dated May 8, 2014, Affidavit of Eileen Yandik, dated May 7, 2014 with Exhibit A, Affidavit of Peter

- T. Sutherland, dated May 7, 2014, Affidavit of Tammy Molinski, dated May 7, 2014 with Exhibit A,
3. Respondent Town of Livingston's Answer, dated May 9, 2014, Memorandum of Law of Livingston Planning Board, dated May 9, 2014, Affidavit of Philip Schmidt, dated May 9, 2014 with Exhibits A-C, ,
 4. Petitioners' Reply, dated June 6, 2014, Petitioner's Reply Memorandum of Law, dated June 6, 2014;
 5. Letter of Jacqueline Phillips Murray, Esq., dated June 18, 2014;
 6. Letter of Claudia K. Braymer, Esq., dated July 7, 2014;
 7. Sur-Reply Affidavit of Jacqueline Phillips Murray, Esq., dated July 2, 2014;
 8. Letter of Jacqueline Phillips Murray, Esq., dated July 8, 2014 with attachment (Record Item 20);
 9. Letter of Claudia K. Braymer, Esq., dated July 9, 2014;
 10. Letter of J. Theodore Hilscher, Esq., dated July 22, 2014.

EXHIBIT 6

M | L | F

THE MURRAY LAW FIRM^{LLC}

10 Maxwell Drive, Suite 100 • Clifton Park, NY 12065

Tel: (518) 688-0755 • Fax: (518) 688-0297

www.themurraylawfirm.com

May 6, 2015

Via Electronic Mail and U.S. Mail

Jeffrey S. Steinberg, Deputy Chief
Spectrum and Competition Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554

**Re: Petition for Reconsideration
Eger Communications Proposed Replacement Tower, Columbia County, NY**

Dear Mr. Steinberg:

We represent Eger Communications in connection with its Petition for Reconsideration of the Commission's August 5, 2013 decision on an April 5, 2011 informal complaint in respect to the above public safety replacement tower project. The Commission confirmed that the pleading cycle in respect to the Petition concluded November 24, 2014.

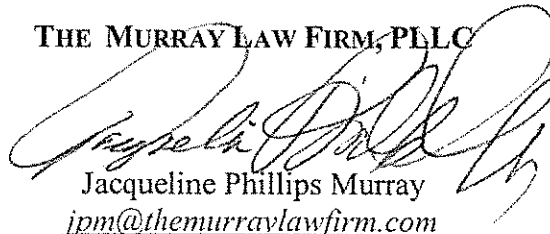
As set forth in the Petition, the replacement tower is needed to support critical upgrades to Columbia County's antiquated and unreliable public safety communications systems. Given the relatively short construction season in the northeast where this site is located, any further delay in deciding the Petition will delay Columbia County's upgrades to its public safety communications system for another year or more.

As such, we respectfully request that the Commission expedite its review and confirm whether it will decide the Petition within the next thirty (30) days or on or before another expedited date certain. In the event that the Commission indicates it is unwilling or unable to expedite a decision on the Petition, we will have to seek judicial review of the Commission's August 5, 2013 pursuant to 47 CFR §1.106(m).

We thank you in advance for the courtesy of a prompt reply to this request.

Very truly yours,

THE MURRAY LAW FIRM, PLLC



Jacqueline Phillips Murray
jpm@themurraylawfirm.com

JPM/lb

Jeffrey S. Steinberg, Deputy Chief
May 6, 2015
Page 2

cc: Mark Eger ✓
John Bonafide
John Caffry, Esq.
Donald Johnson

EXHIBIT 7

Federal Communications Commission

DA 15-862

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 Rules⁵ and also dismiss Eger's Application for Leave as moot.

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

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.*

the process specified in the NPA will give all interested parties, including the NYSHPO, Eger, the 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

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.*,

(continued....)

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

(...continued from previous page)

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 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. ENV'T. 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.*

Federal Communications Commission

DA 15-862

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

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*.

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Olana Estate. Under the NHPA and the NPA, the Section 106 process consists of a number of steps, 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

Jeffrey S. Steinberg
Deputy Chief, Competition and Infrastructure Policy Division
Wireless Telecommunications Bureau

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

EXHIBIT 8

STAMP AND RETURN

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Eger CommunicationsProposed Replacement Tower
170 Eger Road, Town of Livingston,
Columbia County, New York

DA 15-862

Accepted / Filed**AUG 26 2015**

To: The Commission

Federal Communications Commission
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August 26, 2015

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Eger Communications	)	DA 15-862
)	
Proposed Replacement Tower)	
170 Eger Road, Town of Livingston,)	
Columbia County, New York)	

APPLICATION FOR REVIEW

Eger Communications (“Eger”), pursuant to Section 1.115 of the Commission’s rules, submits this application for review in response to the recent *Reconsideration Order* issued in this matter by the Deputy Chief of the Wireless Telecommunications Bureau’s Competition and Infrastructure Policy Division (“Division”).¹ As discussed below, the Division erred in dismissing Eger’s petition for reconsideration of the Division’s 2013 *Letter Ruling*, which required Eger to perform a full Section 106 historic preservation review for a proposed replacement tower that will support critical public safety communications upgrades in Livingston, Columbia County, New York.² On review, the Commission should vacate the *Reconsideration Order* and reach the merits to confirm that the proposed tower is a replacement tower that is excluded from Section 106 review under Section III.B of the 2004 Nationwide Programmatic Agreement (“2004 NPA”).³

¹ *Eger Communications*, Order on Reconsideration, DA 15-862 (WTB/CIPD rel. July 27, 2015) (“*Reconsideration Order*”), dismissing Petition for Reconsideration of Eger Communications (filed Aug. 30, 2013) (“*Petition*”).

² Letter from Jeffrey S. Steinberg, Deputy Chief, Spectrum and Competition Policy Division, to Jaqueline P. Murray, Counsel for Eger Communications (Aug. 5, 2013) (“*Letter Ruling*”).

³ Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Commission, § III.B (2004), 47 C.F.R. Pt. 1, App. C.

I. INTRODUCTION AND SUMMARY

This case presents critical public safety concerns that merit immediate Commission review. In 2010, Eger filed an application with the Town of Livingston, New York for approval to replace an existing twin 190-foot guyed tower structure used to support public safety services with a single self-supporting lattice tower of the same height at the same location.⁴ The record amply shows that the replacement tower is essential to support needed upgrades to Columbia County's public safety communications systems⁵ – so essential, in fact, that the County's public safety agencies and departments became co-applicants to Eger's local siting application.⁶ The Town of Livingston approved the replacement tower, after taking into account concerns about impacts to historic properties.⁷ Indeed, the existing tower structure was completed after the NY

⁴ *Reconsideration Order* at ¶ 2; *Petition* at 2.

⁵ See *Petition* at 5-7 & Ex. C (appending letters from Columbia County 911 Emergency Communications Department, County of Columbia – Emergency Medical Services, Columbia County Office of Fire Coordinator, NDP Emergency Medical Services, Lebanon Valley Protective Association, Livingston Fire District Board of Fire Commissioners, Greenport Rescue Squad, and Hillsdale Fire Company No. 1 – all explaining their imminent need for the replacement tower); see also Letter from the Honorable Chris Gibson, Representative, United States House of Representatives, to Daniel Abeyta, Assistant Chief, Spectrum and Competition Policy Division (Jun. 24, 2013) (“Rep. Gibson Letter”); Letter from the Honorable Kathleen A. Marchione, State Senator, New York State Senate, to Jeffrey S. Steinberg, Deputy Chief, Spectrum and Competition Policy Division (Nov. 14, 2013) (“Sen. Marchione Letter”).

⁶ See Letter from Andrew B. Howard, Deputy County Attorney, Columbia County, to Jeffrey S. Steinberg, Deputy Chief, Spectrum and Competition Policy Division (Sept. 19, 2013) (“Columbia County Attorney Letter”); *Petition* at 5-6, 11; Reply in Further Support of *Petition for Reconsideration of Eger Communications*, at 3 (filed Sept. 20, 2013) (“Reply”).

⁷ See *Reconsideration Order* at ¶ 2 n.6; *Scenic Hudson, Inc. et al. v. Town of Livingston Planning Board et al.*, Decision/Order, Index No. 6454-13, R.J.I. No. 10-13-0493 (N.Y. Sup. Ct. Aug. 26, 2014) (“*Scenic Hudson*”), appended as App. A to Application for Leave to Amend *Petition for Reconsideration of Eger Communications* (Oct. 24, 2014).

SHPO determined in 1992 that it would have no impact on historic properties,⁸ and the proposed replacement unquestionably meets the criteria for exclusion in the 2004 NPA.⁹

Nevertheless, Scenic Hudson, Inc. and Olana Partnership filed an informal complaint with the Division on April 5, 2011, alleging that the proposed replacement tower would have an impact on the Olana House State Historic Site (“Olana”) located approximately two miles away.¹⁰ *More than two years later*, the Division issued its *Letter Ruling*, which declined to address the applicability of the replacement tower exclusion, directed Eger to conduct a full Section 106 review, and ignored immediate public safety needs for sorely needed upgrades to antiquated and failing systems.¹¹ Eger promptly filed a petition for reconsideration, stressing the applicability of the 2004 NPA replacement tower exclusion and the need for public safety to be heard before finally deciding the informal complaint.¹² Public safety advocates also warned of the dangers of further delay, highlighting “near misses” attributable to the antiquated radio system that have put the lives of first responders at risk during emergencies.¹³ Yet, it took the

⁸ Letter from Julia S. Stokes, Deputy Commissioner for Historic Preservation, New York Office of Parks, Recreation and Historic Preservation (“NY SHPO”), to Mark Eger, Mark Eger & Bros., Inc. (Sept. 28, 1992) (“1992 SHPO Approval”), *appended as Ex. B to Petition*; see Petition at 4-5 n.4. The 1992 SHPO Approval concluded that the existing 190-foot tower structure that Eger proposes to replace with a new 190-foot tower at the same site “will have No Impact upon cultural resources in or eligible for inclusion in the State and National Registers of Historic Places.”

⁹ See Petition at 3-5, 7-9. Section III.B of the NPA generally excludes from Section 106 review a replacement tower that does not substantially increase the size of the existing tower, provided certain other conditions are met. See *infra* note 50.

¹⁰ See Letter from John W. Caffry, Counsel for Olana Partnership and Scenic Hudson, Inc., to Dan Abeyta, Assistant Chief, Spectrum and Competition Policy Division, at 1, 3 (Apr. 5, 2011) (“Informal Complaint”).

¹¹ See *Letter Ruling* at 3.

¹² See Petition at 3-11.

¹³ See, e.g., Columbia County Attorney Letter; Sen. Marchione Letter.

Division almost *two more years* to rule on the petition, only to dismiss it on procedural grounds and find that the *Letter Ruling* was a non-final, interlocutory action not subject to reconsideration.¹⁴ Notably, the Division refused the County's first responders an opportunity to be heard, even though the Division's decision indefinitely delayed needed upgrades to their public safety systems.¹⁵

The Division's finding that the *Letter Ruling* is interlocutory and not subject to review is clear error, and the *Reconsideration Order* must be vacated. Pursuant to the Supreme Court's test in *Bennett v. Spear* – the very precedent relied upon by the Division¹⁶ – the decision to require Eger to complete a full Section 106 review was a final action imposing a specific obligation on Eger and resulting in real legal consequences to Eger and the public safety co-applicants. It is therefore fully reviewable. In any case, the Commission should exercise its discretion to consider the merits given the vital public safety interests at stake.¹⁷ Prompt review by the Commission is therefore warranted to conform to precedent, correct the Division's erroneous finding, and avoid further procedural prejudicial error to Eger and its public safety co-applicants.¹⁸ Upon consideration of the merits, the Commission should balance environmental considerations with its core mandate to “promot[e] safety of life and property through the use of

¹⁴ *Reconsideration Order* at ¶¶ 9-11.

¹⁵ See Columbia County Attorney Letter.

¹⁶ See *Reconsideration Order* at ¶ 9 & n.39 (citing *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (“*Bennet*”).

¹⁷ See, e.g., *Carmel Broadcasting Limited Partnership*, 6 FCC Rcd 3287, 3287 ¶ 3 (1991) (“*Carmel Broadcasting*”); *Am. Tel. & Telegraph Co.*, 41 F.C.C.2d 389, 446 ¶ 109 n.23 (ALJ 1971) (“*AT&T*”).

¹⁸ 47 C.F.R. § 1.115(b).

... radio communication,”¹⁹ and find that the proposed tower is excluded from Section 106 review under the plain terms of the 2004 NPA.

After more than four years, the time is now to act and allow this project to move forward, consistent with the 2004 NPA. As New York State Senator Kathleen Marchione has warned: *“Continued delay ... would, without question, unduly compromise public safety and continue to jeopardize the lives of our first responders.”*²⁰

II. QUESTIONS PRESENTED FOR REVIEW

The following questions are presented for Commission review:

- (i) whether the Commission should consider the merits of the Petition, finding that the Division erroneously dismissed the Petition as an interlocutory appeal, contrary to precedent, or that vital public safety considerations compel the Commission to exercise its discretionary review; and
- (ii) whether the Commission should find on the merits that the proposed tower is excluded from Section 106 review under Section III.B of the 2004 NPA or, at a

¹⁹ 47 U.S.C. § 151; see *Amendment of Environmental Rules*, 6 FCC Rcd 1716, 1716 ¶ 4 n.13 (1991) (FCC must “reach fully informed decisions that address and balance environmental issues with other issues within [its] mandates”). The FCC’s commitment to public safety is long held at the highest levels of the Commission. See, e.g., Remarks of FCC Chairman Tom Wheeler, American Enterprise Institute, Washington, D.C., at 2 (June 12, 2014) (“The FCC’s responsibility to promote public safety ... is fundamental. Our mandate is codified in the Communications Act ...”), https://apps.fcc.gov/edocs_public/attachmatch/DOC-327591A1.pdf; *Deployment of Text-to-911 Applications*, 29 FCC Rcd 9846, 9944 (2014) (Statement of Commissioner Ajit Pai) (“The FCC has no higher purpose than promoting the safety of life and property through the use of communications.”); *NET 911 Improvement Act*, 23 FCC Rcd 13144, 13175 (2008) (Statement of Commissioner Jonathan S. Adelstein) (“Since the earliest days of this Commission, promoting our nation’s public safety through communications has been our highest calling.”); *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, 19 FCC Rcd 15676, 15747 (2004) (Statement of Commissioner Kathleen Q. Abernathy) (“[T]he Commission has no higher priority than promoting public safety ...”).

²⁰ Sen. Marchione Letter (emphasis added).

minimum, that public safety co-applicants must be afforded a full opportunity to be heard to avoid further prejudicial procedural error.

As shown below, these questions should be answered in the affirmative.²¹ Accordingly, these questions warrant Commission consideration because the action taken by the Division conflicts with precedent, contains erroneous findings as to important questions of fact, and has resulted in prejudicial procedural error. 47 C.F.R. § 1.115(b).

III. ARGUMENT

A. The Division Wrongly Dismissed Eger's Petition for Reconsideration, and in Any Case the Commission Should Consider the Merits Given Vital Public Safety Considerations.

The *Reconsideration Order* misapplied applicable Supreme Court precedent to erroneously find that the *Letter Ruling* is interlocutory and not subject to reconsideration. Under *Bennett*, two requirements must be met for an agency action to be final and not interlocutory. “First, the action must mark the consummation of the agency’s decisionmaking process – it must not be of a merely tentative or interlocutory nature. And second, the action must be one by

²¹ Consistent with Section 1.115(c), the Division has had ample opportunity to consider whether, under applicable precedent, a Division directive to perform an environmental review is interlocutory. See *Global Tower, LLC*, 29 FCC Rcd 8339 (WTB/SCPD 2014) (“*Global Tower*”) (affirming Division’s decision requiring tower proponent to prepare an Environmental Assessment and dismissing a petition for reconsideration as interlocutory), cited in *Reconsideration Order* at ¶ 9 nn.38-39. In any case, the Division’s position is already “crystalized” in light of *Global Tower*, see *Tribune Co. v. FCC*, 133 F.3d 61, 67 (D.C. Cir. 1998), and public safety’s interest in having this matter “resolved promptly” after more than four years “is so great” that further exhaustion before the Division is inappropriate, see *Mathews v. Eldridge*, 424 U.S. 319, 330 (1976); *WSTE-TV, Inc. v. FCC*, 566 F.2d 333, 336-37 (D.C. Cir. 1977) (“*WSTE-TV*”). Nevertheless, in the event the Commission concludes that any arguments are “new,” Eger respectfully requests that the Commission treat this filing as a petition for further reconsideration and, pursuant to its general authority to review such petitions, consider the issues presented herein. See 47 U.S.C. § 405; 47 C.F.R. § 1.106; *Extension of Initial Non-Delinquency Period for C and F Block Installment Payments*, 14 FCC Rcd 6080, 6081 n.1 (1999); *Side by Side, Inc.*, 27 FCC Rcd 11132, 11132 n.6 (EB 2012).

which rights or obligations have been determined, or from which legal consequences will flow.”²² Importantly, these requirements should be applied in both a “‘flexible’ and ‘pragmatic’” manner.²³ Both requirements are amply met here.

First, the *Letter Ruling* was the Division’s definitive determination that Section 106 review is required; the conclusion on that point was not tentative. While the *Reconsideration Order* concludes that the requirement to perform a Section 106 review is not the “‘consummation’ of the Section 106 review process” and does not “determine[] whether ... the proposed tower would have an adverse effect,”²⁴ that is not what *Bennet* asks. Rather, the germane question is whether the decision to require Eger to perform a Section 106 review is itself a “final” and not a “tentative” decision,²⁵ and the answer is clearly “yes.”

For example, in *Pennaco Energy, Inc. v. United States DOI*,²⁶ the Tenth Circuit held that a decision by the Department of Interior Board of Land Appeals (“IBLA”) finding that National Environmental Policy Act (“NEPA”) requirements were not satisfied prior to auctioning oil and gas leases, and that further environmental review was required, is a “final” action under the first prong of *Bennett*. The court explained:

Although the IBLA did not make a final determination as to what NEPA required, the IBLA’s decision was a definitive statement of its position that the environmental analyses already prepared by the

²² *Bennett*, 520 U.S. at 177-78 (internal citations and quotations omitted).

²³ *Qureshi v. Holder*, 663 F.3d 778, 781 (5th Cir. 2011) (“In evaluating whether a challenged agency action meets these two [*Bennett*] conditions, this court is guided by the Supreme Court’s interpretation of the APA’s finality requirement as ‘flexible’ and ‘pragmatic.’”) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 149-50 (1967)).

²⁴ *Reconsideration Order* at ¶ 10.

²⁵ *Bennet*, 520 U.S. at 177-78.

²⁶ *Pennaco Energy, Inc. v. United States DOI*, 377 F.3d 1147 (10th Cir. 2004) (“*Pennaco*”).

BLM were not adequate. The IBLA's conclusion on that point was neither tentative nor interlocutory in nature.²⁷

This case presents the same scenario. Although the Division did not make a final determination as to whether the proposed replacement would have an adverse effect, the Division's decision "was a definitive statement of its position that the environmental analyses already prepared" by Eger, in reliance on the 1992 NY SHPO "No Impact" finding and the replacement tower exclusion in the 2004 NPA, "were not adequate."²⁸ The Division's "conclusion on that point was neither tentative nor interlocutory in nature,"²⁹ and therefore is a final action under *Bennett*.

Second, the *Letter Ruling* resulted in an action "by which ... obligations have been determined" and "from which legal consequences will flow" under the second prong of *Bennett*. The *Reconsideration Order*'s conclusion that the requirement to perform a Section 106 review is not an adverse effect determination is irrelevant,³⁰ because it says nothing about the obligations and legal consequences that *do* flow from the *Letter Ruling*. Namely, it "direct[ed] Eger to complete the Section 106 process pursuant to the procedures specified in the [2004 NPA]."³¹ Absent the *Letter Ruling*, Eger had no obligation to complete Section 106 review, because Eger's proposed replacement tower meets all of the criteria to be excluded from Section 106 review pursuant to Section III.B of the 2004 NPA.³²

²⁷ *Id.* at 1555.

²⁸ *Id.*; see also Petition at 3-5 & Ex. A ("FCC/NEPA Screening Report") at 2-4.

²⁹ *Pennaco*, 377 F.3d at 1555.

³⁰ See *Reconsideration Order* at ¶ 10.

³¹ *Letter Ruling* at 1.

³² See Petition at 3-5, 9; see also 2004 NPA, § III ("Undertakings that fall within the provisions listed in [the Section III.B exclusion for replacement towers] are excluded from Section 106 review").

Moreover, “legal consequences” flowed from the *Letter Ruling*: pending the time-consuming and uncertain outcome of a Section 106 review process, Eger’s ability to construct the tower, and the public safety co-applicants’ ability to implement their needed system upgrades, are delayed.³³ In fact, the Commission itself has spelled out those legal consequences: “[F]ailure to complete the Section 106 review process prior to construction may violate ... the NHPA and the Commission’s rules.”³⁴ The *Reconsideration Order* therefore wrongly concluded that the petition for reconsideration was an interlocutory appeal.³⁵

In any case, even assuming *arguendo* the *Letter Ruling* is an interlocutory decision, the Commission has the discretion to review such a ruling in cases where critical public interest considerations are presented.³⁶ This is just such a case, and the public interest equities here compel full and immediate review on the merits. The record shows support from all segments of

³³ See *Pennaco*, 377 F.3d at 1155 (“Definite legal consequences flowed from the IBLA’s decision, namely that Pennaco’s development of the leased tracts is delayed until the BLM has prepared additional unspecified NEPA documentation.”).

³⁴ *Nationwide Programmatic Agreement*, Report and Order, 20 FCC Rcd 1073, 1133 ¶ 164 (2004) (“2004 NPA R&O”).

³⁵ While the *Reconsideration Order* also cites the Commission’s 2014 decision in *Jet Fuel Broadcasting* for the proposition that an action that does not dismiss an application or terminate an applicant’s right to participate is interlocutory, see *Reconsideration Order* at ¶ 9 (citing *Jet Fuel Broadcasting Application for a New AM Broadcast Station*, 29 FCC Rcd 2471, 2471-72 ¶ 2 (2014) (“*Jet Fuel Broadcasting*”)), that case is inapposite. *Jet Fuel Broadcasting* involved two competing applicants for an FCC radio license. See *Jet Fuel Broadcasting*, 29 FCC Rcd at 2471 ¶ 1. Here, Eger is a tower owner, not a competing applicant for a mutually exclusive license.

³⁶ See, e.g., *Carmel Broadcasting*, 6 FCC Rcd at 3287 ¶ 3 (finding that review of an interlocutory ruling is appropriate where “far-reaching and vital concerns to the public interest” are presented); *AT&T*, 41 F.C.C.2d at 446 ¶ 109 n.23 (noting that while challenges to an interlocutory ruling normally will not be entertained, “the Commission may decide, purely as a matter of discretion, to depart from this rule”).

the local public safety community – 911, police, fire, medical, as well as state and local legislators – all stressing the critical and imminent need for the replacement tower.³⁷

In their submissions, public safety advocates explained that the topography in Columbia County (rolling hills and deep valleys) makes radio communications difficult, and the existing location is an “ideal” site that provides “excellent coverage” and “critical communication capability to many of our fire, EMS and police agencies.”³⁸ As one representative explained, it is “without question one of our best sites.”³⁹ Nevertheless, these public safety representatives stated that the existing structure, used by County emergency services for decades, requires immediate replacement.⁴⁰ Structural analysis revealed that the existing structure cannot accept any additional loading.⁴¹ “The inability to expand our capability at this tower site jeopardizes the entire [Columbia County emergency communications] upgrade project – which jeopardizes public safety.”⁴² The County’s public safety agencies are therefore working with Eger to replace the existing tower with simply a stronger tower of the same height at the same site that is capable

³⁷ See, e.g., Letter from Robert C. Lopez, Columbia County 911, to Daniel Abeyta, Assistant Chief, Spectrum and Competition Policy Division (Nov. 30, 2011) (“Columbia County 911 Letter”); Letter from P.J. Keeler, EMS Coordinator, County of Columbia – Emergency Medical Services, to Daniel Abeyta, Assistant Chief, Spectrum and Competition Policy Division (Dec. 2, 2011) (“Columbia County EMS Letter”); Letter from Paul Jahns, Chief, Livingston Fire District, to Daniel Abeyta, Assistant Chief, Spectrum and Competition Policy Division (Dec. 27, 2011); Letter from Benjamin A. Wheeler, Chief, Lebanon Valley Protective Association, to Daniel Abeyta, Assistant Chief, Spectrum and Competition Policy Division (Dec. 26, 2011) (“Lebanon Valley Protective Ass’n Letter”); Rep. Gibson Letter; Sen. Marchione Letter; Columbia County Attorney Letter.

³⁸ See Columbia County 911 Letter; Columbia County EMS Letter.

³⁹ Columbia County 911 Letter.

⁴⁰ See Rep. Gibson Letter; Columbia County 911 Letter; Columbia County EMS Letter; Lebanon Valley Protective Ass’n Letter.

⁴¹ Columbia County 911 Letter; Columbia County EMS Letter.

⁴² Columbia County 911 Letter.

of supporting additional load.⁴³ “Without this replacement tower Columbia County is unable to move forward with our countywide public safety radio infrastructure upgrade project that began back in 2005.”⁴⁴

Tragically, “the number of ‘near misses’ attributable to the condition of the existing radio system grows every year.”⁴⁵ For example, according to Columbia County’s state senator, a number of volunteer firefighters only narrowly escaped an exploding building because of shortcomings in the radio system.⁴⁶ For all these reasons, the public safety co-applicants have called the need for the replacement tower “imminent” and “critical” and urged the Commission to act now to make the county safe, stressing time is of the essence: “This replacement tower is an absolute essential part of the Columbia County public safety radio network and it is imperative the project move forward without delay.”⁴⁷

Accordingly, the Commission should reach the merits and, as discussed below, find that the proposed tower is excluded from Section 106 review under Section III.B of the 2004 NPA. At the very least, the Commission should find that the Division erred in failing to account for public safety concerns and should afford the public safety co-applicants, as parties to the proceeding, an opportunity to be heard.

⁴³ See Rep. Gibson Letter.

⁴⁴ Columbia County EMS Letter.

⁴⁵ Sen. Marchione Letter.

⁴⁶ *Id.*

⁴⁷ Columbia County EMS Letter; Columbia County Attorney Letter; Rep. Gibson Letter; *cf. Lamb’s Knoll, Maryland*, 19 FCC Red 12283, 12292-93 ¶ 27 (WTB/SCPD 2004) (recognizing public safety considerations are important).

B. The Commission Should Find that the 2004 NPA Excludes the Proposed Tower from Section 106 Review, and at a Minimum Must Give Public Safety an Opportunity to Be Heard.

On the merits, the Commission should find that the proposed tower fits squarely within the replacement tower exclusion in the 2004 NPA. As a consequence, under the express terms of the 2004 NPA, the proposed replacement tower is “excluded from Section 106 review by the SHPO/THPO, the Commission, and the Council,” and, accordingly, “shall not be submitted to the SHPO/THPO for review.”⁴⁸

In its Petition, Eger explained that it retained Tectonic Engineering & Land Surveying, P.C. (“Tectonic”) to review the proposed replacement tower for compliance with applicable environmental requirements, including the 2004 NPA.⁴⁹ Tectonic determined that the proposed replacement tower was excluded from Section 106 review because it meets the criteria for exclusion in Section III.B of the 2004 NPA.⁵⁰ Specifically, the replacement tower is the same height as the existing tower it will replace; it is at the same site and does not expand its boundaries or require any excavation outside any existing access or utility easements related to the site; and the tower it will replace was constructed prior to March 16, 2001.⁵¹ In addition to meeting all of the exclusion criteria, Eger also explained that the existing 190-foot structure to be

⁴⁸ 2004 NPA, § III.

⁴⁹ See Petition at 3-5, 7-9; FCC/NEPA Screening Report at 2-4.

⁵⁰ 2004 NPA, § III.B (excluding from Section 106 review the construction of a replacement tower that does not substantially increase the size of the existing tower; does not expand the boundaries of the leased or owned property surrounding the tower by more than 30 feet in any direction; does not involve excavation outside these expanded boundaries or outside any existing access or utility easement related to the site; and does not replace a tower built after March 16, 2001 that did not undergo Section 106 review).

⁵¹ FCC/NEPA Screening Report at 2-4.

replaced underwent a Section 106 review process, which was completed with a determination of “No Impact” rendered by the NY SHPO on September 28, 1992.⁵²

Importantly, the Division *does not dispute* that the proposed tower meets the replacement tower exclusion criteria.⁵³ Instead, crediting concerns that the replacement tower “may present a significantly greater visual intrusion” than the existing structure, it ordered Eger to perform a full Section 106 review citing Section XI of 2004 NPA.⁵⁴ Section XI, however, does not direct an outcome; rather, it states that if a member of the public notifies the Commission of concerns regarding application of the 2004 NPA to excluded undertakings, the Commission “will consider public comments” and “where appropriate, take appropriate actions.”⁵⁵

The Commission should revisit the Division’s finding that Section 106 review here is “appropriate.” As noted, the Division does not dispute the applicability of the replacement tower exclusion. The Commission adopted that exclusion because “it is highly unlikely that a replacement tower within the exclusion could have any impact other than on archeological properties,”⁵⁶ and categorically excluding such facilities from Section 106 review would “facilitate[e] the timely deployment of service.”⁵⁷ The Division makes no finding that archaeological resources are in any way impacted here, focusing solely on the potential change

⁵² Petition at 4-5; 1992 SHPO Approval.

⁵³ See *Letter Ruling* at 3.

⁵⁴ *Id.*

⁵⁵ 2004 NPA, § XI.

⁵⁶ 2004 NPA R&O, 20 FCC Rcd at 1090 ¶ 45.

⁵⁷ *Id.* at 1087 ¶ 35. The Commission also rejected a proposed provision to the 2004 NPA that would allow SHPOs to “opt-out” of exclusions from Section 106 Review. See *id.* at 1100 ¶ 72. As Eger explained in its Petition, the Division’s application of Section XI to require Section 106 review effectively amends the 2004 NPA to include an “opt-out” provision, contrary to the provisions of Section XII of the 2004 NPA. See Petition at 9-11 (noting that any amendment to the 2004 NPA “shall be subject to appropriate public notice and comment”).

in visibility from Olana of the replacement tower as compared to the existing twin guyed tower structure that has been in Olana's viewshed for decades.⁵⁸

While Olana is an important resource, the facts here do not support a finding that special environmental review outside the bounds of the 2004 NPA is needed, particularly when weighed against the critical public safety communication needs at stake.⁵⁹ First, the proposed replacement tower meets the replacement tower exclusion criteria, and therefore by definition is "highly unlikely" to impact anything other than archaeological resources.⁶⁰ Second, the proposed tower is located two miles away from Olana, which is well beyond the 0.5 mile area of potential effects normally considered for visual impacts under the 2004 NPA for a non-excluded tower.⁶¹ Third, the Town of Livingston conducted an exhaustive assessment of visual effects, taking into account visual impact studies, and concluded that "[t]he new tower will have a similar minimal visual impact" as the structure it will replace.⁶² Fourth, the New York State

⁵⁸ See *Letter Ruling* at 3.

⁵⁹ See *supra* note 19 and accompanying text.

⁶⁰ 2004 NPA R&O at ¶ 45.

⁶¹ 2004 NPA, § VI.C.4.a; see Sen. Marchione Letter (noting that the replacement tower is "located outside the traditional viewshed" from Olana).

⁶² *Scenic Hudson* at 7-8 (quoting Town of Livingston June 12, 2013 Planning Board Resolution). Specifically, the Resolution found:

"The current application seeks the replacement of the two existing towers with one tower and so represents lowering the number of towers.... According to both visual impact studies received, the existing towers are visible today from Olana. The Planning Board finds this visual impact from Olana to be minimal. The new tower will have a similar minimal visual impact. The proposed tower location is of the same height as the existing towers and in the same location as the existing towers. It has been suggested by those speaking on behalf of the Olana Historic Site that because the proposed tower is about 13 feet [wide] at the tree line (which is about 40 feet high), while the existing towers are each about 2 feet

Supreme Court upheld that finding, concluding that the Town took a “hard look” at the impact of the tower on the Olana viewshed.⁶³ Fifth, *the NY SHPO found the existing structure has “No Impact” on historic resources.*⁶⁴

Given the foregoing, the “appropriate” action under Section XI of the 2004 NPA is to conclude that the proposed tower meets the replacement tower exclusion criteria and Section 106 review is not required.⁶⁵ As Senator Marchione explained: “I understand that there is some concern about the proximity of the existing tower to the Olana State Historic Site. Olana is a treasure, and the view of the Hudson enjoyed by its visitors is breathtaking. *If this replacement tower, located outside of the traditional viewshed, were to have any adverse impact on it, I wouldn't be lending my support to this project.*”⁶⁶

Moreover, the Division *twice* failed to “consider public comments” submitted by the public agencies about the immediate and critical need for the tower, and for this reason alone the

wide, therefore, the visual impact of the proposed tower would be greater than the visual impact of the existing tower. However, the difference of less than 11 feet in width is not discernible at the distance of about 2 miles away from the site to Olana The Planning Board [also] takes notice that the proposed tower would be one of many twentieth and twenty-first century additions to the Olana viewshed made since Frederic Church's lifetime, and because there are already two towers at the location, does not represent an increase in the number of such additions. There are, in the same viewshed, three [other] radio towers. These towers are taller than the existing/proposed towers here under review. They are much closer to Olana, about ½ mile away. They carry lights which blink at night. The three towers are visible to a much greater degree than the proposed tower.”

⁶³ *Id.* at 7.

⁶⁴ See 1992 SHPO Approval.

⁶⁵ See Petition at 10-11.

⁶⁶ Sen. Marchione Letter (emphasis added).

Commission must revisit the Division's invocation of Section XI. In its Petition, Eger explained that the *Letter Ruling* 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, as confirmed by the numerous letters to the Commission discussed above.⁶⁷ As the Columbia County Attorney's Office so eloquently explained:

We note that ... several of Columbia County's public safety agencies and departments had written to the Commission expressing their imminent need for the replacement tower. The Commission did not respond and, in its [*Letter Ruling*], the Commission did not consider Columbia County's public safety need for the replacement tower. We understand that the Commission was also made aware that Columbia County's public safety agencies and departments became co-applicants to Eger Communications' application for the replacement tower ... but the Commission still failed to afford Columbia County an opportunity to be heard or otherwise take into consideration Columbia County's interests in this matter.

Columbia County's public safety interest in the development of the replacement tower is distinct from that of the tower owner Unless and until the Commission grants the Petition and takes Columbia County's public safety interests into consideration *before* deciding the informal complaint, the public interest will not be served.

We respectfully request that the Commission ... afford Columbia County an opportunity to be heard as soon as possible.⁶⁸

The *Reconsideration Order* perpetuates the *Letter Ruling*'s error by relying on a perceived procedural hurdle – the erroneous conclusion that the *Letter Ruling* is interlocutory and cannot be appealed – to silence the important voices of the public safety community. This is clear prejudicial procedural error. As the D.C. Circuit has recognized, it is incumbent upon the

⁶⁷ See Petition at 5-7, 11 & Ex. C.

⁶⁸ Columbia County Attorney Letter.

Commission to “consider[] whether the public interest would be served by reviewing the [Petition] on its merits” before upholding its dismissal on purely procedural grounds.⁶⁹

IV. CONCLUSION

Reading the Division’s *Letter Ruling* and *Reconsideration Order*, one would have no idea that important public safety agencies alerted the Division to the threat to public safety posed by the Division’s inaction, or even that the Division took these concerns into consideration. The Commission should right this wrong by vacating the *Reconsideration Order* and reaching the merits to confirm that the proposed tower is a replacement tower that is excluded from Section 106 review under Section III.B of the 2004 NPA. At a minimum, the Commission’s public interest standard mandates that the Commission vacate the *Reconsideration Order* and remand to the Division with instructions to rescind its 2013 *Letter Ruling* and restore the *status quo ante*, and thereafter afford public safety a full opportunity to be heard before making a final ruling.

⁶⁹ *WSTE-TV*, 566 F.2d at 337.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Blake A. Zanardi of Wilkinson Barker Knauer, LLP, hereby certify that on this 26th day of August, 2015, a copy of the foregoing Application for Review was served via first-class United States mail, postage prepaid, on the following:

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EXHIBIT 9

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

EGER COMMUNICATIONS

PROPOSED TOWER PROJECT
COLUMBIA COUNTY, NEW YORK.

OPPOSITION TO THE
APPLICATION FOR REVIEW

DA 15-862

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INTRODUCTION AND SUMMARY

This firm represents Scenic Hudson, Inc. ("Scenic Hudson") and The Olana Partnership ("TOP") in this matter. Eger Communications ("Eger") is the current owner and operator of two 190 foot tall guyed communications towers located on Blue Hill in the Town of Livingston, Columbia County, New York and seeks to construct a new tower at that location, while removing the existing towers. Scenic Hudson and TOP are confident that there are reasonable alternatives to Eger Communication's current proposal to place a 190 foot tall tower within the historic viewshed of the Olana State Historic Site ("Olana"), which alternatives would reduce the tower's adverse visual effects.

On August 5, 2013, FCC ordered Eger Communications to complete review of the proposed tower under Section 106 of the National Historic Preservation Act ("NHPA"). Instead of proceeding with that review, Eger Communications has repeatedly delayed the process by initially opposing Scenic Hudson's and TOP's position that the Section 106 process applies, then filing the underlying Petition for Reconsideration after the FCC found that the Section 106 process did apply, and filing the now-pending Application for Review.

Scenic Hudson and TOP oppose Eger's Application for Review (dated August 26, 2015) that seeks to vacate the FCC's recent Reconsideration Order (released July 27, 2015) dismissing Eger's

Petition for Reconsideration (dated August 30, 2013) and Eger's Application for Leave to Amend its Petition for Reconsideration (dated October 24, 2014) (collectively referred to hereinafter as "Petition for Reconsideration"). Eger's Petition for Reconsideration sought the reconsideration of the August 5, 2013 decision of the FCC's Competition and Infrastructure Policy Division of the Wireless Telecommunications Bureau ("Division Letter") that Eger must complete the review process set forth in Section 106 of the NHPA, pursuant to the procedures specified in the Nationwide Programmatic Agreement for Review of Effects on Historical Properties for Certain Undertakings Approved by the Commission ("Nationwide Programmatic Agreement").

Eger's Petition for Reconsideration was dismissed because the Division Letter was an interlocutory action by the FCC that is not subject to a petition for reconsideration under the FCC's rules. The dismissal of the Petition for Reconsideration should be affirmed, and the Application for Review should be denied.

POINT I

THE APPLICATION FOR REVIEW SHOULD BE DENIED

In considering an application for review, the FCC "assesses whether (1) the action conflicts with statute, regulation, case precedent, or established policy; (2) the action involves a previously unresolved question of law or policy; (3) the application of existing precedent should be overturned; (4) an erroneous finding as to an important or material question of fact has occurred; or (5) there has been prejudicial procedural error".¹ FCC's regulations are clear that "petitions for reconsideration of interlocutory actions will not be entertained" and may be dismissed by the relevant bureau or office.²

Here, the decision under review, dismissal of Eger's Petition for Reconsideration, should be affirmed because there is no basis in the criteria listed above for finding that the dismissal should be overturned. The Division Letter requiring Eger to proceed with Section 106 review of its proposal tower project was an interlocutory action, and not a "final action", for purposes of the FCC's regulations pertaining to the reconsideration of certain FCC decisions, in that it did not

¹ In the Matter of Wireless Properties, LLC, Application for Review, Chattanooga, Tennessee, Order, FCC 15-91 (2015), p. 6.

² 47 CFR § 1.102(b)(2); see 47 CFR § 1.106(a)(1), (p).

dismiss or deny an application, or terminate Eger's right to participate in the consideration of this matter.³

"For an agency action to be 'final', first, the action must mark the 'consummation' of the agency's decision making process, and not be merely of a tentative or interlocutory nature; and second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow".⁴ While the Division Letter may have had practical implications for Eger Communications, it did not determine "whether or not the proposed tower would have an adverse effect" on Olana; the review process to make that determination has not yet begun.⁵ Therefore, it was not a final action by FCC because it was not "consummation" of the agency's decision resulting in

³ In the Matter of Eger Communications, Petition for Reconsideration, Livingston, New York, *Order on Reconsideration*, DA 15-862 (2015), p. 5.

⁴ In the Matter of Genesis Communications I, Inc., Application for a Major Change to Broadcast Station, Micanopy, Florida, *Opinion and Order*, FCC 14-40 (2014), p. 1.

⁵ In the Matter of Eger Communications, Petition for Reconsideration, Livingston, New York, *Order on Reconsideration*, DA 15-862 (2015), pp. 5-6; contrast Bennett v. Spear, 520 U.S. 154, 159 (1997) (finding that an agency decision, made after the "formal consultation" process, was a final agency action for purposes of judicial review); see also In the Matter of Global Tower, LLC, Application for Antenna Structure Registration, Snodysville, Pennsylvania, *Order on Reconsideration*, DA 14-1004 (2014), p. 3 (dismissing a petition for reconsideration of an interlocutory order requiring an environmental assessment where the order did not "determine[] whether or not [applicant's] proposal will have a significant impact on the quality of the human environment").

"an authorization, such as a construction permit", or a dismissal or denial of a permit application.⁶ Notably, Eger was not foreclosed from having the FCC's Division Letter reviewed, but the process for doing so was not a petition for reconsideration.⁷

Accordingly, the dismissal of the Petition for Reconsideration of the Division Letter as an interlocutory action was in accord with FCC statute, regulations, case precedent, and policy.⁸ Additionally, the dismissal did not involve: a "previously unresolved question of law or policy"; an action where "the application of existing precedent should be overturned"; "an erroneous finding as to an important or material question of fact has occurred"; or "prejudicial procedural error".⁹ Therefore, the dismissal of the Petition for

⁶ In the Matter of Genesis Communications I, Inc., Application for a Major Change to Broadcast Station, Micanopy, Florida, *Opinion and Order*, FCC 14-40 (2014), p. 1.

⁷ See 47 CFR § 1.106(m) ("The filing of a petition for reconsideration is not a condition precedent to judicial review of any action taken by the Commission or by the designated authority . . . "); 47 CFR § 1.115(a).

⁸ See 47 U.S.C. § 405; 47 CFR § 1.102(b)(2); see also In the Matter of Global Tower, LLC, Application for Antenna Structure Registration, Snyder'sville, Pennsylvania, Order on Reconsideration, DA 14-1004 (2014), p. 3. Eger Communications admits that the FCC's policy of dismissing petitions for reconsideration of interlocutory orders regarding further environmental review is "'crystallized' in light of *Global Tower*". Application for Review, p. 6, fn 21.

⁹ In the Matter of Wireless Properties, LLC, Application for Review, Chattanooga, Tennessee, Order, FCC 15-91 (2015), p. 6.

Reconsideration was correct and the Application for Review should be denied.

Moreover, Eger's Petition for Reconsideration merely reiterated the same arguments that it did in its original opposition to Scenic Hudson's and TOP's Informal Complaint (dated April 5, 2011).¹⁰ Eger Communications argued in 2011 that the tower was excluded from Section 106 review because it a "replacement" tower. Eger Communication's Petition for Reconsideration made the exact same argument - "that the replacement tower is excluded from Section 106 review pursuant to the plain language of NPA Section III (B)".¹¹ "After reviewing all of the pleadings", the FCC explicitly decided to reject the parties' arguments relating to whether or not the tower qualified as a replacement tower.¹²

Additionally, the information about the use of the tower by "local public safety entities"¹³ was not "ignored"¹⁴, but was known to FCC, and considered by it, prior to its original

¹⁰ See Letters from Robert J. Gagen, Esq. and Jacqueline Phillips Murray, Esq. to Daniel Abeyta (FCC) dated August 29, 2011 and October 24, 2011.

¹¹ Petition for Reconsideration, p. 8.

¹² Letter from Jeffrey S. Steinberg (FCC) to Jacqueline Phillips Murray, Esq. dated August 5, 2013, p. 3.

¹³ Division Letter, p. 1.

¹⁴ Application for Review, p. 3.

decision requiring Eger Communications to undertake the Section 106 review process. Therefore, the Petition for Reconsideration was properly dismissed because Eger Communications failed to present any new facts or changed circumstances, and the arguments that it made had already been "fully considered and rejected by the Commission".¹⁵ Eger Communication should not be permitted to use its pending Application for Review to re-open a decision that was fully briefed by the parties, and decided by FCC, more than two years ago.

POINT II

THE UNDERLYING STAFF DECISION WAS CORRECT

The initial decision by FCC staff in 2013 was correct. At any time during the last two years, Eger Communications could have commenced the Section 106 review process, and considered and accepted any of the various alternatives that exist to the proposed project. It also could have availed itself of the FCC procedures for establishment of emergency communications, or for judicial review of the Division Letter, but it has elected not to pursue any of those options.¹⁶ Instead it continues to press for

¹⁵ 47 CFR § 1.106(p)(3); see 47 CFR § 1.106(c).

¹⁶ Eger Communications sought and received local zoning approval from the Town of Livingston to construct the new tower on Blue Hill. That approval was issued in July 2013. Upon information and belief, Eger Communications has not applied for a building permit or commenced construction of the proposed tower.

repetitive administrative review of the same decision. Eger Communication's policy arguments for asking the FCC to exercise its "discretion to review" the merits of the Division Letter should be rejected.¹⁷

In the event that Eger Communication's request for the FCC to "reach the merits" of the underlying staff decision is considered, Scenic Hudson and TOP respectfully request that the August 5, 2013 Division Letter be affirmed. There is no reason now, four years after the initial Informal Complaint was filed by Scenic Hudson and TOP, to reverse the FCC's Division Letter.

A. The Tower May Have an Adverse Impact on Olana

Olana was designated as a National Historic Landmark in 1965, and was added to the National Park Service's Watch List of Threatened and Endangered National Historic Landmarks in 2004 due to the potential for new construction projects in Olana's viewshed.¹⁸ The preservation of the Olana viewshed is listed as a Priority Project in the 2009 New York State Open Space Conservation Plan (p. 82).¹⁹ Scenic Hudson and TOP share the position of the New York State Historic Preservation Office

¹⁷ Application for Review, p. 9.

¹⁸ See Letter from John Caffry, Esq. to Dan Abeyta (FCC) dated October 7, 2011, p. 7.

¹⁹ The 2009 New York State Open Space Conservation Plan is available at <http://www.dec.ny.gov/lands/47990.html>.

("SHPO") - the Office of Parks, Recreation and Historic Preservation ("OPRHP") - that the new tower will have an adverse visual effect on Olana and its viewshed.

Olana was the home of Frederic Church, the renowned painter of the Hudson River School in the Nineteenth Century.²⁰ It is now owned by the State of New York and is operated by OPRHP as the Olana State Historic Site.²¹ It presently includes the Church House, outbuildings and about 336 acres of land.²² It is located in the Town of Greenport, less than two miles northwest of the proposed Tower site.²³ Olana receives over 130,000 visitors per year.²⁴ The majority of these visitors do not tour the House and instead spend their entire visit enjoying other parts of the property, and enjoying the views from the property.²⁵

Olana's views were central to Church's vision for the property.²⁶ Mr. Church personally oversaw the creation of the

²⁰ See Informal Complaint, p. 3.

²¹ See id.

²² See id.

²³ See id.

²⁴ See id.

²⁵ See id. at pp. 3-4.

²⁶ See id. at p. 4.

forested and panoramic views from his property.²⁷ These were crafted as carefully as any of his paintings.²⁸ During the construction of Ridge Road, a carriage path, the views from which were its primary feature, Church said that "he was creating 'more and better landscapes in this way than by tampering with canvas and paint in the studio.'"²⁹ Olana is one of the few places in the world where one is able to review the work of an artist such as Church and then be able to gaze upon the actual landscape which was the object of the painting.³⁰

The 360 degree views from the Olana property are an integral part of its significance.³¹ According to the SASS Report³² (p. 98):

The panoramic views available from Olana and its grounds are similar in composition to many of Church's most renowned works - vegetated foreground of great variety and interest framing a middle ground containing open pastures and water elements such as ponds and winding creeks, and a deep

²⁷ See id. at p. 5.

²⁸ See id.

²⁹ The Office of R.M. Toole, Historic Landscape Report - Olana State Historic Site (1996), pp. 102-103, available at http://olana.org/learn_landscape.php.

³⁰ See Informal Complaint, p. 5.

³¹ See Informal Complaint, pp. 6-7.

³² New York Department of State Division of Coastal Resources and Waterfront Revitalization, Scenic Areas of Statewide Significance (1993) (hereinafter "SASS Report"), available at http://www.dos.ny.gov/communitieswaterfronts/SASS/SASS_Index.pdf.

background encompassing majestic rivers and distant mountains.

The SASS Report recognized the importance of the many carefully composed panoramas carefully placed by Church throughout the Olana grounds.³³

Of particular concern in this matter is Church's artistic interest in the view of Blue Hill from Olana, which is evidenced by the fact that Blue Hill, where the existing towers are located, and the proposed new tower would be located, was the subject of several paintings by Church.³⁴ A present-day viewer looking at Blue Hill, the object of these paintings, would also have a clear view of the new tower, if constructed as proposed.³⁵

Under Section 106, the FCC must determine whether a project may have an "adverse effect". Adverse effect is defined as:

An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur

³³ Id.

³⁴ See Letter from John Caffry, Esq. to Dan Abeyta (FCC) dated October 7, 2011, p. 6.

³⁵ See Informal Complaint, p. 7.

later in time, be farther removed in distance or be cumulative. 36 CFR § 800.5(a)(1).

36 CFR § 800.5(a) does not require that an adverse effect be "significant" in order to trigger Section 106 review.³⁶

The SHPO has stated that the proposed tower "would be significantly more visible in the historic viewshed" from Olana than the existing guyed towers.³⁷ The SHPO has explained that the "density of the proposed 190 foot free-standing tower is demonstrably more visible in the landscape than the existing guyed units which are viewed one behind the other from Olana."³⁸ In a more recent letter, OPRHP stated that the Tower "will have a significant adverse impact on the historic viewsheds associated with" Olana.³⁹

A visual impact analysis procured by Scenic Hudson and TOP stated that the tower would be "front and center in Olana's signature south viewshed and will be directly visible from virtually all of the places on the property commonly visited by

³⁶ Opposition to Application for Leave to Amend Petition for Reconsideration, filed by Caffry & Flower on November 4, 2014, pp. 3-4.

³⁷ Letter from Andy Beers (SHPO) to Kevin McDonald and Lawrence Hermance (Town of Livingston) dated December 2, 2010.

³⁸ Id.

³⁹ Letter from Ruth L. Pierpont (SHPO) to Mr. Alvarez and Mr. Hermance (Town of Livingston) dated April 18, 2013.

the public".⁴⁰ The analysis explained that the new tower's structure, size, and proposed appurtenances and equipment make the new tower "significantly more visible" than the existing two guyed towers.⁴¹ The SHPO also found that the "existing thin guyed towers currently blend well into the view from Olana in most atmospheric conditions", but that the new proposed tower would have a "much more pronounced silhouette in the landscape" because it would be a "solid mass in the landscape" and would be "further exaggerated" by the new telecommunications equipment mounted on the tower.⁴²

In summary, due to it being "plainly and prominently visible from Olana", and there being a potential that it "may present a significantly greater visual intrusion than the existing guyed towers on the Olana historic property and landscapes", the proposed tower may have an adverse effect on Olana.⁴³ Therefore, Section 106 review of the proposed tower is triggered.

Eger Communications claims that Section 106 review is unnecessary because "the Town of Livingston conducted an

⁴⁰ Letter from Matthew W. Allen (Saratoga Associates) to Lawrence Hermance and Thomas Alvarez (Town of Livingston) dated April 22, 2013.

⁴¹ Id.

⁴² Letter from Ruth L. Pierpont (SHPO) to Mr. Alvarez and Mr. Hermance (Town of Livingston) dated April 18, 2013.

⁴³ Division Letter, p. 3.

exhaustive assessment of visual effects".⁴⁴ Eger Communicant's reliance on the Town of Livingston's review is inappropriate because the Town of Livingston's Planning Board did not prepare a comprehensive environmental impact statement pursuant to State Environmental Quality Review Act ("SEQRA"). Further, the Town of Livingston's determination pursuant to SEQRA is not at all relevant to the FCC's administration of the NHPA and the FCC's determination regarding the project's adverse effects on Olana, which is a State and National historical site.

Eger Communication's continued reliance on a 1992 letter from the SHPO⁴⁵ is unreasonable and inappropriate in light of the SHPO's updated 2010 and 2013 letters regarding the specific tower at issue herein. The SHPO's determination from 1992 does not address the current concerns raised by the new tower's mass and associated equipment. Furthermore, the SHPO's 1992 determination does not constitute Section 106 review for that tower, or for this new tower.

Eger Communication's continued reliance on this old information, and refusal to conduct the Section 106 review, has caused delays for several years.⁴⁶ If Eger Communications had

⁴⁴ Application for Review, p. 14.

⁴⁵ Application for Review, p. 13.

⁴⁶ As early as 2007, when the new tower was first proposed, the SHPO advised Eger that the tower was subject to Section 106 review, and that the effects on Olana must be addressed in that

commenced the Section 106 review a few years ago, when requested by Scenic Hudson and TOP, the needs of the various public safety agencies could have been met by now.

B. The Tower is Subject to Section 106 Review

1. Nationwide Programmatic Agreement, Section XI

Upon considering the concerns of "[a]ny member of the public" with regard to the review of individual projects "covered or excluded under the terms" of the Nationwide Programmatic Agreement, the FCC can "take appropriate action".⁴⁷ After considering the concerns raised by Scenic Hudson, TOP, and the SHPO, appropriate action here included overruling Eger Communication's faulty determination that its tower was excluded from Section 106 review, and determining that the tower should undergo Section 106 review due to its potential adverse effects on Olana. Therefore, FCC staff properly found that "based on the unique facts of this matter, that Eger [Communications] must complete the Section 106 review for the proposed tower under the procedures specified in the Nationwide [Programmatic] Agreement".⁴⁸

process. See Letter from John A. Bonafide (SHPO) to Mr. Mark Eger (Eger) dated May 30, 2007.

⁴⁷ Nationwide Programmatic Agreement, Section XI.

⁴⁸ Division Letter, p. 3, citing Section XI of the Nationwide Programmatic Agreement.

2. The Proposed Tower is Not Exempt

Additionally, despite Eger Communication's assertions, the proposed tower is not a "replacement" tower that is exempt from Section 106 review under the Nationwide Programmatic Agreement.⁴⁹ Furthermore, contrary to Eger Communication's assertion that the FCC "does not dispute that the proposed tower meets the replacement tower exclusion criteria",⁵⁰ the Division Letter explicitly did "not resolve whether the proposed tower falls within the replacement tower exclusion".⁵¹

Neither the Nationwide Programmatic Agreement or the applicable FCC and Advisory Council on Historic Preservation ("ACHP") regulations regarding Section 106 define a "replacement" tower. However, the Nationwide Programmatic Agreement "substantially limits the exclusions" from Section 106 review available under the Nationwide Programmatic Agreement, Section III.⁵² Therefore, if FCC were to decide the question of whether the exclusion applies to the proposed tower, the FCC should

⁴⁹ See Letter from John Caffry, Esq. to Dan Abeyta (FCC) dated October 7, 2011, p. 5.

⁵⁰ Application for Review, p. 13.

⁵¹ Division Letter, p. 3.

⁵² Petition for Reconsideration, p. 10, quoting Matter of Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process (FCC Report and Order adopted September 9, 2004).

determine that the limited exclusion does not apply to the new tower, especially because the tower would cause adverse effects on Olana (see Point II.A, supra).⁵³

The new tower would be a relocated, separate tower and would not be a mere in-kind "replacement" of one of the two existing towers on the site. First, it will be a stand-alone lattice tower, that will be much more visible.⁵⁴ The existing towers are slender guyed towers. Also, because it would hold the equipment from the two existing towers and additional new equipment, and will have capacity to add even more apparatus in the future, its visibility will be increased.⁵⁵ The proposed tower will support large antennas and other large equipment (20 feet or more in height), so that it is not exempt under the criteria § I.C of the Collocation Nationwide Programmatic Agreement.⁵⁶ Thus, the new tower structure is not a "replacement", as that term is used in the Nationwide Programmatic Agreement.

⁵³ See 36 C.F.R. § 800.14(c) (exclusions under agency programmatic agreements are allowed only when the "potential effects of the undertakings . . . are foreseeable and likely to be minimal or not adverse").

⁵⁴ See Letters from Matthew W. Allen (Saratoga Associates) to Lawrence Hermance and Thomas Alvarez (Town of Livingston) dated April 22, 2013 and June 28, 2013.

⁵⁵ See id.

⁵⁶ See id.

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of

CERTIFICATE OF SERVICE

EGER COMMUNICATIONS
PROPOSED TOWER PROJECT
COLUMBIA COUNTY, NEW YORK.

I, Claudia K. Braymer, of Caffry & Flower, hereby certify that on this 9th day of September 2015, a copy of the foregoing Opposition to the Application for Review was served via first-class United States mail, postage prepaid on the following:

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EXHIBIT 10

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STAMP AND RETURN

September 12, 2018

The Honorable Ajit Pai
Chairman
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Received-FCC
SEP 12 2018
Bureau / Office

Re: DA 15-862; Eger Communications, Proposed Replacement Tower,
170 Eger Road, Livingston, Columbia County, NY

Dear Chairman Pai:

Eger Communications ("Eger"), by its counsel, submits this letter to urge the Commission to act on Eger's application for review submitted three years ago, and to highlight pertinent elements of the record omitted from a recent letter submitted by Scenic Hudson and The Olana Partnership.¹

The tower at issue is a proposed replacement tower intended to support critical public safety communications upgrades. As a replacement tower, the proposed structure is expressly excluded from Section 106 review under Section III.B of the 2004 Nationwide Programmatic Agreement ("NPA"). Nonetheless, Scenic Hudson/Olana filed an informal complaint in 2011 alleging that the replacement structure would impact the Olana House State Historic Site ("Olana") several miles away. The Competition and Infrastructure Policy Division did not act on that complaint until 2013, when it instructed Eger to complete Section 106 review.² Eger sought reconsideration of that decision, which the Division dismissed in 2015 on procedural grounds.³ The instant application for review followed.

There are two critical issues that the recent Scenic Hudson/Olana letter does not address. First, *the immediate, critical public safety need* for this replacement tower merits swift action. The existing structure has been used for decades to provide the backbone of public safety infrastructure in western Columbia County, but cannot handle the additional load required to support needed upgrades. As a result, the record shows support for the replacement tower from police, fire, medical and 911 representatives; state and local legislators; and national public

¹ See Eger Communications, Application for Review re: DA 15-862 (filed Aug. 26, 2015) ("Application for Review"); see also Letter from Jeffrey Anzevino, Scenic Hudson, and Sean Sawyer, The Olana Partnership, to Ajit Pai, Chairman, FCC, re: DA 15-862 (July 30, 2018).

² Letter from Jeffrey S. Steinberg, Deputy Chief, Spectrum and Competition Policy Division, to Jaqueline P. Murray, Counsel for Eger Communications (Aug. 5, 2013).

³ Eger Communications, Order on Reconsideration, DA 15-862 (WTB/CIPD rel. July 27, 2015).

WILKINSON) BARKER) KNAUER) LLP

September 12, 2018

Page 2

safety advocates.⁴ Most recently, Rep. Faso wrote to highlight the continued local support for the project and the county's request that the matter be expedited.⁵ As the Commission recently recognized, it is important to act promptly to resolve environmental disputes to facilitate wireless broadband deployment.⁶ Given the demonstrated public safety deployment needs at issue here, the imperative to act is even more compelling.

Second, while Scenic Hudson/Olana repeat their concerns about impacts to Olana, they gloss over many of the pertinent facts on the merits. In particular, while the Division justified Section 106 review by citing Section XI of the NPA, that Section merely states that the Commission will "where appropriate, take appropriate actions" if concerns are raised about an excluded action. The application for review shows that Section 106 review is *not* appropriate, because: (1) the proposed tower fits within the replacement tower exclusion; (2) Olana is located outside the area of potential effects; (3) the town concluded that the replacement tower will have a "minimal visual impact" and the State Supreme Court upheld that finding; and (4) the State Historic Preservation Office previously determined that the existing twin guyed tower structure to be replaced (which is the same height and at the same site as the proposed single self-supporting lattice tower) has "No Impact" on historic resources.⁷

For these reasons, Eger urges the Commission to promptly act on its application for review and find that the proposed replacement tower is excluded from Section 106 review.

Respectfully submitted,

WILKINSON BARKER KNAUER, LLP



Christine M. Crowe
Craig E. Gilmore

Counsel for Eger Communications

cc: Attached Service List

⁴ See Application for Review at 9-11; Eger Communications, Reply to Comments and Opposition to Application for Review re: DA 15-862, at 1-2 (filed Sept. 23, 2015) ("Reply").

⁵ See Letter from John J. Faso, Member of Congress, to Ajit Pai, Chairman, FCC, re: DA 15-862 (July 17, 2018).

⁶ See *Removing Barriers to Infrastructure Investment*, FCC 18-30, at ¶¶ 146, 153 (2018) (noting that where an informal complaint is filed against an environmental assessment ("EA"), staff should endeavor to resolve the contested proceeding within 90 days). While this proceeding does not (and should not) involve an EA, the need to act here is equally if not more acute. See 47 U.S.C. § 151 (FCC must "promot[e] safety of life and property"); *Amendment of Environmental Rules*, 6 FCC Rcd 1716, 1716 ¶ 4 n.13 (1991) (FCC must "balance environmental issues with other issues within [its] mandates") (emphasis added).

⁷ See Application for Review at 12-15; Reply at 4.

CERTIFICATE OF SERVICE

I, Luciana Jhon, of Wilkinson Barker Knauer, LLP, hereby certify that on this 12th day of September, 2018, a copy of the foregoing letter was served via first-class United States mail, postage prepaid, on the following:

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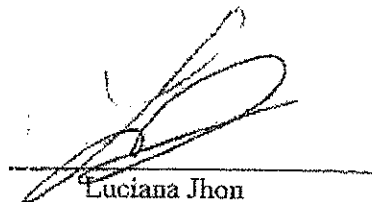
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Luciana Jhon

CERTIFICATE OF SERVICE

MICHAEL H. SUSSMAN, ESQ., counsel for petitioner, hereby certifies that on February 13, 2019, he caused to be personally served to respondents at their business addresses shown below the Amended Petition for a Writ of Mandamus with Exhibits 1-10 and the Notice of Amended Petition as follows:

Federal Communications Commission
445 12th Street SW
Washington, DC 20554

United States of America- United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20630



Michael H. Sussman, Esq.

AFFIDAVIT OF SERVICE

Case: 19-1031	Court: United States Court of Appeals for the District of Columbia Circuit	County: District Of Columbia, DC	Job: 3069143
Plaintiff / Petitioner: Eger Communications		Defendant / Respondent: Federal Communication Commission and United States of America	
Received by: One Source Process, Inc.		For: Sussman & Associates	
To be served upon: Federal Communication Commission			

I, Ashley Spencer, being duly sworn, depose and say: I am over the age of 18 years and not a party to this action, and that within the boundaries of the state where service was effected, I was authorized by law to make service of the documents and informed said person of the contents herein

Recipient Name / Address: Glenda Burns, Company: 445 12th St SW, Washington, DC 20554

Manner of Service: Authorized, Feb 13, 2019, 12:54 pm EST

Documents: Notice of Amended Petition for Writ of Mandamus; Amended Petition for Writ of Mandamus; Exhibits
(Received Feb 13, 2019 at 10:18am EST)

Additional Comments:

1) Successful Attempt: Feb 13, 2019, 12:54 pm EST at Company: 445 12th St SW, Washington, DC 20554 received by Glenda Burns. Age: 40; Ethnicity: African American; Gender: Female; Weight: 145; Height: 5'5"; Hair: Black; Eyes: Brown; Relationship: Package Receptionist ;

Subscribed and sworn to before me by the affiant who is personally known to me.

Ashley Spencer 02/15/19
Ashley Spencer Date

L.N. Coley 2/15/19
Notary Public Date
9/14/23
Commission Expires

One Source Process, Inc.
1133 13th Street NW, Suite C4
Washington, DC 20005
800-668-5448

LAWRENCE N. COLEY
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires September 14, 2023



AFFIDAVIT OF SERVICE

Case: 19-1031	Court: United States Court of Appeals for the District of Columbia Circuit	County: District Of Columbia, DC	Job: 3069309
Plaintiff / Petitioner: Eger Communications		Defendant / Respondent: Federal Communication Commission and United States of America	
Received by: One Source Process, Inc.		For: Sussman & Associates	
To be served upon: United States of America c/o US Dept. of Justice			

I, Ashley Spencer, being duly sworn, depose and say: I am over the age of 18 years and not a party to this action, and that within the boundaries of the state where service was effected, I was authorized by law to make service of the documents and informed said person of the contents herein

Recipient Name / Address: David Burroughs, Company: 950 Pennsylvania Ave NW, Washington, DC 20530

Manner of Service: Authorized, Feb 13, 2019, 12:32 pm EST

Documents: Notice of Amended Petition for Writ of Mandamus; Amended Petition for Writ of Mandamus; Exhibits (Received Feb 13, 2019 at 10:18am EST)

Additional Comments:

1) Successful Attempt: Feb 13, 2019, 12:32 pm EST at Company: 950 Pennsylvania Ave NW, Washington, DC 20530 received by David Burroughs. Age: 42; Ethnicity: African American; Gender: Male; Weight: 200; Height: 5'7"; Hair: Black; Eyes: Brown; Relationship: Mailroom Clerk ;

Subscribed and sworn to before me by the affiant who is personally known to me.

Ashley Spencer 02/15/19
Ashley Spencer Date

L N. Coley 2/15/19
Notary Public Date
9/14/23
Commission Expires

One Source Process, Inc.
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LAWRENCE N. COLEY
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires September 14, 2023

